

PROOF OF FOREIGN LAW IN THE MANITOBA COURTS

Gavin Wood*

I. Introduction

John Brown, a Manitoba resident, while in Mexico on a trip, is involved in an auto accident caused by Bob Smith, another Manitoba resident. Brown, through counsel, proposes to initiate an action in the Manitoba Court of Queen's Bench naming Smith defendant. Must John Brown's counsel plead Mexican law in the statement of claim or should he — despite the rule in *Phillips v. Eyre*¹ — disregard the foreign element in his pleading? Further, need the traffic laws of Mexico be reviewed, and experts prepared by counsel for trial?²

It is a well-settled principle of Anglo-Canadian law that foreign law be pleaded and proven as a fact. While judges are deemed to know all the laws of the forum (in the hypothetical, Manitoba), they have no knowledge of foreign law.³ At first blush then, one would assume John Brown must plead Mexican law in initiating his suit and would rely upon one or more experts on Mexican law for trial. In fact, despite the well-settled principle, counsel must consider carefully before so acting. For the general rule of 'pleading and proof' is significantly modified — in jurisdictions in general but in the Province of Manitoba in particular⁴ — by a presumption at common law and by provisions for judicial notice. The extent of the modification is such that Brown's counsel may, in fact, do his client a disservice by pleading Mexican law.

The purpose of this article is to familiarize the practitioner with the various issues raised when he or she is faced with proof of foreign law in a suit and with the various procedural and evidential tools available in Manitoba to deal with the foreign element.

An overview of the topic is contained in the first part of the paper. The overview reveals that there are several methods of ascertainment of foreign law, namely: by presumption, agreement, judicial notice or pleading and proof. The paper in the second section considers each of these methods in turn. To place certain points raised in the body of the paper in perspective, the American alternative to the 'foreign law as fact' system is considered as an aside. In the conclusion, the John Brown — Bob Smith hypothetical is reconsidered.

* B.A. (Hons.), L.L.M. (Colum.) of the law firm of Taylor, Brazzell, McCaffrey, Winnipeg, Manitoba.

1. (1870), 6 Q.B.L.R. 1 (Ex.). See *O'Connor v. Wray*, [1930] S.C.R. 231, [1930] 2 D.L.R. 899; *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321. See also J.G. Castel, *Canadian Conflict of Laws* (1977) 612.

2. See, e.g. *Perron v. Paris* (1983), 44 N.B.R. (2d) 409 (Q.B.); *Guerin v. Proulx* (1982), 37 O.R. (2d) 558 (Co. Ct.).

3. *R. v. Wagner* (1931), 39 Man. R. 532 at 535 (C.A.).

4. See *The Manitoba Evidence Act*, R.S.M. 1970, c. E150, s. 32.

II. Overview

A leading textwriter on conflict of laws summarizes the proof of foreign law in the following rule:

Rule 210 — (1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.⁵

The genesis of the 'fact theory' of foreign law has never been completely explained.⁶ However, the practical basis of the requirement that foreign law be handled as a fact is more readily determined. In a time when the sources available on foreign law were scarce or non-existent, courts were not prepared to undertake the responsibility of discerning foreign law. With "an understandable feeling of inadequacy or insecurity with regards to issues of foreign law"⁷, the theory of foreign law as fact had much to offer to the English jurist.

Certain rules flow from the fact theory. As foreign law is a question of fact, the court is deemed to have no independent knowledge of foreign law. A court takes judicial notice of all domestic law, but not of foreign law.⁸ As a fact, foreign law is to be proven by the party who desires to rely upon it; the burden of proof rests upon him or her. To satisfy this burden, the party must plead the relevant portions of foreign law and then must prove that law at trial. Proof of the foreign law, as with any other fact, is by testimony. Should the party fail to plead and prove the foreign law, the court will apply the law of the forum to the action.

In summary, the fact theory produces the following rules: (1) the court initially has no knowledge of the foreign law relevant to the suit; (2) the burden of proving that law rests with the party whose position is advanced by the foreign law; (3) to satisfy the burden the person must plead and prove the foreign law; and (4) if the burden is not satisfied, the court proceeds to determine the suit on the basis that forum law alone applies.

These basic rules — rules, if you will, of common law — have been significantly modified by statute in two ways. Initially, as with all facts, foreign law was a finding for the jury.⁹ Now, by statute, the question as to the effect of the evidence presented with respect to foreign law is for the judge's determination alone.¹⁰

Also, in most jurisdictions, legislation, in sharp departure from the historical basis of the fact theory, provides that the judge may (or must) take judicial notice of certain categories of foreign law.

5. *Dicey and Morrison on The Conflict of Laws*, (10th ed. J.H.L. Morris 1980) 1206 [hereinafter referred to as Dicey].

6. A. Miller, "Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine" (1967), 65 Mich. L.R. 613 at 618.

7. *Ibid.*, at 619.

8. See Law Reform Commission of Canada, *Report on Evidence* (1975), 103.

9. *Osgood v. Hatch*, [1872] *Steven's Dig.* 387.

10. See, e.g. Dicey, *supra* n.5, at 1209; *The Manitoba Evidence Act*, R.S.M., c. E150, s. 32(2).

In part as a result of the second statutory change, several distinct methods have developed for ascertainment of foreign law by a court. These methods include the traditional pleading and proof, as well as others frequently described as "exceptions"¹¹ to that traditional method. So viewed, pleading and proof is naturally favored. This is unfortunate, for the ascertainment of foreign law by pleading and proof generally should be considered only after the other methods has been rejected. This point will be dealt with further.

III. Methods of Proof

Foreign law may be ascertained by the court in the following ways: (1) by presumption; (2) by agreement; (3) by judicial notice; or (4) by pleading and proof. These methods are numbered in the order in which, it is submitted, they should be considered by counsel. Thus, for example, in the hypothetical of the automobile accident in Mexico, counsel for John Brown, before pleading the law of Mexico 'as a fact', should consider the alternatives offered by the other methods.

A. By Presumption

Foreign law is presumed to be the same as forum law unless the contrary is proved. This presumption applies to all law (with the possible exception of statute law of the forum). It is not limited to the law of torts as was suggested by the defendant, but rejected by the court in *Furlong v. Burns and Co.*¹²

One clear result of the presumption is that the proof of foreign law does not necessarily fall on the plaintiff, the usual bearer of onus. Rather it rests on the party relying upon the difference between foreign law and forum law. This result has been neatly summarized as follows: "The rule appears, therefore, to be that the *lex fori* will be applied unless one party suggests that the law of another jurisdiction is applicable, and, if one party does make this suggestion, he should set forth the effect of the foreign law in his pleadings and adduce evidence to prove it as a fact."¹³ As a corollary, before embarking on the pleading and proof of foreign law, counsel must be confident that the foreign law and forum law differ. For if they do not, his client will bear the costs of the unnecessary proof.¹⁴

It also follows that in a suit between A and B, if the foreign law favors B's position, then counsel for A will be satisfied to rely on the presumption. If counsel for B fails to raise the fact of foreign law in pleading, the advantage of that law to B is lost.¹⁵

Thus, in the situation set out in the introduction, John Brown's counsel may rely on the presumption that Mexican law is the same as Manitoba

11. See below.

12. [1964] 2 O.R. 3 (H.C.).

13. *Hill v. Spraid* (1909), 11 W.L.R. 680 at 684 (Alta. Tr. Ct). See also *Re Stanbro* (1884), 2 Man.R. 1 (C.A.); *Re Brooks*, [1945] 1 D.L.R. 726 at 728 (Ont. H.C.); *Lear v. Lear*, [1973] 3 O.R. 935 at 944 (H.C.); rev'd on other grounds, (1975), 5 O.R. (2d) 572 (C.A.); Dicey, *supra* n. 5, at 1216.

14. See, e.g. *Kelly's America Limited v. Smith* (1956), 19 W.W.R. 580 at 582 (Sask. C.A.).

15. One wonders how many advantages are so lost.

law. Consider the leading case of *Canadian National Steamships Company v. Watson*.¹⁶ In that case, the plaintiff, while employed on the defendant's ship, was injured due to the alleged negligence of certain other employees of the defendant. While the plaintiff was successful in his action at trial and on appeal to the Quebec Court of Appeal, on further appeal the Supreme Court of Canada ordered a new trial on grounds immaterial for the present purpose. In so holding, however, the Court examined the effect of the presumption of sameness on the rule in *Phillips v. Eyre*.¹⁷ Chief Justice Duff wrote, for four of the five justice court:

It is essential that the plaintiff prove an act or default actionable by the law of Quebec. While it is also part of his case to establish that the tort charged is non-justifiable by the *lex loci delicti* in the sense mentioned, he is entitled to pray in aid a presumption which is a presumption of law, viz., that the general law of the place where the alleged wrongful act occurred is the same as the law of Quebec. Where a defendant relies upon some difference between the law of the locality and the law of the forum the onus is upon him to prove it.¹⁸

More on point to the fictitious Mr. Brown's situation are the decisions of the New Brunswick Supreme Court, Appeal Division in *Johnston v. Arbeau*¹⁹ and *McCully v. Barbour*.²⁰ In both cases, the plaintiffs, suing due to out-of-province auto accidents, were held by the Court to have satisfied the requirement that the wrong complained of was not justifiable according to the laws of the foreign jurisdiction by relying²¹ on the presumption of sameness.²²

One must not be left with an impression, however, that the presumption always favors the plaintiff. For on occasion the party bringing suit must show the foreign law to be different from that of the forum. *Ruck v. Ruck*²³ illustrates this point. Plaintiff sought, by summary judgment in an Alberta court, to enforce a judgment obtained in Maryland for child support and collection of arrears. To be enforceable the judgment had to be final; however, no evidence was advanced on this aspect of the Maryland judgment. On the other hand, the law of Alberta recognized the power of variation in such circumstances. Therefore, on the presumption of sameness, the application for summary judgment was dismissed.²⁴

On occasion a court may dismiss a case as having not been proven when in fact the plaintiff has relied upon the presumption of sameness. Thus, in *Archie Colpitts, Ltd. v. Grimmer*²⁵ the dismissal at trial was set aside and remitted for completion and the trial judge 'reminded' that the presumption

16. [1939] S.C.R. 11.

17. *Supra* n. 1.

18. *Supra* n. 16, at 13-14. For a recent application of Duff C.J.'s statement see *Northern Alberta Railways Co. v. K & W Trucking Co.* (1974), 62 D.L.R. (3d) 378 (Alta. S.C.).

19. (1959), 24 D.L.R. (2d) 740 (N.B.S.C., App. Div.).

20. (1970), 14 D.L.R. (3d) 216 (N.B.S.C., App. Div.).

21. In *Johnston*, evidence that the wrong was not justifiable in the foreign jurisdiction was also raised.

22. For an interesting application of the presumption in the area of maritime law, see *Gronlund v. Hansen* (1969), 4 D.L.R. (3d) 435 (B.C. C.A.).

23. (1980), 11 Alta. L.R. (2d) 397 (Q.B.).

24. The same point is also made but with ultimately a different result in *Lear v. Lear* *supra*. n. 13.

25. (1978), 83 D.L.R. (3d) 281 (N.S. Sup. Ct., App. Div.).

applied. Subject to such anomalies, however, the Canadian courts consistently apply the presumption.²⁶

Nevertheless, uncertainty surrounds the scope of the presumption of sameness. For example, at least one textwriter questions its application when the foreign law is not based on the common law.²⁷ In this regard, it is important to note that in *Weingarden v. Moss*,²⁸ Mr. Justice Coyne of the Manitoba Court of Appeal, writing for two of a three justice court, applied the presumption of sameness with respect to Michigan law, noting that Michigan was "a common-law state." It is not clear from the decision whether Coyne J. took judicial notice of that fact.

A more significant uncertainty of scope is whether the courts are entitled to presume that the foreign law is the same as the statute law of the forum. Court decisions on the matter are divided. In *Arnold v. Fleming*,²⁹ the conveyance law of the state of California was presumed the same as that of the forum. Both laws were statutory. And in *Scott v. Marshall*,³⁰ the traffic laws of Illinois were assumed the same as those of British Columbia. Other examples may be given.³¹

In marked contrast, in *Purdom v. Pavey & Company* Chief Justice Strong of the Supreme Court of Canada wrote:

It may be that a mortgagee's interest according to the law of Oregon is not exigible. Up to 1837, according to English law such an interest was not at common law, nor until the passing of statutes of comparatively modern date, available to satisfy creditors by means of either legal or equitable execution. Then we cannot presume that the law of Oregon corresponds with the present state of our own statutory law.³²

Mr. Justice Cartwright re-affirmed this view in his judgments in *Helens (falsely called) Densmore v. Densmore*³³ and *Gray v. Kerlake*.³⁴ In *Gray* he wrote: "It is contended that the Court of Appeal were right in presuming that the law of the State of New York was the same as that of Ontario, but the presumption relates to the general law and does not extend to the special provisions of particular statutes altering the common law."³⁵ English textwriters cite other authorities to the same effect.³⁶

26. See, e.g. *Re O'Brien* (1883), 3 O.R. 326 (Ch.); *Topance v. Martin* (1876), 38 U.C.R. 411; *Langdon v. Robertson* (1887), 13 O.R. 497 (C.P. Div.); *McCaulley v. O'Brien* (1897), 5 B.C.L.R. 510 (S.C.); *The King v. Watts* (1902), 5 C.C.C. 246 (Ont. H.C.); *Arnold v. Fleming*, [1923] 1 W.W.R. 706 (Alta. S.C.); *Canadian Fire Insurance Co. v. Robinson* (1901), 31 S.C.R. 488; *Provincial Bank v. Bellefleur*, [1936] 1 D.L.R. 795 (N.B. Co. Ct.); *People's Wayne County Bank v. Killam* (1932), 41 O.W.N. 417 (H.C.); *Furlong v. Burns & Co. Ltd.*, *supra* n. 12; *Johnston v. Arbeau*, *supra* n. 19; *Young v. Industrial Chemicals Co.*, [1939] 4 D.L.R. 392 (B.C.S.C.); *Lear v. Lear*, *supra* n. 13; *Aikman v. George Mills & Co. Ltd.*, [1934] O.R. 597 (H.C.); *Siebert v. Siebert* (1978), 82 D.L.R. (3d) 70 (B.C.S.C.); *Morardshammar AB v. H.R. Radomski & Co. Ltd.* (1983), 145 D.L.R. (3d) 111 (Ont. H.C.); *aff'd* (1984), 5 D.L.R. (4th) 576 (Ont. C.A.); *Ruck v. Ruck*, *supra* n.23.

27. Dicey, *supra* n. 5, at 1216.

28. (1955), 63 Man. R. 243 (Q.B.); *aff'd* (1955), 63 Man. R. 253 (C.A.).

29. *Supra* n. 26.

30. (1965), 54 W.W.R. 1 (B.C.S.C.). See also *Weingarden v. Moss*, *supra* n. 28.

31. See, e.g. *Archie Colpitts, Ltd. v. Grimmer*, *supra* n. 28.

32. (1896), 26 S.C.R. 412 at 416-417.

33. [1957] S.C.R. 768 at 780; *rev'g* (1956), 19 W.W.R. 252 (B.C.C.A.).

34. [1958] S.C.R. 3.

35. *Ibid.*, at 10. See also *Key v. Key*, [1930] 3 D.L.R. 237 (C.A.); *Gronlund v. Hansen*, *supra*, n. 22; *McCully v. Barbour*, *supra* n. 20.

36. Dicey, *supra* n. 5, at 1216; *Cheshire's Private International Law* (8th ed. P. North 1970) 123. In such cases, the common law of the forum before the statutory change is applied. See *Pink v. Perlin* (1898), 40 N.S.R. 260 (Q.B.).

Yet in texts this uncertainty is dealt with by either describing the cases in which the presumption is not applied to statute law as “anomalous”³⁷ or by suggesting that “it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies [forum] law.”³⁸ Indeed the majority of cases seem not to distinguish between statute and common law.

An alternative approach to this problem was suggested in *Pink v. Perlin & Co.*³⁹ Consider the following suggestion that the length of time a statute has been in force in the forum has bearing on the scope of the presumption: “The statute just referred to, which was first enacted in 1884, had only been in operation in Nova Scotia a short time when the marriage took place, and I do not feel myself constrained to assume that the State of Ohio anticipated our Legislature in regard to the passage of a similar enactment relating to the property and status of married women.”⁴⁰

Prudent counsel must be aware that there is some uncertainty over whether statutory law of the forum will be automatically applied in the absence of proof of the foreign law. In a recent decision of a Master of the Alberta Court of Queen’s Bench, an application for summary judgment was dismissed on the following ground: “As there is *no* evidence before me as to what the Ontario Law is, and as there is doubt about whether the presumption that the law of the foreign jurisdiction is the same as the law of *lex fori* applies to statute law, the application is dismissed.”⁴¹

An interesting application of the presumption of sameness occurs in the area of married status; for by relying on the presumption, the law of the domicile may be circumvented. By not proving the law of the domicile, the applicant, possibly with the concurrence of the respondent, forces by default the application of forum law with presumably easier terms.⁴² It has been suggested in those circumstances that the judge should require that evidence be called on the law of the domicile. In *Feiner v. Demkowicz*,⁴³ this suggestion was considered favorably but not followed. Apparently, in this case, the court concluded the parties had acted in good faith.

Related to the presumption of sameness is the presumption of validity of foreign judgments. Each province, by statute, prescribes how a foreign judgment may be proved. Generally it is by exemplification or certified copy.⁴⁴ Once proved, the foreign judgment is presumed to be valid until the contrary is shown,⁴⁵ and, “casts upon the defendant the onus of impeaching the judgment or breaking it down.”⁴⁶

37. *Ibid.*, *Cheshire's Private International Law*.

38. Dicey, *supra* n. 5, at 1216; J.G. Castel, *Canadian Conflict of Laws* (1975) 654.

39. (1898), 40 N.S.R. 260.

40. *Ibid.*, at 265.

41. *Traders Realty Limited v. Sibley* (1982), 20 Alta. L.R. (2d) 378 at 384, 27 C.P.C. 275 at 279 (Q.B.).

42. *Supra* n. 37, at 392.

43. (1973), 2 O.R. (2d) 121 (H.C.).

44. Castel, *supra* n. 38, at 518.

45. See, e.g. *Bonn v. National Trust Co.* (1930), 65 O.L.R. 633 at 638, [1930] 4 D.L.R. 820 (Ont. S.C., App. Div.); *Wigston v. Chown* (1964), 49 W.W.R. 543 (Sask. Q.B.); *In Re Bergman and Waldron*, [1923] 3 W.W.R. 70, [1923] 4 D.L.R. 56 (Sask. C.A.); *Thibodeau Machinery Co. v. Crown Iron Railing Co.* (1964), 46 W.W.R. 246 (Sask. Q.B.).

46. *Marshall v. Houghton*, [1922] 3 W.W.R. 65 at 70-71 (Man. K.B.); aff'd 33 Man. R. 166, [1923] 2 W.W.R. 553 (C.A.).

In one sense, the presumption of sameness is not really a method of ascertaining foreign law, but rather an alternative to that ascertainment. It should be considered first by counsel faced with a suit involving foreign law. Before relying upon the presumption, however, counsel must ensure it works in his or her client's favor. It is submitted that counsel must also grapple with the difficult consideration that, in relying on the presumption, the court is not being deliberately misled.

B. By Agreement

Foreign law need not be proven if it is admitted. Proof by admission may take the following forms: (1) the parties, agreeing that the circumstances of the suit are governed by certain statutes and/or case authorities of the foreign jurisdiction, may jointly submit those materials to the court⁴⁷; (2) the parties while not concurring on which statutes or case authorities govern, may agree to each submit materials for the court to consider in determining the foreign law⁴⁸; (3) the parties may agree as to the legal effect of the foreign law⁴⁹; or (4) the parties may agree to submit the question to a foreign court.

In both the first and second forms of admission, the court is called upon to determine the applicable foreign law without the aid of the testimony of experts in the foreign law. The case of *Merritt v. The Copper Crown Co.*⁵⁰ illustrates the first form. In *Merritt* an issue arose as to what information a company was bound to furnish under the law of the state of Virginia. The West Virginia statute regulating such matters had been "admitted on the pleadings". Counsel seeking to rely on the statute argued: "The statute of West Virginia having been admitted on the pleadings, we are in the same position as if it had been produced by a Virginia lawyer and stated by him to be the law."⁵¹ The court agreed. Mr. Justice Graham expressly drew a distinction between mere production of the statute by one party and agreement to its production by both:

There is something better than if the mere Code of West Virginia had been tendered in evidence. I think the proof by virtue of the admission is as good as if an expert had sworn that there was a statute of West Virginia in force, which was applicable to this company, giving the chapter and section of the code, and stating it *in haec verba*, as it is set out in the pleading.⁵²

The second form of admission is also best illustrated by actual decisions. In *Jones v. Smith*,⁵³ counsel agreed that the court might look to the decisions of the Courts of California to determine the law of California. And in *Smith*

47. *Merritt v. The Copper Crown Co.* (1902), 36 N.S.R. 383; *Estonian State Cargo v. The Elise*, [1948] Ex. C.R. 435; *Dittimer v. The Minister of Consumer and Commercial Relations of Ontario*, [1980] I.L.R. 1-1292 (Ont. S.C.).

48. *Patton v. Reed*, [1972] 6 W.W.R. 208, 30 D.L.R. (3d) 494 (B.C.S.C.); *Smith v. Smith* (1954), 13 W.W.R. 207 (B.C.S.C.); *Jones v. Smith*, [1925] 2 D.L.R. 790 (Ont. S.C., App. Div); *Lear v. Lear*, *supra* n. 13.

49. *Madenv. Long*, [1983] 1 W.W.R. 649 (B.C.S.C.); *State of New York v. Fitzgerald* (1983), 148 D.L.R. (3d) 176 (B.C.S.C.); *Nike Informatic Ltd. v. Avac Systems Ltd.* (1979), 16 B.C.L.R. 139; *Batavia Times Publishing Co. v. Davis* (1977), 18 O.R. (2d) 252; *Re Thomaes and Registrar of Motor Vehicles* (1977), 18 O.R. (2d) 219 (H.C.); *The Administrator, Motor Vehicle Accident Claims Act v. The Saskatchewan Government Insurance Office*, [1981] I.L.R. 1-1373 (Alta. C.A.).

50. *Supra* n. 47.

51. *Ibid.*, at 385.

52. *Ibid.*, at 393.

53. *Supra* n. 48.

v. *Smith*⁵⁴, while following the approach in *Jones v. Smith*, Clyde J. of the British Columbia Supreme Court complained: "I regret that I have not had the assistance of counsel learned in the law of Ontario as I find that the authorities on the point are by no means clear. If before exploring the authorities I had realized the extent of the difficulty . . . I would perhaps have insisted upon being given expert assistance in some form."⁵⁵ More recently in *Patton v. Reed*⁵⁶ the same method of proof was again employed.

Both the first and second forms of admission are subject to criticism. In an early Supreme Court of Canada decision Mr. Justice Strong suggested that foreign law should not be proven merely by the filing of statutes and case authorities, without the evidence of experts.⁵⁷ A number of later decisions have amplified that point.⁵⁸ In *Maguire v. Maguire*, Chief Justice Meredith in a dissenting judgment cautioned:

Nothing could be more dangerous than for a Judge of this Court to determine as a matter of law what the law of some other country, with the laws of which he is not familiar, is; and it is perhaps as dangerous to attempt to do so upon statute-law as it is upon 'case-law,' especially in these days when statute-laws are sometimes changed as readily, and perhaps as quickly, as some men change their suits of clothes. Foreign laws can be rightly dealt with in our Courts only as questions of fact to be proved by competent witnesses.⁵⁹

Yet, the submission to the court of foreign cases and statutes as proof of the foreign law continues. A recent addition to this subject is the decision in *Lear v. Lear*.⁶⁰ At trial the court, with the consent of counsel, examined the case law of New Jersey to determine if a New Jersey alimony judgment was final, and concluded that the plaintiff relying on the New Jersey judgment had not satisfied the onus of proving that law. On the appeal, the Ontario Court of Appeal agreed with the trial Judge's conclusion that the plaintiff had not satisfied the onus. However, Brooke J., in writing for the Court, went on:

The foreign law must be pleaded and proved to the satisfaction of the trial Judge. In general the foreign law must be proved by expert evidence and not merely by putting the text of a foreign enactment before the Court or citing foreign decisions or books of authority. The Court is not entitled to conduct its own research into foreign law . . .⁶¹

Even still, the textwriters consider submission without expert evidence as an alternative to pleading and proof of foreign law (despite acknowledging that "the courts are reluctant to take this course"⁶²).

By the third form of admission, the parties agree as to the 'answer' to the question of foreign law; that is, the parties agree as to the effect of the

54. *Supra* n. 48.

55. *Supra* n. 48, at 209. See also *Meagher v. Aetna Ins. Co.* (1873), 20 Gr. 354 at 370.

56. *Supra* n. 48.

57. *Worthington v. Macdonald* (1884), 9 S.C.R. 327 at 334.

58. *Terry v. Terry*, [1948] 2 W.W.R. 152 (Sask. K.B.); *Re Satisfaction Stores*, [1929] 2 D.L.R. 435 (N.S.S.C.); *Estonian State Cargo v. The Elise*, *supra* n. 47.

59. (1921), 50 O.L.R. 100 at 107 (C.A.).

60. *Lear v. Lear*, *supra* n. 13.

61. *Supra* n. 13 (C.A.), at 576. The Court of Appeal reversed on the ground that, because New Jersey law had not been proven, Ontario law applied and by Ontario law the alimony judgment was final. See also *Upjohn v. Upjohn* (1975), 7 O.R. (2d) 246 (H.C.); *Small v. Zacher* (1975), 8 O.R. (2d) 372 (H.C.).

62. *Dacey*, *supra* n. 5, at 1208 (footnotes omitted); *Cheshire and North*, *supra* n. 37, at 124.

foreign law. The foreign law may be admitted, as any other fact, at different stages of the suit. One party in pleading may rely on a foreign law and the other may admit, or confess and avoid. More often, such admissions are negotiated and included with an agreed statement of facts submitted prior to trial. The technique of serving notice to admit foreign law as fact is also available; however, that method seems largely unutilized.⁶³

The admission need not conform to the actual foreign law. While a court would never knowingly allow an admission to displace domestic law,⁶⁴ foreign law is only applied to protect the rights of the parties. It is their responsibility to protect those rights in agreeing to the answer to a question of foreign law. However, the duty not to mislead the court arises once again.

By the fourth form of admission, the parties apply to the forum court for an order that a question of foreign law be submitted for answer to a foreign court. Thus, in *Re Komer*⁶⁵, pursuant to statute, the Ontario Registrar submitted a question of Quebec law to a Superior Court Judge of Quebec. An opinion was obtained and adopted.

The preferred method⁶⁶ of proof by agreement is for the parties to agree to the answer to a question of foreign law. If that is not possible, but both counsel wish to submit foreign law materials rather than call experts, the trial judge should be made aware of the proposed form of proof prior to trial. However, the judge has discretion in this area and thus the court's position on such proof must be known prior to trial to avoid the embarrassment of being called upon to present expert evidence when none has been arranged to be available.

C. By Judicial Notice

At common law foreign law may, in certain circumstances, be judicially noticed as a notorious fact.⁶⁷ In *Harold Meyers Travel Service Ltd. v. Magid*,⁶⁸ under pressure from the court, counsel for the defendant admitted that gambling was permissible on Paradise Island. After recording the admission, Fraser J. went on in his decision to note that even in the absence of the admission he would have declined to presume the gaming laws of Paradise Island were the same as those in Ontario. However, finding foreign law as a notorious fact is extremely limited. Consider that in the 1929 decision of *Walkerville Brewing Co. v. Mayrand*,⁶⁹ the finding of fact by the trial judge that the importation of liquor into the United States was in contravention of the laws of the United States was struck on appeal as no "legal evidence of [such] material facts"⁷⁰ had been presented.

63. No cases were found utilizing the method.

64. *Cranstoun v. Bird* (1896), 4 B.C.L.R. 569 at 580. See I. Hunter, "Proving Foreign and International Law in the Courts of England and Wales" (1978), 18 Vir. J. Int. L. 665 at 670.

65. (1925), 27 O.W.N. 467 (K.B.).

66. See, *infra* n. 96 for a proposed reform of the Canadian Law Reform Commission involving agreement to take judicial notice.

67. Dicey, *supra* n. 5, at 1207.

68. (1975), 60 D.L.R. (3d) 42 (Ont. H.C.); *aff'd* on other grounds (1977), 77 D.L.R. (3d) 32 (Ont. C.A.).

69. [1929] 2 D.L.R. 945 (Ont. S.C., App. Div.).

70. *Ibid.*, at 946.

The principle that knowledge of foreign law is not imputed to a judge has been significantly modified by judicial notice provisions contained in the federal and provincial Evidence Acts. The wording of these provisions vary considerably. For example, *The Saskatchewan Evidence Act*⁷¹ provides, in the following terms, for the taking of judicial notice of foreign law:

[s.3(2):] The courts of this province and every judge and officer thereof may take judicial notice of the laws of any province or territory of Canada, of the laws of Great Britain and Ireland, of Great Britain and Northern Ireland, of Northern Ireland or of the Irish Free State and for the purpose of ascertaining the same, such court, judge or officer may refer to any books of statutes, reports of cases and works upon legal subjects as it or he may deem authentic, or may require evidence upon oath, declaration or affirmation, oral or written, or by certificate or otherwise, as may seem proper. In all cases, it shall be the function of the court, and not of the jury, to determine such laws when brought in question.⁷²

In contrast, the *Canada Evidence Act* is compulsory:

17. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the *British North America Act, 1867*. R.S., c. 307, 517.

18. Judicial notice shall be taken of all Acts of the Parliament of Canada, public or private, without being specially pleaded.⁷³

The Province of Manitoba has particularly liberal provisions. Section 31 of *The Manitoba Evidence Act*⁷⁴ provides that judicial notice shall be taken of, *inter alia*, all Acts of the Imperial Parliament, the Parliament of Canada, the Provincial legislatures and all competent legislative bodies of any other part of the British Commonwealth. Section 32 provides:

(1) Every court shall take judicial notice of the laws of any part of the British Commonwealth, or of the United States, or any state, territory, possession, or protectorate thereof, but foreign law shall nevertheless be pleaded where any rule or law so requires.

(2) In all cases it is the function of the court and not of a jury, to determine such laws when brought in question.

These extensive provisions for judicial notice suggest that Canadian law has been substantially freed from the requirement of pleading and proving foreign law — judges, it appears, may simply take judicial notice. However, judicial notice is not, in fact, extensively utilized as a means of ascertaining foreign law.⁷⁵ As already noted, Canadian judges have, on occasion, ascertained foreign law without the assistance of expert testimony, although they are reluctant to do so as the practice has been criticized.⁷⁶ Proof of foreign law by the parties firmly remains the rule.

This is not to suggest that the provisions for judicial notice are never utilized. But they play a minor role. In *O'Donovan v. Dussault*,⁷⁷ the Appel-

71. R.S.S. 1965, c. 80, s. 3(2).

72. Castel, *supra* n. 38.

73. R.S.C. 1970, c. E-10.

74. R.S.M. 1970, c. E150.

75. See the paucity of cases on judicial notice of foreign law in Castel, *supra* n. 38, at 635.

76. See, *supra* n. 59.

77. [1973] 3 W.W.R. 634 at 638 (Alta. S.C., App. Div.).

late Division of the Alberta Supreme Court relied on the statutory provision for judicial notice and consequently considered a Saskatchewan statute.⁷⁸

The broadness of the Manitoba provision for judicial notice raises special considerations. To begin with, subsection 32(1) of *The Manitoba Evidence Act* provides for the taking of judicial notice, but also states that foreign law is nevertheless to be pleaded "where any rule or law so requires." However, this proviso, requiring pleading in appropriate circumstances, has been held to be virtually meaningless. In *Weingarden v. Moss*,⁷⁹ the plaintiff brought an action on three promissory notes either drawn or made payable in Detroit, Michigan. Counsel for the plaintiff argued (without formally pleading or proving) that the Michigan *Bills of Exchange Act* was not materially different from the Canadian Act. Judgment went for the plaintiff at trial. Defense counsel on appeal questioned the propriety of the argument that Michigan and Manitoba negotiable instruments laws were the same, and contended that if the plaintiff intended to rely on foreign law, it must have been pleaded and proven in the normal way.⁸⁰ Mr. Justice Coyne of the Manitoba Court of Appeal, in writing one of two concurring judgments, supported the plaintiff. He found that Michigan law was deemed to be the same as that in Manitoba. As an alternative ground, he continued: "In addition, by *The Manitoba Evidence Act* . . . the court must take judicial notice of the laws of the United States and of the individual states and those laws need not be pleaded unless a rule or law so requires. I know of no such rule or law in this province. See *Campbell v. Funk* [1935] 3 WWR 561, affirmed by this court on appeal, unreported."⁸¹

In *Campbell v. Funk*,⁸² Chief Justice MacDonald stated at trial as 'a given' that the plaintiff need not plead the laws of Minnesota. These two decisions suggest that in Manitoba there is no need to plead the Acts of the Imperial Parliament, the Parliament of Canada or the Provincial legislatures and no need to plead "the laws of any part of the British Commonwealth, or of the United States." However, these decisions are difficult in that they fly directly against the general rule that foreign law must be plead (see below).

Other difficult considerations abound. What is meant by the phrase "Judicial notice of the laws" in section 32(1)? Does it refer to judicial notice of only statute law or all the law? If the latter, does that mean a Manitoba judge is imputed to know all the subtleties of the law of Texas or Florida but only the Acts of Saskatchewan? Note that by paragraph 31 (f) judicial notice is taken of, *inter alia*, *all facts* of the provinces (and not "the laws"

78. There are a number of reported decisions where reference is made to some statutory provisions of another jurisdiction without there apparently having been proof of those provisions. See, e.g. *Ross v. McMullen* (1971), 21 D.L.R. (3d) 228 (Alta. S.C.); *Wincal Properties Ltd. v. Cal-Alta Holdings Ltd.*, [1983] 3 W.W.R. 57 (Alta. Q.B.). Presumably, provisions for judicial notice were relied upon.

79. *Supra* n. 28.

80. *Supra* n. 28.

81. *Supra* n. 28, at 259. The pocket of the *Campbell v. Funk* case in the Manitoba Court of Appeal has been searched. There are no reasons for judgment.

82. (1935), 3 W.W.R. 561 (Man. K.B.).

of the provinces as provided for with respect to, *inter alia*, the United States in subsection 32(1)).

More importantly, despite the *Weingarden* decision, should foreign law be pleaded? In the example of John Brown and the auto accident assume for the moment that the accident had occurred in Saskatchewan. Plaintiff's counsel may desire the court to know certain provisions of the Saskatchewan Traffic Act. Although he can make note of these provisions at trial, it is submitted that the appropriate Saskatchewan law should also be pleaded. Saskatchewan law, a material fact on which John Brown relies, should be set out in the statement of claim. It is to be noted that in *Allen v. Standard Trusts Company*,⁸³ while plaintiff's counsel relied on section 32 of *The Manitoba Evidence Act*, he also set forth 'fully' the laws of the State of Minnesota in his pleadings.

Still assuming that the accident occurred in Saskatchewan, should Brown's counsel be prepared to produce statutes and experts at trial? The Supreme Court of Canada has, at common law, a very wide power to take judicial notice. In exercising it the Court has made clear that it requires no testimony of experts.⁸⁴ In Manitoba, however, it appears that counsel is expected to aid the court (by presenting evidence) in its task of taking judicial notice. The latter approach is consistent with the general rule that foreign law cannot be proved merely by the production of books and case reports. This is so despite the mandatory terms of section 32.

Some light on this last point may be derived from the case of *Allen v. Standard Trusts Company*.⁸⁵ At trial Galt J. assumed the law of Minnesota relating to an aspect of company law had to be pleaded and proved. He accepted the evidence of an expert produced by the plaintiff. On appeal, the Court of Appeal noted that judicial notice could be taken of the laws of Minnesota. Nevertheless, the Court welcomed the evidence of the expert as easing its task of taking judicial notice. Dennistoun J., in one of three concurring judgments, wrote:

The first objection is in respect to the proof of the law of Minnesota. That point is determined by sec. 32 of *The Manitoba Evidence Act*, R.S.M. 1913, ch. 65, which enables the Courts of this province to take judicial notice of the laws of any part of the United States of America and to refer to statutes, reports of cases, evidence on oath, etc. These three methods of proof were taken in this case.⁸⁶

The section 32 referred to, however, set out the various methods of ascertaining foreign law.⁸⁷ The present section 32 does not.

One further example of a Manitoba court ascertaining foreign law by judicial notice is *Knight v. Knight*.⁸⁸ And similarly in *Hannah v. Pearlman*,⁸⁹

83. (1919), 30 Man. R. 594 (K.B.); aff'd (1920), 30 Man. R. 605 (C.A.).

84. See *Logan v. Lee* (1907), 39 S.C.R. 311 at 313.

85. *Supra* n. 83.

86. *Supra* n. 83.

87. "32. The courts of this Province . . . may take judicial notice . . . and for the purpose of ascertaining the same, such court, judge or officer may refer to any books of statutes, reports of cases and works upon legal subjects as it or he may deem authentic, or may require evidence upon oath, declaration, or affirmation, oral or written, or by certificate or otherwise, as may seem proper." *The Manitoba Evidence Act* R.S.M. 1913, ch. 65, s. 32.

88. [1925] 2 D.L.R. 467 (Man. K.B.).

89. [1954] 1 D.L.R. 282 (B.C.S.C.).

a British Columbia Court took judicial notice of foreign law without expert testimony.

Yet in Canada today (including Manitoba), there is little reliance placed upon provisions for judicial notice of foreign law. Aside from minor usage, such as in *O'Donovan v. Dussault*⁹⁰ to supplement pleading and proof on a specific 'bit' of foreign legislation, judicial notice is virtually unutilized, regardless of whether provision for judicial notice is permissive or mandatory.⁹¹ At best it fills in 'minor holes' in pleading and proof.

In this regard, consider the demands for pleading and proof of the Supreme Court of Canada.

The Supreme Court established, early on, a broad power to take judicial notice of the laws of the provinces. In 1907, in *Logan v. Lee*, Chief Justice Fitzpatrick, on behalf of the Court, wrote:

I think it proper that I should here announce, after having consulted with my brother judges, that this court, constituted as an appellate tribunal for the whole Dominion of Canada, requires no evidence as to what laws may be in force in any of the provinces or territories of Canada. This court is bound to follow the rule laid down by the House of Lords in the case of *Cooper v. Cooper* [13 App. Cas. 88], in 1888, and to take judicial notice of the statutory or other laws prevailing in every province and territory in Canada *suo motu* . . .⁹²

The Supreme Court has no need to refer to the expert evidence adduced at trial.⁹³ However, the foreign law must have been pleaded and at least an attempt made at proving it at trial if judicial notice is to be taken. The reason for this rule has been explained, in the case *Canadian Steamships Co. v. Watson*, by Mr. Justice Cannon in a concurring judgment:

This Court, in cases from the province of Quebec, must follow the rule that all facts in support of the action, e.g., the law of another province, must be alleged and proved; otherwise it would be unfair for this Court to take *suo motu* judiciary notice of the statutory or other laws of another province, ignored in the pleadings, when the Quebec courts did not consider them, and, forsooth were prohibited from considering them as applying to the case.⁹⁴

In the case of *Upper Ottawa Improvement Company v. The Hydro-Electric Power Commission of Ontario*,⁹⁵ the Supreme Court of Canada refused to hear arguments on the application of the law of a province because it had not been pleaded at trial.

Certainly it can be argued that this rule of pleading is not applicable in Manitoba. Notice that Mr. Justice Cannon's reason for the rule hinges on the fact that foreign law is not considered before the provincial courts without pleading. The matter is undecided, however; it surely constitutes

90. *Supra* n. 77.

91. See *Price Mobile Home Centres Inc. v. National Trailer Convoy of Canada* (1974), 44 D.L.R. (3d) 443 (Man. Q.B.), in which the lack of pleading of the law in Ohio pertaining to security interest and the failure to call any expert evidence on this law caused the Court to refuse to consider the possible application of Ohio law. Mr. Justice Nitikman agreed with the view that it was dangerous for a court to state what the law of another jurisdiction is in the absence of expert evidence. Section 32 of *The Manitoba Evidence Act* was not mentioned in the reasons for judgment.

92. *Supra* n. 84, at 313.

93. *Ottawa Electric Railway Co. v. Letang*, [1924] S.C.R. 470.

94. *Supra* n. 16, at 18.

95. [1961] S.C.R. 486 at 502. See also *Pettikus v. Lecker* (1980), 117 D.L.R. (3d) 257 at 278 (S.C.C.).

another reason for pleading and proving foreign law in Manitoba courts despite the availability of the method of judicial notice.

The experience of United States courts with proving foreign law by judicial notice further illustrates the limited nature of the method. That experience is considered in Part IV of the paper. Briefly, however, in answer to criticisms of the fact theory of foreign law, American legislators introduced extensive provisions for judicial notice of foreign laws. Even with such provisions — and an articulated rejection of the fact theory — the American federal and state jurisdictions generally continue to rely upon the method of pleading and proof of foreign laws. American courts may be authorized, or even required, to judicially note foreign laws, but they generally will only do so to supplement evidence by pleading and proof of foreign laws.

Needless to say, based on current Canadian law, provisions⁹⁶ for judicial notice of foreign law provide a supplement to the traditional 'plead and prove' method. Certainly the more extensive use by the judiciary of judicial notice provisions can be argued, particularly where they are drawn in mandatory terms. But prudent counsel must recognize the supplemental nature of the method.

D. By Pleading and Proof

In the hypothetical auto accident, questions concerning pleading and proof need only be dealt with by John Brown's counsel after he has considered and rejected the other three methods of dealing with an issue of foreign law. In particular, as counsel for the plaintiff, he or she does not automatically bear the burden of setting out the foreign law. "[T]he presumption [of law] is not required to be pleaded . . ."⁹⁷ Because of the presumption of sameness it is only the party that believes the foreign law is applicable, is different from the *lex fori* and assists the party's position who must set forth the effect of the foreign law in pleadings and adduce evidence to prove that law as a fact.⁹⁸

In practice, of course, once the 'fact' of foreign law is raised by one party, evidence on that law will often be presented by both sides, for each may have a very different opinion of the answer to a question of foreign law. In the course of the trial the burden of proving, or disproving, may shift. As noted in a recent decision of Marceau J., of the Federal Trial Court:

96. For an unusual judicial notice-like method see *Goodman v. Goodman* (1974), 14 R.F.L. 243 (Ont. Prov. Ct.). There have been proposals for reform of the laws of evidence in Canada. The Law Reform Commission of Canada in 1975 produced a Model Evidence Code, which included provisions dealing with judicial notice of foreign laws (see The Law Reform Commission of Canada, *Report on Evidence*, (1975) at 45-46. Extensive notes accompany the Model code at 104-105). In 1976, the Ontario Law Reform Commission also produced a report on the law of evidence which proposed changes to proof of foreign statutes by judicial notice (see Ontario Law Reform Commission, *Report on the Law of Evidence*, (1976) at 236-237). In 1982 the Federal-Provincial Task Force on Uniform Rules of Evidence produced a report on the law of evidence. Chapter four deals with judicial notice (Uniform Law Conference of Canada, Report of the *Federal-Provincial Task Force on Uniform Rules of Evidence*, (1982) at 47-54).

97. *Young v. Industrial Chemicals Company*, [1939] 2 W.W.R. 468 (B.C.S.C.).

98. *Hill v. Spraid*, *supra* n. 13; *Feiner v. Demkowicz*, *supra* n. 43. In *Morardshammer AB v. H.R. Radomski & Co. Ltd.*, *supra* n. 26, the plaintiff brought an action in Ontario on a contract governed by Swedish law. No evidence of Swedish law was adduced by either side, and the defendants submitted that the plaintiffs action for want of proof. Held: in the absence of evidence to the contrary, Swedish law was presumed to be the same as Ontario law (from the headnote).

In my view, the fact that constitutes foreign law, although very special in nature, is to be treated as any other fact when the question of the onus of proof arises: the party relying upon it to advance its contention must prove it. In practice, however, the burden of proof of such a fact, particularly when a difficulty of interpretation is involved, may shift from one side to the other during the course of the trial, thus requiring both parties to adduce evidence relating thereto, and the Court cannot but take into account the whole of that evidence. It is only where the Court is unable to arrive at any positive conclusion as to some particular alleged effect of the foreign law that the question of the burden of proof may have a clear significance.⁹⁹

Foreign law cannot be proven by citing a previous decision of a forum court in which the same foreign rule was in issue.¹⁰⁰ The courts continue to admonish counsel for just such attempts at proof.¹⁰¹ In *Re Attorney-General of British Columbia and Becker*,¹⁰² for example, the court distinguished an earlier decision¹⁰³ of the same jurisdiction on the basis that there was evidence of foreign law in that earlier case and none presented in the case at bar.¹⁰⁴

Similarly foreign law generally cannot be proven in applications for summary judgment. If the answer to a question of foreign law is in dispute, an interlocutory motion for judgment is not a proper procedure.¹⁰⁵ However, if the fact of foreign law is not in contention then summary judgment is available.¹⁰⁶

1. Pleading

Assuming that agreement is not possible and that the method of judicial notice is unavailable¹⁰⁷ (as would be the situation in John Brown's case), a party must plead the law, if it in fact differs from the law of the forum.

The pleading of foreign law requirement is strict; if unpleaded, evidence of the 'fact' of the foreign law will not be admitted at trial. "[W]here an issue is raised as to what the law of a foreign state applicable to a case is, it should and must be pleaded. Otherwise there is no opportunity for the person against whom the issue is raised to prepare to meet it."¹⁰⁸

Either the plaintiff or defendant may be required to plead foreign law.¹⁰⁹ In pleading a foreign law, counsel must bear in mind that foreign law is 'a

99. *Orient Leasing v. The Ship "Kosci Maru"*, [1979] 1 F.C. 670 at 676 (T.D.).

100. *Cheshire and North*, *supra* n. 37, at 124; *Dacey*, *supra* n. 5, at 1207; *Phipson on Evidence*, (12th ed. Buzzard May and Howard 1976) 503.

101. *Maden v. Long*, [1983] 1 W.W.R. 649 (B.C.S.C.); *Re Morris Goodman* (1916), 26 Man. R. 537 (C.A.); *Traders Realty Limited v. Sibley* (1982), 20 Alta. L.R. (2d) 378 (Q.B.).

102. (1978), 87 D.L.R. (3d) 536 (B.C.S.C.).

103. *Attorney General of British Columbia v. Buschkewitz*, [1971] 3 W.W.R. 17 (B.C. Co. Ct.).

104. *Supra* n. 102.

105. "The authorities are clear that where there exists any real difficulty as to a matter of law or any serious conflict as to a matter of fact then summary judgment should not be granted." *Arnoldson Y Serpa v. Confederation Life Association* (1974), 3 O.R. (2d) 721 at 722 (C.A.). See also *Orient Leasing v. The Ship Kosei Maru*, *supra* n. 99; *Traders Realty Limited v. Sibley*, *supra* n. 101; *Upjohn v. Upjohn*, *supra* n. 61.

106. *Minister of State of the Principality of Monaco v. Project Planning Associates International Ltd.* (1980), 32 O.R. (2d) 438 (H.C.).

107. If counsel determines to plead and prove, these matters are still important.

108. *Winbiger v. Winbiger* (1953), 10 W.W.R. 131 at 136 (B.C.S.C.). See also *Crosby v. Constable* (1957), 23 W.W.R. 32 at 33-34 (B.C.S.C.); *app'd in Price Mobile Home Centres Inc. v. National Trailer Convoy of Canada*, *supra* 91; *Hill v. Spraid*, *supra* n. 3.

109. *Alvarodiaz v. Sunlife Assurance Co. of Canada*, [1973] 3 O.R. 126 (H.C.). No initial burden of pleading lies on the plaintiff if that party is prepared to rely upon the assumption that foreign law is taken to be the same as the law of the forum: *Pritchard v. Standard Life Assurance Company* (1884), 7 O.R. 188 (Q.B.). An interesting example of the requirements of pleading of foreign law is *Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Limited* (1983), 34 Nfld. & P.E.I.R. 478 (Nfld. S.C.). For the requirements of pleadings in a statement of defence against a foreign judgment see *British Linen Co. v. McEwan* (1892), 8 Man. R. 99 (Q.B.). See also *Small v. Zacher*, *supra* n. 61.

fact'. In Manitoba, *Queen's Bench Rule* 101 applies.¹¹⁰ It provides: "Pleadings shall contain a concise statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved." Such pleading is susceptible to the charge that it is embarrassing. In *LeBlanc v. Covenant Mutual Benefit Association of Illinois*¹¹¹ the defendants in their statement of defence pleaded, *inter alia*, that "by the laws of the State of Illinois" the plaintiff could not recover upon a certificate. A motion to strike that pleading out was successful, the court holding that it was necessary for the defendants to set forth the particular laws of Illinois relied upon. Similarly, paragraphs contained in a statement of defence which sought to rely in general terms on the laws of Ontario were struck in *Strathdee v. Manufacturers Life Assurance Co.*¹¹²

In *Hands v. Stampede International Resources Ltd.*, the requirements were re-stated in the following terms: "If the plaintiff says the foreign statute applies he should set out that part of the statute and section in detail, and if he is alleging there has been a breach then specify in what manner and the application of the statute so that the Court and the defendant will understand what he is pleading."¹¹³

Not only must the law be set out affirmatively, but the case must be clearly brought within it.¹¹⁴ And if foreign law is plead in a statement of defence, the pleadings must always establish a tenable defence.¹¹⁵

The *Bryant Press Limited v. Acme Fast Freight Inc.*¹¹⁶ is a valuable case with regard to the pleading of foreign law. A motion to 'strike out' was again involved. It was brought by the defendant who contended that merely stating the foreign statute on which one relied was insufficient; a short summary of its effect was required. The Senior Master in his reasons relied on American authorities and stated that there are three methods of pleading a statute: first, by merely citing the statute and section; second, by, in addition, summarizing its effect; and third, by setting out the statute verbatim. The Master then went on to note that the second method is preferred by Ontario courts.¹¹⁷ In this particular case, because of the length and complexity of the statute sections relied on by the plaintiff, the Master ordered that the plaintiff file particulars in accord with the second method.

Similarly, in the case of *Ontario Stone Corporation v. R.E. Law Crushed Stone Ltd.*,¹¹⁸ the Senior Master required a summary of the applicable law even though Ohio's general law (as opposed to statute law) was pleaded. This set a precedent¹¹⁹ which may be significant when alleging the common or unwritten law of a foreign jurisdiction.

110. *The Queen's Bench Rules*, C280-M.R. 26/45.

111. (1898), 34 N.B.R. 444 (C.A.).

112. (1909), 11 W.L.R. 468 (Alta. C.A.).

113. [1971] 3 O.R. 44 (H.C.).

114. *See Ashley & Crippen Ltd. v. Webster*, [1950] O.W.N. 142, 12 C.P.R. 42 (Q.B.); *Hope v. Caldwell* (1871), 21 U.C.C.P. 241 (C.A.).

115. *Bowes Co. v. American Railway Express Co.* (1924), 24 O.W.N. 313 (Div. Ct.), in which paragraphs of a statement of defence were struck as untenable.

116. *The Bryant Press Limited v. Acme Fast Freight Inc.*, [1951] O.W.N. 665 (H.C.).

117. The first method, it is submitted, is only used when one is relying on a very simple provision of a foreign statute.

118. [1964] 1 O.R. 303 (S.C.).

119. *Ibid.*, at 306.

2. Proof

The subject of proof of foreign law involves many more intricacies than that of pleading. The starting point of this topic is the statutory provisions for proof of foreign law; for statutes have been widely passed providing for the production of foreign laws at trial. The *Canadian Evidence Act* provides, in sections 19-22,¹²⁰ for such production. *The Manitoba Evidence Act*¹²¹ contains similar provisions.

At first blush these provisions appear to create a sharp distinction between the proof of statutory and general foreign law. Consider section 36 of *The Manitoba Evidence Act*. It provides that any "state document" (very broadly defined in paragraph 36(1)(c) to include not only Acts and ordinances but also, *inter alia*, regulations, notices, appointments, licences, letters patent, official gazettes and treaties) of the Imperial Parliament, the federal and provincial governments of Canada, and the countries of the British Commonwealth. Other foreign statutes can be proved in Manitoba courts by several modes. In general, these modes involve the production of some

120. R.S.C. 1970, c. E-10, ss. 19-22 as am. by S.C. 1976-77, c. 28.

19. Every copy of any Act of the Parliament of Canada, public or private, printed by the Queen's Printer, is evidence of such Act and of its contents; and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed, unless the contrary is shown. R.S., c. 307, s. 19.
20. Imperial proclamations, orders in council, treaties, orders, warrants, licences, certificates, rules, regulations, or other Imperial official records, Acts or documents may be proved
 - (a) in the same manner as they may from time to time be provable in any court in England;
 - (b) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof; or
 - (c) by the production of a copy thereof purporting to be printed by the Queen's Printer. R.S., c. 307, s. 20.
21. Evidence of any proclamation, order, regulation of appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada and evidence of a treaty to which Canada is a party, may be given in all or any of the modes following, that is to say:
 - (a) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of such treaty, proclamation, order, regulation, or appointment or a notice thereof;
 - (b) by the production of a copy of such treaty, proclamation, order, regulation or appointment, purporting to be printed by the Queen's Printer; and
 - (c) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk, or assistant or acting clerk of the Queen's Privy Council for Canada; and in the case of any order, regulation or appointment made or issued by or under the authority of any such minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides. R.S., c. 307, s. 21.
22. (1) Evidence of any proclamation, order, regulation, or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the modes following, that is to say:
 - (a) by the production of a copy of the official gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof;
 - (b) by the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the government or Queen's Printer for the province; and
 - (c) by the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, or by the head of any department of the government of a province, or by his deputy or acting deputy as the case may be.
- (2) *Prima facie* evidence of any proclamation, order, regulation or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as constituted prior to the 1st day of September 1905, or of the Commissioner in Council of the Northwest Territories or of the Commissioner in Council of the Yukon Territory, may also be given by the production of a copy of the *Canada Gazette* purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof. R.S., c. 307, s. 22.

121. R.S.M. 1970, c. E150, s. 36.

official document attesting to the existence and authority of the state document in question. No such provisions exist for the proof of general foreign law. Hence the appearance of a sharp distinction.

The Canadian courts have determined a certain role for such provisions, however. At common law, the production of a statute by itself did not constitute proof,¹²² and authentication added nothing.¹²³ At common law, "The mere certificate of the Assistant Attorney-General does not prove what the law [is]. The law of foreign countries, whether written or unwritten, like other questions of fact, must be proved by parol evidence."¹²⁴ Thus, provisions for the proof of foreign "state documents" in and of themselves by some means of authentication constitute a substantial change.

The extent of this change was neatly summarized by Mr. Justice Hodgins in writing for a four justice court in *Northern Trusts Co. v. McLean*. After reciting a provision in the Ontario evidence act, equivalent to subsection 36(3) of *The Manitoba Evidence Act*, he continued:

Now, while the foreign law is a question of fact and is usually and properly to be proved by experts in the particular foreign law in question, this enactment makes the contents of a provincial statute to be good evidence in the cause. If so, the language of the statute, if a proper copy is produced, must, like any other evidence, be regarded, and its meaning ascertained, by the presiding Judge at the trial. Expert evidence is of course admissible upon it if based on local decisions or later legislation, but in the absence of such evidence its meaning will be that which the Courts in this Province determine.¹²⁵

Proof by production of an authenticated copy of the state document is a supplement to the general method of proof of foreign law by expert testimony although proof merely by production can 'stand alone'. For example, the statute law of another jurisdiction may be proved in a legal proceeding in Manitoba by the mere production of an authenticated copy, without the intervention of an expert witness.¹²⁶ In *In Re Charles E. Thomas*¹²⁷ counsel for a prisoner subject to an order for extradition brought an application in the nature of *habeas corpus*. He argued that the judge who had granted the extradition order had incorrectly received evidence by allowing the prosecution to prove the law of Massachusetts by filing a certified copy of a section of a Massachusetts criminal statute. The argument was rejected, the court noting that by "radical changes in the common law doctrine as to proof of foreign law"¹²⁸ the filing of the certified copy properly proved the foreign statutory provision. White J. in his reasons for two of three justices went on to note: "... the statute when thus proved affords *prima facie* evidence that the foreign law is as there enacted, because otherwise

122. *Supra* n. 57.

123. *State of Utah v. Jones*, [1925] 3 W.W.R. 750 at 754 (Alta. S.C.).

124. *Re Low*, [1933] O.R. 393 at 396 (C.A.).

125. (1926), 58 O.L.R. 683 at 684-685 (C.A.).

126. "This section clearly contemplates that the statute law of another province may be proved on a legal proceeding in this jurisdiction by the mere production — that is without the intervention of an expert witness — of a statute purporting to be printed by the authority of the legislature of the other province." *Dodge v. Western Canada Fire Insurance Co.* (1912), 2 W.W.R. 972 at 977 (Alta. S.C.).

127. (1917), 45 N.B.R. 148 (C.A.).

128. *Ibid.*, at 158.

the enactment of these provisions of s. 58,¹²⁹ which I have quoted, would have been futile and the provisions themselves inoperative."¹³⁰

When an authenticated copy of a statute is produced without other evidence, it is presumed that the rules of construction in the foreign courts are the same as those of the forum.¹³¹

Having said that proof by production may 'stand alone', it is important to quickly add that generally it is not the only form of proof offered. Counsel do not care to risk filing statutes without interpretation by experts,¹³² and the courts are reluctant to receive statutory materials without explanation by experts. The courts' perception of the production of authenticated copies of statutes as principally a supplementary form of proof was expressed by Mr. Justice Turgeon, in writing for the Saskatchewan Court of Appeal, in the following terms:

I think the section is intended to provide for a case in which it is necessary or expedient for some particular reason, not to prove the law of this province or of another province or of Canada, but merely to have the Court examine the document itself which contains the statute in question . . . The section provides a convenient and inexpensive method of producing a statute in Court for such incidental purposes as I have instanced, but I do not think it has any bearing upon the general rule which governs the proof of foreign law.¹³³

Thus, the apparent sharp divergence between modes of proof of statutory and general foreign law is illusory. The major method of proof for both statutory and general law is by the testimony of experts.¹³⁴

More cases have been reported (and continue to be reported) on the issue of the qualifications required of experts than any other in the area of proof of foreign law. Yet the general law on what constitutes 'an expert' for purposes of proof seems to have been long settled.

J.D. Falconbridge in a case comment in 1929 relied upon a series of Canadian and English authorities¹³⁵ to submit the following rules of competency of a witness to prove foreign law:

Rule 1. A person is competent to prove the law of a foreign country if, and, as a general rule, only if, he knows that law by virtue of his being, or having been,

(a) a judge or legal practitioner in that country; or

129. "All proclamations, treaties and Acts or Statutes of any Legislature or other governing body of any foreign State, Canadian Province or British colony, and all written enactments or laws of the same . . . may be proved in any Court, either by examined copies, or by copies authenticated as hereinafter mentioned, that is to say: — If the document sought to be proved be a proclamation, treaty, Act or Statute of any legislature or other governing body of any foreign State, Canadian Province or British colony, or a written enactment or law of the same . . . the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign State, Canadian Province or British colony to which the original document belongs . . . but if any of the aforesaid authenticated copies shall purport to be signed or sealed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where the seal is necessary, or of the signature or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement." R.S.N.B. 1903, ch. 127, s. 58.

130. *Supra* n. 127, at 163.

131. *Supra* n. 47.

132. The fear being that the statute will be applied against one's position.

133. *Supra* n. 48, at 391-392.

134. Evidence of experts may be presented by commissions and affidavits as well as verbally. *See below*.

135. J. Falconbridge, "Conflict of Laws — Competency to Prove Foreign Laws" (1929), 7 Can. Bar Rev. 399 at 400; later reproduced in J.D. Falconbridge, *Essays on the Conflict of Laws*, (2nd ed. 1954) 834.

- (b) a teacher of law in that country, or the holder there of some other office the duties of which entail a knowledge of the law of that country.

It is said that the 'best evidence' is that of a person qualified under clause (a), but under either clause (a) or clause (b), the witness has acquired his knowledge by virtue of his office — he is *peritus virtute officii*.

Rule 2. A person is not competent to prove the law of a foreign country (a) if he has merely studied the law in that country, and, *a fortiori*, (b) if he has merely studied the law of that country in another country . . .

Rule 3. Much must be left to the discretion of the trial judge, but if the foreign law is foreign in essence as well as in name, a stricter rule as to competency should be applied than if the foreign law is germane to the law of the forum . . .

Rule 4. A person who knows the law of the foreign country by virtue of holding in another country an office which entails a knowledge of the law of the foreign country may, in special circumstances, be held to be competent to prove that law.

Thus, an expert falls within one of two groups. First are those who know the foreign law by virtue of being, or having been, "a foreign Judge or . . . a barrister or solicitor practising in the Courts of his own country."¹³⁶ Establishing that the witness comes within this group is generally sufficient to establish his status as an expert. Even a party to a proceeding, if he or she satisfies the criteria, may be found competent.¹³⁷ However, not actively practising the law of the foreign country for a lengthy period may disqualify a lawyer.¹³⁸

The second group comprises the holders of offices (usually within the foreign country but in special circumstances outside), the duties of which entail a knowledge of the law of that country. Usually, however, evidence that a certain position is held is insufficient; the requirements of the office which necessitate knowledge of the law must also be set out. Thus, in *Re Low*¹³⁹ a witness was judged not to be an expert when these requirements were not put in evidence:

What were Dods' qualifications to give expert evidence as to such law? He was an inspector of customs. There is no evidence as to the nature of his official duties, as to the qualifications required of such inspector, or of his qualifications for the office, his education, training, scholarship, career, or of whether literate or illiterate. In the absence of evidence of his qualifications it cannot be assumed as a fact that he possessed that legal knowledge necessary in order to qualify him to give evidence as to the laws of the United States respecting the charge of bribery in question here.¹⁴⁰

The competency of the second group has been recognized by the Supreme Court of Canada.¹⁴¹

If at all possible, witnesses qualifying as experts within the first group should be called on as there are other rules that limit the qualifying of the

136. *R. v. Naoum* (1911), 24 O.L.R. 306 at 311, 19 C.C.C. 102 at 108 (C.A.).

137. *Murphy Estate v. M.N.R.* (1974), 28 D.T.C. 6394 at 6398 (F.C.T.D.): "I was convinced that his professional integrity outweighed any possible interest."

138. *Winbigler v. Winbigler*, *supra* n. 108, in which twenty years non-practise was a disqualification.

139. *Supra* n. 124.

140. *Supra* n. 124, at 398. For a similar case with opposite results, see *R. v. Bleiler* (1912), 2 W.W.R. 5 (Alta. S.C.).

141. *Gould v. Reinblatt*, [1929] S.C.R. 74; aff'g 45 Que. K.B. 136; rev'g 65 Que. S.C. 17. See Falconbridge, *supra* n. 135, at 400.

second group. For "... if the foreign law is foreign in essence as well as in name, a stricter rule as to competency should be applied than if the foreign law is germane to the law of the forum."¹⁴² Further, a court may impose a 'best evidence' rule, demanding a legal practitioner of the foreign jurisdiction if one can be made available at a reasonable expense. In *Direct Winters Transport Ltd. v. Duplate Canada Ltd.*,¹⁴³ a witness with knowledge of a particular area of law of a foreign jurisdiction by reason of his business experience was rejected when produced as an expert on the ground that a lawyer from the jurisdiction in question was available.

Lists of persons who have satisfied the criteria may be found in the sources cited in this footnote.¹⁴⁴ A list of recent cases applying the criteria is included as well.¹⁴⁵

The court has a discretion in determining whether or not one's circumstances qualifies the person as an expert. Since practical experience is a consideration, many persons may only marginally qualify. The court may decline to hear from such persons. The position of the courts is illustrated by *Direct Winters Transport Ltd. v. Duplate Canada Ltd.*¹⁴⁶ in which Gale J., as he then was, refused to hear the evidence of an Illinois businessman who possessed knowledge of the motor transport business in the United States and the rules and regulations relating to the controlling tariffs. He explained:

I do not accept the suggestion that simply because a person has some special knowledge of a matter, so that his evidence might be termed admissible, that that person should be allowed to testify where the weight of his evidence would be almost insignificant. To permit the development of such a practice would be, as it strikes me, to ignore or offend the best evidence rule.

I illustrate by pointing out that one could scarcely permit a doctor's nurse to testify as to medical matters if the doctor himself were available. Even if that nurse's evidence might be admissible because her knowledge is greater than others, I would not wish to encourage, let alone inaugurate, the practice on the sole basis of admissibility. Similarly, it would be unthinkable that an American executive of an insurance company who is not an attorney in his jurisdiction would be allowed to testify as to the insurance law of that jurisdiction.¹⁴⁷

An expert need not always present his evidence orally; commissions or affidavits may be used in special circumstances. In *United States v. Annesley*,¹⁴⁸ an application was made for the issuing of a commission for the examination of an attorney in New York State. An affidavit accompanying the application stated that the evidence required could not be obtained in Vancouver, that the attorney was unable to attend in Vancouver and that even if the attorney could come the expense would be out of proportion to

142. Falconbridge, *supra* n. 135, at 401.

143. [1962] O.R. 360 (H.C.).

144. *R. v. Naoum*, *supra* n. 136; Cheshire and North, *supra* n. 37, at 125; *Phipson on Evidence*, *supra* n. 100 at 502-503.

145. See, e.g. *Januszkiewicz v. Januszkiewicz* (1965), 55 W.W.R. 73 (Man. Q.B.); *Frew v. Reed* (1969), 69 W.W.R. 327 (B.C.S.C.); *McColm v. McColm*, [1969] 2 O.R. 742 (H.C.); *Attorney General of British Columbia v. Buschkewitz*, *supra* n. 103; *Murphy Estate v. M.N.R.*, *supra* n. 138; *Patterson v. D'Agostino* (1975), 8 O.R. (2d) 367 (Co. Ct.); *Orient Leasing Co. v. The Ship Kosei Maru*, *supra* n. 99; *Guerin v. Proulx*, *supra* n. 2; *R. v. Bengert* (No. 9) (1979), 15 C.R. (3d) 40 (B.C.S.C.); *Re Karnenas* (1978), 3 R.F.L. (2d) 213 (Ont. Surr. Ct.).

146. *Supra* n. 143.

147. *Supra* n. 143, at 363-364.

148. (1956), 20 W.W.R. 84 (B.C.S.C.).

the issue involved. On this basis, the commission was issued by Mr. Justice McInnes. He commented:

It is my view that the examination of Mr. Skolnik in the state of New York by attorneys qualified by practice in that jurisdiction would be much more effective and of greater assistance to the court than if such examination were carried out by members of the bar of British Columbia unacquainted with the statute law in that state.¹⁴⁹

Proof of foreign law by the affidavit of an expert is employed when the opposing party consents to,¹⁵⁰ or the rules of court provide for,¹⁵¹ its filing. The rules of court generally include the right to file such affidavits on interlocutory application¹⁵² and at trial, by order of the court obtained prior to trial.¹⁵³ Some jurisdictions also provide for the right, without order, to file affidavits of experts at trial.¹⁵⁴ Such an affidavit must be carefully drawn. In *Lear v. Lear*,¹⁵⁵ the plaintiff, in attempting to prove a New Jersey alimony judgment to be final and conclusive, filed an affidavit of an attorney practising in New Jersey. The affidavit was rejected at trial as "highly unsatisfactory in that it stated conclusions of law in a bald general way, without reference to the relevant statutes or case law."¹⁵⁶ When the affidavit was rejected the parties agreed that in order to determine the issue, the court might refer to case law of New Jersey. On appeal the affidavit was said not to establish that the judgment was final and conclusive.¹⁵⁷

In testifying, the expert witness will normally produce statutes, case law, legal treatises or other legal materials, all designed to buttress his or her testimony. The materials cited become part of the evidence. However, the witness is not merely the conduit by which the foreign statutes and case authorities are placed before the court.¹⁵⁸ The witness's testimony is the evidence. "The question for us is, not what the language of the written law is, but what the law is altogether, as shewn by exposition, interpretation and adjudication."¹⁵⁹

The expert witness presents his testimony as the amalgam of all he has learned of the question of foreign law in issue. Thus, it is stated by Lord Langdale, the Master of the Rolls, in the much quoted *Earl Nelson v. Lord Bridport*:

Considering the nature of the case, it seems to me, that the witnesses, in giving their testimony, may, if they think fit, refer to laws or to treatises, for the purpose of aiding their memory upon the subject of their examination.

But, in general, it is the testimony of the witness, and not the authority of the law, or of the text writer, detached from the testimony of the witness, which is to influence the Judge.

149. *Ibid.*, at 86; see also *Campbell v. Funk*, *supra* n. 82.

150. See *Re Spencer and The Queen* (1983), 2 C.C.C. (3d) 526 (Ont. C.A.); *Wyllie v. Martin*, [1931] 3 W.W.R. 465 (B.C.S.C.); *Guaranty Trust Co. of Canada v. Lindberg* (1983), 14 E.T.R. 28 (Sask. Surr. Ct.).

151. At common law, such affidavit evidence is not admissible. *People's Wayne County Bank v. Killam*, *supra* n. 26.

152. *Veco Drilling Inc. v. Armstrong*, [1982] 1 W.W.R. 177 (B.C.S.C.); *Ruck v. Ruck*, *supra* n. 23.

153. *Lear v. Lear*, *supra* n. 13.

154. See *Long Island University v. Morton* (1977), 81 D.L.R. (3d) 392 (N.S. Co. Ct.).

155. *Supra* n.13.

156. *Supra* n. 13, at 941 (H.C.).

157. *Supra* n. 13.

158. But see *Worthington v. Macdonald*, *supra* n. 57, at 334-335.

159. *Baron de Bode's Case* (1845), 8 Q.B. 208 at 265-266, 115 E.R. 854 at 875. Approved in *Re Low*, *supra* n. 124, at 399.

The testimony of the witness, or the information which the Judge is to obtain from him, ought to be founded on the knowledge which he possesses, and which ought to have been derived, not merely from his own observation, as a percipient witness in the course of his own practice and experience, but also from a study of the law itself, and the recognized commentaries thereon, in connection with his own observations and inferences, made in the course of his practice; and when he refers to laws and books in connection with the testimony he gives, he must be considered, only as indicating them to be amongst the subjects of his consideration in the formation of his opinion. If he does not distinctly say so, he is not to be understood as saying that the laws or commentaries to which he refers are the sole foundation of his opinion.¹⁶⁰

In receiving this evidence, the judge must attempt to place himself in the position of a court of the foreign jurisdiction and decide the question of law as that court would do. In *Orient Leasing Company Ltd. v. The Ship "Kosei Maru"*¹⁶¹ one counsel argued that the foreign law presented should be analyzed as if it was the law of Canada. The Court disagreed, saying: "In my view, the function of this Court is to endeavour to ascertain the state of the law in Japan today, regardless of what it should be or may become tomorrow under the possible creative influence of the Japanese jurisprudence."¹⁶²

There are limitations placed upon the evidence admissible from an expert on foreign law. For while a judge cannot be, and is not expected to be, familiar with foreign law, he may refuse to allow the foreign law experts to usurp his role as the finder of the fact of foreign law.¹⁶³ Consequently, rules have developed to allow the court to maintain its independence.

Thus, the function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents.¹⁶⁴ In the case of foreign statutes, the expert tells the court what the statute means, drawing if necessary on foreign rules of construction as set out in texts and cases. In the case of foreign documents, the expert proves the relevant foreign rules of construction. He does not give his opinion on the effect of the document.¹⁶⁵ Rather, the court, in light of the foreign rules of construction, determines the meaning of the documents. In this way the decision of the case on its merits remains with the court, at least theoretically.

This distinction is not pedantic. In *Bausch & Lomb Optical Co. v. Maislin Transport Ltd.*,¹⁶⁶ Mr. Justice Goodman was required to construe the meaning of certain bills of lading according to the law of the United States. As their form was specified by statute, he approached their meaning as a problem of the interpretation and construction of a foreign statute. Therefore the opinions of the experts, which were contradictory, relating to the meaning of the clauses as well as the relevant rules of construction were

160. (1845), 8 Beav. 527 at 538-539, 50 E.R. 207 at 212 (Ch.).

161. *Supra* n. 99.

162. *Supra* n. 99, at 677.

163. *Supra* n. 160, at 535, at 210.

164. Dicey, *supra* n. 5.

165. *Tucker v. Jones* (1915), 9 W.W.R. 620 (Sask. S.C.).

166. (1975) 10 O.R. (2d) 533 (H.C.).

considered by the Judge. After an extensive review of the materials produced, he adopted the opinion of one expert as to the meaning.¹⁶⁷ In contrast, if he had determined the problem to be one of construction of foreign documents, the option of adopting the meaning assigned by the expert would not have been available.¹⁶⁸

A second limitation is that the expert must state the foreign law with some legal precision. The expert must be capable of applying the foreign law to particular circumstances,¹⁶⁹ and may not proceed on merely the basis of broad generalities.

On occasion, Canadian courts have stated this limitation in strong terms. Usually, the Canadian courts expect opinions of expert witnesses;¹⁷⁰ however in two Ontario cases — *Westgate v. Harris*¹⁷¹ and *Hunt v. Hunt*¹⁷² — it was held that the opinion of a lawyer as to the law of a foreign country was not proof of such law.

In *Westgate*, testimony of an expert was rejected because it was wanting in legal precision, lacked reference to authority and contained opinions. On the latter defect the Court wrote: "The 'opinion' of a lawyer alone does not prove the law — he must be in a position to testify that such is in fact the law."¹⁷³ In *Hunt*, after commenting on the criticisms of the view that foreign law must be stated as a fact, re-affirmed the view, saying "it was plainly right"¹⁷⁴, and consequently relied on the expert's statements of fact, as opposed to the plaintiff's expert's opinions.

Requiring that foreign law be stated as a fact has been criticized.¹⁷⁵ The rule generally is stated in the negative: "It is obvious that no witness can speak to a question of law as a fact and that all he can do is to express his opinion."¹⁷⁶ And the view expressed in *Westgate* and *Hunt* has not been followed in later decisions.¹⁷⁷ Certainly foreign law must be proved as facts are proved. (Are 'opinions' on the weather on the day in question sufficient?) But the point breaks down once it is realized that foreign law is unlike other facts.¹⁷⁸ Nevertheless, having said all of the above, if counsel has the luxury, experts with a 'positive view' of the foreign law are to be preferred.

A third limitation is that, governed by the rules of evidence, the expert may not give his opinion on the legal or general merits of the case.¹⁷⁹

167. *Ibid.*, at 547.

168. Dicey, *supra* n. 5, at 1213. See also *U.S. v. Webber (No. 2)*, [1912] 5 D.L.R. 866 (N.S.S.C.), in which the expert's interpretation was applied, although the judge would have construed it differently.

169. *McKenzie v. Gordon* (1867), 7 N.S.R. 153 at 155 (C.A.).

170. *Montana v. Les Developpements Du Saguenay Ltee* (1975), 8 N.R. 168 at 172 (S.C.C.); *Earl Nelson v. Lord Bridport*, *supra* n. 160.

171. [1929] 4 D.L.R. 643 (Ont. S.C. App. Div.).

172. (1958), 14 D.L.R. (2d) 243 (Ont. H.C.).

173. *Supra* n. 171.

174. *Supra* n. 172.

175. R. Murray "Proof of Foreign Law -- Must Foreign Law Be Stated or Proved as a Fact?" (1959), 37 Can. Bar Rev. 618.

176. *Cheshire and North supra* n. 37, at 125; *Castel, supra* n. 38, at 648.

177. See e.g. *Bausch & Lomb Optical Co. Ltd. v. Maislin Transport Ltd.*, *supra* n. 166.

178. Murray, *supra* n. 175, at 625. See also *R. v. Anderson* (1914), 5 W.W.R. 1052 (Alta. S.C.).

179. Murray, *supra* n. 175, at 622; *Castel, supra* n. 38, at 649.

In discussing limitations placed upon expert witnesses, it is important to recognize that a court is limited as well by such expert evidence. In particular, a court often hears only the testimony of a single expert, uncontradicted and hired by one party to present the foreign law in a light favorable to the position of that party. The court may be forced to accept evidence it does not agree with.¹⁸⁰ Or the court may be unaware that the evidence of the expert is erroneous. This latter situation is illustrated by a study¹⁸¹ of a decision of the Family Division of the High Court of London. In *Viswalingam v. Viswalingam*,¹⁸² the issue was whether a marriage had been dissolved according to the law of Malaysia. Evidence of two expert witnesses was presented, both expert on Muslim law. However, "[s]ince, under the laws of Malaysia, Muslim law is totally irrelevant to a consideration of all the questions raised in the course of the litigation . . . the expert evidence presented to the court was similarly irrelevant."¹⁸³ The result: "Neither side brought forward readily available evidence of crucial importance to the problem of ascertaining the relevant law that would be applied by the court of competent jurisdiction in Malaysia. In the result Malaysia law remained unelucidated; and the High Court found wrongly on every point of Malaysian law raised."¹⁸⁴

Arguably, a court's best defence to a situation such as *Viswalingam* is care in determining whether a person purporting to have expertise actually qualifies as an expert. That determination is discretionary. However, in *Viswalingam* both purported experts offered impressive credentials,¹⁸⁵ thus, the determination may be difficult.

Once an expert on the foreign law is so found, the authorities hold that his or her evidence should be followed.¹⁸⁶ Thus, in *Murphy Estate v. M.N.R.*,¹⁸⁷ when counsel for the Minister of National Revenue argued that the expert witness called by the Estate was wrong, Mr. Justice Cattanach rejected the argument and, relying on the rule, said that under the circumstances he had "no alternative"¹⁸⁸ but to accept the evidence of the expert.

Not surprisingly the courts have chafed under such a limitation. Exceptions to it have been developed. The first of these exceptions was referred to by Mr. Justice Cattanach in the *Murphy* decision. He wrote:

This is not a case where I find myself unable to accept the testimony of a foreign lawyer which may be done in exceptional cases. The exceptional cases I have in mind are when a foreign expert arrives at a result so extravagant and involving such a misunderstanding of concepts familiar to lawyers of all countries that the evidence of the foreign expert cannot be accepted and the Court concludes that it can safely and must interpret the matter for itself, based on those universally accepted concepts.¹⁸⁹

180. *Supra* n. 168.

181. L. Stout, "A Question of Fact: Ascertainment of Asian Law by the English Court. A Critique of *Viswalingam v. Viswalingam*, Decided in the High Court, London, 14th March 1979" (1980), 22 Mal. L.R. 34.

182. [1980] 1 M.L.J. 10 (H.C.).

183. Stout, *supra* n. 181, at 63.

184. *Ibid.*, at 36.

185. *Ibid.*

186. Murray, *supra* n. 175, at 624; Cheshire and North, *supra* n. 37, at 126.

187. *Supra* n. 137.

188. *Ibid.*, at 6400.

189. *Ibid.*

Closely related to this is a second exception: if the expert evidence is obscure, obviously false, or inconsistent with the supporting materials, the court may examine and construe for itself the passages of texts and case authorities cited by the expert. Mr. Justice Duff of the Supreme Court of Canada in *Allen v. Hay* has stated this exception in these terms:

These experts may, however, refer to codes and precedents in support of their evidence and the passages and references cited by them will be treated as part of their testimony; and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion.¹⁹⁰

In *Vicari v. Vicari*,¹⁹¹ an attorney-at-law testified that, prior to a 1965 New York Court decision, a Mexican divorce decree would probably not have been recognized under New York State law. After referring to that New York court decision, which indicated the opposite outcome, the Court rejected the expert's opinion as incorrect.¹⁹²

On occasion, a court's right to decline to follow uncontradicted expert evidence has been stated in stronger terms. In the case of *Lister v. McAnulty*,¹⁹³ after quoting the preceding passage from *Allen v. Hay*,¹⁹⁴ Mr. Justice Taschereau, in writing for the Supreme Court of Canada, went on to quote with apparent approval the following passage from *Halsbury's Laws of England*:

If, however, the witness produces any text book, decision, code, or other legal document, as stating or representing the foreign law, the court, on looking at or dealing with these books and documents, is entitled to construe them and form its own conclusion thereon. The court, in deciding on foreign law as a fact, is not bound to accept the construction put upon it by the expert, even if uncontradicted, nor is it bound to accept the decision of foreign courts as correctly setting out the law of the foreign state.¹⁹⁵

Mr. Justice Taschereau then made a point of saying that he had read all the authorities cited by the expert, who had been uncontradicted during the case at bar.¹⁹⁶

In *Montana v. Les Developpements Du Saguenay Ltee*,¹⁹⁷ the above passage from *Halsbury's* was cited (apparently as the law) by Mr. Justice Pigeon of the Supreme Court of Canada on behalf of a five justice court.

The suggestion by *Lister* and *Montana*, that the court is not bound to follow an expert even if his or her reasoning appears sound and is uncontradicted, is at odds with the suggestion found in, for example, *Murphy Estate*. This variance in opinion as to when a court may independently determine a question of foreign law is also reflected in the texts. Consider the following quotations from two texts:

190. (1922), 64 S.C.R. 76, at 81.

191. (1972), 29 D.L.R. (3d) 297, 3 O.R. (3d) 706 (H.C.).

192. *Ibid.*, at 299.

193. [1944] S.C.R. 317.

194. *Supra* n. 190.

195. *Halsbury's Laws of England* (2nd ed. Vol. 13) 615 at *supra* n. 193, at 3243.

196. See also *Hanson v. Collette* (1931), 5 M.P.R. 363 at 370 (N.B.K.B.).

197. *Montana v. Les Developpements Du Saguenay Ltee*, *supra* n. 170.

If the evidence of the expert witness as to the effect of the sources quoted by him is uncontradicted, the court is in general, bound to accept it. But this is not an inflexible rule: if uncontradicted evidence is 'obviously false,' 'obscure,' 'extravagant' or 'patently absurd,' or if 'he never applied his mind to the real point of law,' the court may reject it and examine the foreign sources to form its own conclusion as to their effect. Similarly, the court may reject an expert's opinion as to the meaning of a foreign statute if it is inconsistent with the text or the English translation and is not justified by reference to any special rule of construction of the foreign law. It should, however, be noted in this connection that quite simple words may well be terms of art in a foreign statute.¹⁹⁸

Even if the expert witness is uncontradicted by other expert testimony, the court may examine the texts in order to reach its own conclusions on the foreign law, though where the expert evidence is uncontradicted, the court should be reluctant to reject it.¹⁹⁹

The third exception has already been referred to in the quotation from *Allen v. Hay*²⁰⁰: if the testimony of the experts conflicts, the court is required²⁰¹ to conduct its own 'independent'²⁰² survey of the authorities, in order to decide between the conflicting testimony. That is, when the experts differ, "[I]t becomes necessary to determine which of the opinions put forward is the better supported by the authorities upon which the several counsel rely."²⁰³ The complete independence of the courts when testimony conflicts is understandable, but bear in mind that if the foreign law is not proved by the party seeking to rely on it, the presumption of sameness comes into operation.²⁰⁴ A decision, of course, is still rendered.²⁰⁵

Two recent examples of courts grappling with contradictory expert evidence are *Drew Brown Limited v. The Ship "Orient Trader"*,²⁰⁶ a decision of the Supreme Court of Canada, and *Orient Leasing Company Ltd. v. The Ship "Kosei Maru"*,²⁰⁷ a trial judgment. In both cases, the Justices dealt at length in their reasons with the authorities and statutes cited by the experts in reaching a decision as to the foreign law. The *Kosei Maru* case is particularly interesting for Mr. Justice Marceau heard from seven expert witnesses. He confessed that "[t]o choose between their conflicting views would at first sight appear to be an impossible task."²⁰⁸ Yet he eventually reached a decision.

One issue to address is whether or not a judge, in dealing with the contradictory testimony of experts, can examine authorities not cited by counsel. The Canadian cases on this point²⁰⁹ suggest he cannot. For although the judges talk in terms of "independent" surveys, they do, in fact, deal exclusively with the materials relied on by the experts.

198. Dacey, *supra* n. 5 at 1211 (footnotes omitted).

199. Cheshire and North, *supra* n. 37 at 126.

200. *Supra* n. 190.

201. See *Lyon v. Lyon*, [1959] O.R. 305 at 313 (C.A.).

202. *Quickstad v. McNeill*, [1932] 4 D.L.R. 427 at 453 (B.C.C.A.).

203. *O'Reilly v. O'Reilly* (1909), 21 O.L.R. 201 at 206 (C.A.).

204. *Re Spencer and The Queen*, *supra* n. 150, in which ultimately the burden was applied to decide the issue.

205. See, e.g., *Quickstad v. McNeill*, *supra* n. 202.; *Ross v. Polak*, [1971] 2 W.W.R. 241 (Alta. C.A.); *Wyllie v. Martin*, [1931] 3 W.W.R. 465 (B.C.S.C.). For other examples, see Castel, *supra* n. 38, at 647.

206. [1974] S.C.R. 1286.

207. *Supra* n. 99.

208. *Supra* n. 99, at 678.

209. *Supra* n. 194 to 208.

Professor Castel does state in his text *Canadian Law of Conflicts*: "There is no valid reason why the court should be limited to the evidence given by the experts and the authorities referred to by them."²¹⁰ He cites as authority *Rice v. Gunn*²¹¹ in which "the court examined and relied on cases not cited in the conflicting opinions of the expert witnesses."²¹² However, Chief Justice Laskin, in one of several judgments, in *Drew Brown Limited v. The Ship "Orient Trader"* seems to suggest the opposite view.²¹³

Limiting the courts to the materials cited by counsel is consistent with the view expressed by The Master of the Rolls in *Earl Nelson v. Lord Bridport*.²¹⁴ While recognizing the value of allowing judges independence from foreign law experts afforded by their own examination of the authorities, he also realized the dangers of straying too far from the general rule that foreign law could not be proved by examining texts and cases. An English Judge, he reasoned, does not have the required background in the particular foreign law. "The opinion . . . which is the result of any man's knowledge and experience applied to a complicated case, is founded upon views of the subject so extensive, upon authorities so far differing in value, and upon such various degrees of practice, that it would be impossible to trace all the sources from whence it is derived . . ."²¹⁵ The laws and commentaries, then, are not the sole foundations of the expert's opinion. Consequently, these opinions, with the accompanying authorities, should be relied upon as much as possible. Independent research by a judge, to Lord Langdale, is a dangerous thing.

Textwriters seem to support this view.²¹⁶ And in the context of contradictory testimony it is understandable. As Lord Langdale noted, the opposing experts and counsel will correct the errors and omissions of each other.²¹⁷ In that way the relevant authorities will be cited to the court. But what if, for example, in the case of uncontradicted testimony, only one side presents an expert? By the present view, the court is forced to rely on the materials he presents. Bearing in mind that the expert is expected to help the party who has retained his services, the present position, it is submitted, is unsatisfactory. Yet the rule against independent research by the judiciary of foreign law appears to lock the courts into that position.

IV. An Aside — The American Experience

It may be of value to consider an alternative to the present 'foreign law as fact' system.

As previously indicated, although the fact theory was embraced initially by American courts, it was subject early on to criticism. The criticisms

210. Castel, *supra* n. 38, at 647 (footnotes omitted).

211. (1984), 4 O.R. 579 (C.A.).

212. Castel, *supra* n. 38, at 647 (at n. 167).

213. *Drew Brown Limited v. The Ship "Orient Trader"*, *supra* n. 206, at 1324.

214. *Supra* n. 160

215. *Supra* n. 160, at 538.

216. Dicey, *supra* n. 5, at 126; Cheshire and North, *supra* 37, at 1211.

217. *Earl Nelson v. Lord Bridport*, *supra* n. 160.

centered on the application of rules of evidence designed for traditional fact issues to questions of foreign law and the resulting fertile field for adversarial machinations.²¹⁸ The underlying rationale of characterizing a foreign law issue as factual was also questioned, as in the following quotation from a judgment rendered in 1923 by a Kansas court:

Nor would it be indiscreet to add that the old rule that a court cannot consider and apply the general statutes of another state, unless they are specifically pleaded and formally proved, even to prevent a miscarriage of justice, is an anachronism which comes down from the times when statutes of other states were not readily accessible, and the judiciary will not wait much longer for legislative assistance to get rid of it altogether.²¹⁹

Some legislators responded to such criticism in the 1920's with provisions for judicial notice of the laws of sister states²²⁰ or, more broadly, the laws of foreign countries.²²¹ Then in 1936, the *Uniform Judicial Notice of Foreign Law Act* was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association.²²² The *Act* provided for judicial notice of the law of sister states, with "reasonable notice" to be given by pleading or otherwise.²²³

The *Act*, or a variant, was adopted by a majority of the States.²²⁴ Yet as already mentioned, while judicial notice of foreign law became a recognized method of ascertainment of foreign law "the accumulated experience" to 1960 was that judicial notice was not taken, "regardless of statutory language, unless the parties furnish[ed] the court a reasonable amount of information about the foreign law."²²⁵

The second statutory wave dealing with ascertainment of foreign law came in the early 1960's. In 1962, the *Uniform Interstate and International Procedure Act* was approved by the National Conference of Commissioners on Uniform State Laws. Part IV of the *Act*²²⁶ replaced the *Uniform Judicial Notice of Foreign Law Act* of 1936 with what was said to be a more economical design.²²⁷ Then in 1966 Federal Rule of Civil Procedure 44.1 became effective. It provides:

218. T. Bridgman, "Proof of Foreign Law and Facts" (1980), 45 J. of Air L. and Comm. 845 at 848; *supra* n. 6.

219. *Hammond Motor Co. v. Warren* 213 P. 810 at 811 (S.C. 1923).

220. The California courts were given power to take judicial notice of the law of sister states in 1927. See *supra* n. 6, at 625.

221. Massachusetts enacted a statute requiring that judicial notice be taken of the law of foreign countries in 1926. See *supra* n. 6, at 625.

222. *Supra* n. 6, at 625.

223. "Moreover, the act does not expressly apostatize the common-law pleading requirement but merely provides that 'reasonable notice shall be given to the adverse parties either in the pleadings or otherwise'. The court is authorized to do independent research 'as it may deem proper' and to call upon counsel for assistance in establishing the law. However, section 4 of the act, which restricts the party's presentation to 'admissible evidence', preserves some of the defects of the common-law approach and appears to be inconsistent with the court's power to do independent research. Only section 5 deals directly with the law of foreign countries and it simply states that such law 'shall be an issue for the court.'" *Supra* n. 6, at 625 (footnotes omitted).

224. *Supra* n. 6, at 625-626.

225. *Supra* n. 6, at 628.

226. H. Smit, "The Uniform Interstate and International Procedure Act Approved by the National Conference of Commissioners on Uniform State Laws: A New Era Commences" (1962), 11 Amer. J. of Comp. L. 415.

227. Section 4.01 [Notice] A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this state shall give notice in his pleadings or other reasonable written notice.

Section 4.02 [Materials to be Considered] In determining the law of any jurisdiction or governmental unit thereof outside this state, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence.

Section 4.03 [Court Decision and Review] The court, not jury, shall determine the law of any governmental unit outside this state. Its determination shall be subject to review on appeal as a ruling on a question of law.

Section 4.04 [Other Provisions of Law Unaffected] This Article does not repeal or modify any other law of this state permitting another procedure for the determination of foreign law. "Uniform Interstate and International Procedure Act, Article IV, Determination of Foreign Law", 13 U.L.A. Civil Procedure and Remedial Laws.

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.²²⁸

Together Part IV and Rule 44.1 were said to presage "a new chapter in the history of proving foreign law."²²⁹ This prophesy proved overly optimistic for Part IV simply has not been adopted in very many states. Some states have no judicial notice provision, some are modeled on the 1936 *Uniform Judicial Notice Act* and some on the 1962 *Uniform Interstate Procedure Act*. In the states with judicial notice provisions, when the provision does not apply, the common law doctrine is still applicable.²³⁰ Even in the federal courts the judges have been reluctant to move away from the traditional rule that the parties bear the responsibility for proof of foreign law.²³¹

A net effect has been noted, however; the method of proof has been substantially liberalized.²³² "[Q]uestions of foreign law tend to be tried by a combination of expert testimony and argument of counsel. In today's courtroom, an attorney advances his client's position through briefs, memoranda, and oral argument. He then tries to amplify the presentation by the testimony of an expert witness."²³³

Statutory provision for judicial notice — whether permissive or mandatory²³⁴ — has not been viewed as a replacement for pleading and proof but rather as a method for simplifying proof. Clearly "[f]ailure to give notice and prove the foreign law may thus continue to result in adverse judgments, or in the invocation of [a] variety of presumptions . . ."²³⁵

The reasons for the particular use made of judicial notice provisions are suggested in a number of articles.²³⁶ Briefly, they involve reluctance on the part of both the courts and counsel to reject the traditional pleadings and proof method. Concerning the reluctance of courts, the words of a scholar published in 1967 are apt:

The explanation for the tenacity with which the courts have retained the primeval attitude toward foreign-law issues probably lies in (1) a continued judicial reluctance to engage in the often difficult process of ascertaining alien law, (2) the fear that the average trial judge

228. Fed. Rules Civ. Proc. rule 44.1, 28 U.S.C.A. (supp.).

229. Miller, *supra* n. 220, at 631.

230. Bridgman, *supra* n. 218, at 855.

231. "... the courts appeared reluctant to engage in their own research of foreign law. Of the reported cases there are only three, decided by the same district court, where the court conducted its own research in order to supplement the parties' presentation of foreign law. The courts' reluctance turned to an absolute unwillingness to do research, absent assistance by the parties." S. Sass, "Foreign Law in Federal Courts" (1981), 29 Amer. J. of Comp. L. 97 at 110.

232. Other changes include: (1) partial summary judgments on the issue of foreign law, Bridgman, *supra* n. 230 at 857; (2) determination of the nature of foreign law by appellate courts rather than solely to the erroneous determination of the content and meaning of the applicable foreign law, Sass, *supra* n. 231 at 115.

233. H. Baade, "Proving Foreign and International Law in Domestic Tribunals" (1978), 18 Vir. J. of Inter. L. 619 at 624-625. The proof requirements, of course, depend upon the particular statute provisions of any given jurisdiction. See Bridgman, *supra* n. 230, at 850-859.

234. Bridgman, *supra* n. 230 at 852 and 854.

235. *Ibid.*, at 858-859 (footnotes omitted).

236. See, e.g. Miller, *supra* n. 220; Bridgman, *supra* n. 230; Sass, *supra* n. 231; R. Schlesinger, "A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law" (1973), 59 Cornell L. Rev. 1.

cannot be fully entrusted with the job but must be given the fullest possible assistance of counsel, and (3) a refusal to believe that the proof-of-foreign-law statutes require a departure from the traditional modes of pleading and proof or that they represent an attempt to establish a degree of equality between the proof of domestic and foreign law.²³⁷

Concerning counsel, the view is that by the adversary process, rather than independent judicial initiative, the interests of litigants may be best assured.²³⁸ That is, instead of a merely mechanical usage of the foreign law expert to 'get' the foreign law before the court, counsel can utilize the expert testimony "for an informed discussion of the relative weight and sufficiency of the materials presented for the court's consideration."²³⁹

In summary, in the United States the statutory reforms treating foreign law as issues of law (rather than of fact) and providing for judicial notice have resulted in a reallocation of the responsibility for ascertaining foreign law. That responsibility is shared — or at least has the potential to be shared — by court and counsel.²⁴⁰ As one writer has noted: "By way of allocating their respective functions . . . the court [has been given] the important power to decide whether it will consider foreign law materials submitted without evidentiary formalities, and, even more important, whether and to what extent it will conduct its own research on points not covered, or insufficiently covered, by adversary presentation."²⁴¹

The extensive experience of American courts with judicial notice of foreign laws tends to confirm that of the Canadian courts: judicial notice does not function well as a complete replacement of the method of 'plead and prove'. Rather, the methods tend either to combine (as in American jurisdictions) or the authorization for judicial notice falls into disuse (as in Manitoba). Currently in Canada, as set out in the accompanying footnote, revamped methods for proving foreign laws are being studied.²⁴² In that study, consideration should be given to the American experience.

V. Conclusion

In introducing the John Brown — Bob Smith hypothetical a caution was made against counsel for Brown 'automatically' pleading and proving the Mexican law. The full significance of that caution is now revealed. Counsel must be aware that there are several alternative methods of dealing with a problem of foreign law. Pleading and formal proof may not only be unnecessarily expensive, it may be employed in complete disservice to the position of Brown.

237. Miller, *supra* n. 220, at 628 (footnotes omitted).

238. Bridgman, *supra* n. 230, at 853.

239. Baade, *supra* n. 233, at 625.

240. Schlesinger, *supra* n. 236, at 24.

241. *Ibid.*

242. See *supra* n. 96.

