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# The Use of Official Notice in a Refugee Determination Process

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Résumé de l'article

La connaissance d'office permet aux décideurs de prendre en considération, de leur propre chef, un large éventail d'information dans le processus décisionnel. Cette règle de preuve permet d'atteindre à la fois un double objectif d'équité et de célérité. Dans le présent article, l'auteure examine la règle de preuve et étudie la pratique de la Section du statut de réfugié suivant laquelle les membres prennent connaissance d'office des « dossiers de référence standardisés ». Ces dossiers compilent des renseignements sur les conditions qui régnent à l'intérieur de divers pays d'où viennent la majorité de réfugiés. Cette étude est importante car les renseignements contenus dans ces dossiers peuvent être utilisés pour déterminer si la crainte de persécution de plus de 20 000 revendicateurs du statut de réfugié par année au Canada est bien fondée. L'auteure conclut qu'il est possible de prendre connaissance d'office des dossiers de référence standardisés si la Section du statut de réfugié divulgue l'information en conformité avec les règles de la justice naturelle.

# The Use of Official Notice in a Refugee Determination Process*

France HOULE**

*La connaissance d'office permet aux décideurs de prendre en considération, de leur propre chef, un large éventail d'information dans le processus décisionnel. Cette règle de preuve permet d'atteindre à la fois un double objectif d'équité et de célérité. Dans le présent article, l'auteure examine la règle de preuve et étudie la pratique de la Section du statut de réfugié suivant laquelle les membres prennent connaissance d'office des « dossiers de référence standardisés ». Ces dossiers compilent des renseignements sur les conditions qui règnent à l'intérieur de divers pays d'où viennent la majorité de réfugiés. Cette étude est importante car les renseignements contenus dans ces dossiers peuvent être utilisés pour déterminer si la crainte de persécution de plus de 20 000 revendicateurs du statut de réfugié par année au Canada est bien fondée. L'auteure conclut qu'il est possible de prendre connaissance d'office des dossiers de référence standardisés si la Section du statut de réfugié divulgue l'information en conformité avec les règles de la justice naturelle.*

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*Official notice allows members of administrative tribunals to take into account on their own motion a large scope of information in the decision-making process. With this rule of evidence, it is possible to reach a double objective of fairness and expeditiousness. In this article, the author examines the rule of evidence. She also studies the practice of the Convention Refugee Determination Division of taking official notice of « standardized country files ». These files compile information on conditions prevailing in*

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* The opinions expressed herein are those of the author and not of the Immigration and Refugee Board. This article is an excerpt from her masters thesis.

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*refugee-producing countries. This study is important because the content of these files can be used to determine whether each of the 20 000 and more claimants for refugee status in Canada has a well-founded fear of persecution. The author concludes that standardized country files can be officially noticed as long as the Convention Refugee Determination Division discloses the information in conformity with the rules of natural justice.*

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The Immigration and Refugee Board is the largest administrative tribunal in Canada. It is divided into three divisions: the Immigration Appeal Division which deals with immigration matters, the Convention Refugee Determination Division (CRDD) which deals with refugee claims and the Adjudication Division which is responsible for conducting immigration inquiries and detention reviews. The CRDD receives over 20 000 claims for refugee status every year. For this reason, it is important to find mechanisms which can help the CRDD reduce the length of its hearings as well as the time taken for deliberation when a decision is reserved.

Taking official notice of reliable sources of information can be one of these mechanisms to ensure a more expeditious refugee determination process. This article explains not only the evidentiary rule, but also its legal framework. Indeed, although official notice is a tool primarily designed to enhance the expedition of an administrative process, it cannot be used in a manner which will deprive a person of the rights conferred by the rules of natural justice.

With the inception of the CRDD in 1989, a Documentation, Information and Research Branch (Documentation Centre) was established[1]. The Documentation Centre provides information and conducts research to produce documents describing conditions in refugee-producing countries. All this information can be used by Members, Board staff, counsel and claimants in the determination of refugee claim[2].

With respect to the taking of evidence by the Convention Refugee Determination Division (CRDD), subsection 68(3) of the *Immigration Act* states the general principle that the CRDD is not bound by the formal rules of evidence and can base its decision on credible and trustworthy evidence[3]. In addition to subsection 68(3), subsection 68(4) states that CRDD Members can use both information which can be judicially noticed or information which can be officially noticed to decide a claim. Within the realm of facts which can be officially noticed, subsection 68(4) distinguishes between « generally recognized facts » and information and opinion within the « specialized knowledge » of the CRDD. The information intended to be officially noticed under subsection 68(4) must offer the same guarantee of credibility as evidence adduced at the hearing under section 68(3). Indeed, it would be quite unfair if information not formally introduced as evidence were not credible just as any other evidence adduced at the hearing. The information which can be found at the Documentation Centre is claimed to be credible. Since the aim of this article is not to dispute this claim, I will presume throughout this paper that the evidence coming from the Centre is admissible at the CRDD.

Basic material on a country is compiled to form packages called « Standardized Country Files » (SCF) from which official notice is taken by the CRDD Members at the beginning of a hearing. In its draft paper on the

1. There are five Regional Documentation Centres across the Country in addition to the headquarters based in Ottawa. Regional Documentation Centres are based in Montreal, Calgary, Vancouver and two in Toronto.
2. The Documentation Centre has become important in the decision-making process. In the first year of its operation, the CRDD consulted the information available at the Documentation Centre in more than 50 % of the claims adjudicated or heard. This way of publicly and openly generating evidence for Members, Board staff, counsel and claimants through a Documentation Centre is unique in Canadian administrative law.
3. See *Immigration Act*, R.S.C. 1985 (4th supp.), c. 28, subsection 68 (3) (as modified by *Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, which was proclaimed in force on February 1, 1993) which states : « The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case. »

present refugee determination process[4], the now defunct Law Reform Commission recommended that the Chair authorize, through guidelines, the « taking of formal notice at the beginning of the hearing of the country of origin information produced by the Documentation Centre[5] ». Presumably, the practice of taking notice of an SCF at the beginning of a hearing flows from this tentative recommendation.

The purpose of this article is to determine whether subsection 68(4) allows CRDD Members to take official notice of an SCF and, if the answer is yes, how to ensure that the information noticed will be disclosed in accordance with the rules of natural justice during and after the hearing. I will first provide an overview of the material available at the Resource Centre of the Documentation Centre and describe the documents produced by its Research Directorate which forms the content of an SCF. Although these files are called « standardized », the process of standardization is not yet complete. Nevertheless, most of the information produced by the Research Directorate is normally included in an SCF. Therefore, my analysis will primarily focus on the documents produced by the Research Directorate. Second, I will explain the meaning of the terminology used in subsection 68(4) in addition to the concept of « official notice » (which is not specifically used in that subsection) to determine, thereafter, whether the documents produced by the Research Directorate enter into either category of subsection 68(4). Third, I will examine how to ensure that the practice of taking official notice of an SCF is fair for claimant of refugee status.

## 1. The Information Available at the Documentation Centre

The Resource Centre of the Documentation Centre provides information on human rights conditions, including law and practice, in countries-of-origin of persons making refugee claims. The holdings of the Resource

4. The Law Reform Commission was dismantled before it had time to complete this study and translate it into French. Therefore, the study cannot be made official and it is the reason why I use the expression « draft paper ». See LAW REFORM COMMISSION OF CANADA, *The Determination of Refugee Status in Canada : A Review of the Procedure*, Ottawa, Law Reform Commission of Canada, 1992 (draft final report, March 5, 1992).

5. *Id.*, p. 184. The recommendation says: « Pursuant to the authority granted by section 68(4) of the *Immigration Act*, members of the Convention Refugee Determination Division of the Immigration and Refugee Board should take notice of the country of origin information produced by the Immigration and Refugee Board Documentation Centre without need for such information to be formally presented or proven in the course of a hearing. In accordance with section 68(5) of the *Immigration Act*, where the decision-makers intend to take notice of such information, they should, as required by the *Act*, advise all parties to the proceedings of that intention and afford them a reasonable opportunity to make representations with respect to such information. »

Centre located in Ottawa are composed of information about countries compiled on a monthly, weekly and daily basis and reported from various agencies: — US State Department assessments, reports of United Nations organs, regional human rights rapporteurs, and analyses by non-governmental organizations, such as the International Commission of Jurists, the Minority Rights Groups, the Netherlands Institute for Human Rights, the Danish Centre of Human Rights, Documentation Réfugiés, the Norwegian Institute of Human Rights, and the Lawyer's Committee for Human Rights, Amnesty International Reports, and Human Rights Watch among others.

The information that is produced by the Research Directorate of the Documentation Centre[6] initially consisted of Country Profiles, Information Packages, Overviews, Question and Answer Series, the « Perspectives » Series, and three services: SCF's, Responses to Information Requests and Weekly Media Review.

The information on human rights in countries-of-origin are assessed and evaluated and form the basis of Country Profiles. These are the Documentation Centre's primary documentation provided to Members of the Refugee Division and their staff, claimants, and counsel for claimants. They document the geographical, historical, political and social dimensions of the country of origin of refugee claimants. They report on the human rights situation in the country as recorded by monitors and observers, both domestic and international.

Contents of Country Profiles include the following sections: maps[7], general information and introduction[8], human rights issues[9], issues in

6. The Research Directorate is the largest component of the Documentation Centre and it is divided into five units: Products and Research Analysis, the Resource Centre, Databases, Information Services, and the office of the Senior Analyst.
7. Outlining « traditional exit and migration routes, refugee camps, resettlement areas, areas of insurgent and counterinsurgent activities, detention centres and areas of civil or ethnic strife. » CANADA, IMMIGRATION AND REFUGEE BOARD, *IRB Documentation Centre, What it is and how it Works*, Ottawa, Immigration and Refugee Board, 1990, p. 6 [hereinafter « *What it is and how it works* »].
8. Which place « the country in its general regional and geopolitical context with emphasis upon those factors unique to the country and relating to the exodus of people from it. » *Ibid.*
9. Which « compares individual and collective rights guaranteed in the country's constitution with what occurs in practice ». « [It places] a special emphasis upon freedom of association and expression, disappearances and extra-judicial killings, legal rights, torture, freedom of religion, indigenous people and ethnic groups, other vulnerable groups, and economic rights. » *Id.*, p. 7.

brief[10], exit and return[11], political parties and movements[12], a chronology of major events[13], and, finally, an annotated bibliography and notes[14]. Country profiles are updated, on average, every two years.

Information Packages contained a short report « providing general statistical information about a country's institutions, organizations, and peoples[15] ». Excerpts from major reports produced by human rights monitors were appended to the document. Overviews « provid[ed] general information about institutions, organizations, and peoples, as well as a brief examination of the major human rights related issues in the country[16] ». Information Packages and Overviews, however, are no longer produced[17] since their content is now incorporated in Country Profiles. Nevertheless, some are still circulating.

The other information produced by the Research Directorate include the Question and Answer Series (which were formerly called Issue papers), the Weekly Media Review, the « Perspectives » series, Responses to Information Requests and SCF's. The Question and Answer series provides updated information on situations and policy changes in claimant-producing countries. This series complements and updates the Country Profiles[18] and updating depends on developments in these countries. Newspaper clippings are gathered on a weekly basis and put together to form the Weekly Media Review. This service reports on situations in countries considered of immediate concern to the Refugee Division and on countries identified as potential future sources of refugee claimants[19]. The « Perspec-

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10. Which summarizes « the major human rights issues with special emphasis on the current situation and, where possible, an assessment of what the future might bring. » *Ibid.*
11. Which focuses « on the right of individuals to leave and to return to their country, including penalties for illegal departure or the return of persons who have claimed refugee status abroad. » *Ibid.*
12. Which provides « information on the structure, mandate, ideology and strengths of the various political parties as well as the relationships between political parties, including legal restrictions on the formation of parties. » *Ibid.*
13. Which outlines « the relevant sequence of events leading to the current situation in the country. » *Ibid.*
14. Which provides « an abstract of the major sources used in the compilation of the country profile. » *Ibid.*
15. See CANADA, IMMIGRATION AND REFUGEE BOARD DOCUMENTATION CENTRE, *Guidelines*, Ottawa, Documentation, Information and Research Branch, 1990, p. 13 [hereinafter « *Guidelines* »].
16. *Ibid.*
17. *Ibid.*
18. See S. RUSU, « The Development of Canada's Immigration and Refugee Board Documentation Centre », (1989) 3 *Int. J. Refugee L.* 319, 325. Until September 1992, she was the Director of Research at the Documentation Centre.
19. *Ibid.*

tives » series is coordinated and video-taped by the Centre and provides up-to-date information to decision-makers and to the community at large on country-specific situations[20]. Responses to Information Requests represent research undertaken by staff upon specific request by the Members and Refugee Hearing Officers of the CRDD[21] and are produced on a daily basis.

SCF's are available in all Documentation Centres and they contain information on countries such as the Country Profile produced by the Research Directorate for that country, newspaper clippings and information requests. They are provided to Members of the Division, Refugee Hearing Officers, counsel and claimants across the country. Since the content of the SCF is not standardized for each region, it is possible to find different information in Vancouver and Toronto on the file of a given country. However, there is a joint project of the Documentation Centre and the Coordinator of Hearings Process to standardize the content of the country files but, as said before, the process is not yet complete.

At the Resource Centre, three databases (which have been developed by the Resource Centre staff and the Database Unit) are also available.

The Centre's automated system is capable of supplying information in two broad categories : country of origin (human rights material) and legal information[22]. These databases are « REFBIB », which contains bibliographic entries and abstracts of the Centre's holdings ; « REFDEC », which includes the full text in both official languages of a selection of decisions made by the Immigration and Refugee Board and « REFINFO », which contains the full text of Responses to Information Requests[23]. The

20. *Ibid.* « Participating speakers include refugees, human rights workers, academics and specialists on refugee issues. »
21. IMMIGRATION AND REFUGEE BOARD DOCUMENTATION CENTRE, *op. cit.*, note 15, p. 8.
22. It has adopted international standards on terminology and formatting enabling the exchange of information with external databases. Information on the databases provided by Maria Leal who was the Acting Coordinator of the Resource Centre when the interview was conducted at the Resource Centre in the summer of 1991. R. Rossi reviewed and confirmed this information on September 4, 1992. He is the Senior Analyst of the Documentation Centre.
23. A fourth database will be developed and will focus on information concerning law and practice in the countries of origin of refugee claimants, as well as countries of asylum and transit. This data will help researchers to obtain information on a particular country's laws, and how these laws and regulations are applied in practice, particularly on questions of admission, transit, residence, departure and return. In this regard, the full text and relevant commentaries on treaties and covenants specific to human rights and refugees will be collected, as well as significant examples of foreign application of the 1951 Convention relating to the Status of Refugees. This database will be named « REFLAP ». The information on databases was obtained from IMMIGRATION AND REFUGEE BOARD, *op. cit.*, note 7, p. 5.

« REFINFO » and « REFDEC » databases are available through « Quick Law[24] ».

Researchers also have access to the National Library « Dobus » system and other commercial databases such as « Infoglobe », « Lexis/Nexis » and « Quistel ». These commercial databases provide information contained in newspapers worldwide.

Since January 1991, the Documentation Centre has had access to the « Internet » database through the Human Rights Centre in Ottawa. « Internet » is a broad database with access to a variety of services, including a bibliography of some of the publications of about two thousand NGOs (including the most important such as Amnesty International and Human Rights Watch). The other component of the database is a list of international and regional organizations on Human Rights. The Human Rights Centre in Ottawa and the National Documentation Centre work in collaboration to exchange information on violations of Human Rights[25].

In sum, the basic documents produced by the Research Directorate of the Documentation Centre are Country Profiles, the Questions and Answer Series, Media Weekly Review and Responses to Information Requests. These documents are normally included in an SCF. In addition to SCF's, the Centre provides a broad range of documents on the conditions prevailing inside countries which material is available to the public for reference in all Regional and the Ottawa Documentation Centres.

### 2. Taking Official Notice of a Standardized Country File

More and more CRDD Members are taking official notice of an SCF at the beginning of a hearing either on their own motion, or on the request of a Refugee Hearing Officer or of a counsel for claimants as it was reported by

24. Quick Law is a computerized legal database service available across Canada.
25. Information provided by Lucie Bernier, Documentalist at the Human Rights Centre. Interview conducted by telephone on January 14, 1992. There is also an informal immigration lawyer's network in Ottawa where lawyers exchange the information which they gathered from their clients on the situation prevailing in their clients' country before they left. (Most of the time, it is newspaper clippings from the country the claimant has fled. Therefore, it is very current information.) This informal network of information exchange was created for two reasons : first, because the information provided by clients is usually not accessible through the Documentation Centre and, secondly, it saves research time for lawyers practising immigration law. Warren Creates provided me with this information. He is the president of the local immigration section of the County of Carleton Bar Association. He also pointed out that this network was not created as a result of a dissatisfaction with the information emanating from the Documentation Centre. Interview with W. Creates was conducted by telephone on January 14, 1992.

the Federal Court of Appeal in *Sivaguru* v. *Canada (Immigration and Refugee Board)*[26]. Normally, the procedure followed is that, instead of producing the entire country file, the Refugee Hearing Officer enters as an exhibit the current index of the contents of an SCF and the information contained in the SCF is officially noticed by CRDD Members. In this section, I will determine whether the information contained in an SCF can be officially noticed. Subsection 68(4) states :

> The Refugee Division may, in any proceedings before it, take notice of any facts that may be judicially noticed and subject to subsection (5) of any other generally recognized facts and any information or opinion that is within its specialized knowledge.

In the first place, I will draw a distinction between judicial notice and official notice. At this stage, I will use the expression « specialized knowledge » to refer to all information which can be officially noticed under subsection 68(4) which includes « generally recognized facts » and the « specialized knowledge ». Second, I will distinguish between « generally recognized facts » and the « specialized knowledge » of the CRDD. Finally, I will determine whether the information produced by the Research Directorate and contained in an SCF can enter into either category of official notice.

### 2.1 The Scope of Judicial Notice and Official Notice

Official notice is very similar to judicial notice. It means that tribunals can decide issues of fact and law on the basis of information which has not been formally proved by the parties. In *Junkin* v. *Davis*[27], Lord Draper said :

> I take judicial notice to mean the taking a thing proved without requiring or receiving any proof of that thing, and as I understand the law, judicial notice is not taken as a matter of evidence to be submitted to the jury, but as a matter of fact sufficiently taken to be established[28].

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26. *Sivaguru* v. *Canada (Immigration and refugee board)*, (1992) 16 Imm. L.R. (2d) 85, 86. In this case, the Federal Court of Appeal did not comment on the practice of taking official notice of an SCF because it was not an issue since counsel for claimant agreed with the procedure.
27. *Junkin* v. *Davis*, (1855-56) 6 U.C.C.P. 408 (C.A.) (per Draper C.J. in a dissenting judgment).
28. *Id.*, 412. See also *Commonwealth Shipping Representative* v. *P. & O. Branch Services*, [1923] A.C. 191, 212 (H.L.) ; *Schnell* v. *B.C. Elec. Ry.*, (1910) 14 W.L.R. 586 (B.C.A.) ; *R.* v. *Pinno*, [1925] 1 W.W.R. 737 (Sask. D.C.).

Judicial notice relates to matters in the realm of courts as opposed to official notice which is a concept used in the context of administrative law[29]. The difference between them lies in their scope.

The right of administrative tribunals to use extra-record information is broader than that possessed by courts. Indeed, judicial notice of facts will be taken only if they are notorious[30]. Their notoriety will be decided on the basis of their indisputability among reasonable persons or on their « being capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy[31] ». Courts take judicial notice of general facts that come from the day-to-day experience of the ordinary person. It is not necessary that common knowledge be universal. Therefore, judges can take notice of local affairs and conditions[32] :

> Accordingly, it has been common for a judge to notice courts and judicial proceedings, domestic law, local conditions and matters, geographical facts, human behaviour, business and trade practices, official matters, political organization and activities, historical facts, times, measures and weights, the uncontroverted facts relating on the course of nature or on scientific facts, and others[33].

Because judges are allowed to take notice of facts that are notorious only, this excludes the use of their specialized knowledge[34]. Beyond notorious facts or indisputable facts known locally, judges cannot inform themselves by their own initiative or specialized knowledge[35] but must rely

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29. W. GELLHORN, « Official Notice in Administrative Adjudication », (1941) 20 *Texas L. Rev.* 131, 136 ff.
30. *Lumly* v. *Gye*, (1853) 118 E.R. 749 (Q.B.) ; *Graham* v. *G.T.R.*, (1912) 1 D.L.R. 554 (Ont. C.A.) ; *R.* v. *Lew*, (1912) 1 D.L.R. 99 (B.C. C.A.) ; *R.* v. *Pinno*, cited above, note 28 ; *Sutherland* v. *Bell and Schiesel*, (1911) 18 W.L.R. 521 (Alta. C.A.). Examples of notorious facts : *Clayton* v. *Hardwick Colliery Ltd.*, (1915) 32 T.L.R. 159 (H.L.) : young boys often throw stones playfully ; *Dennis* v. *A.J. White & Co.*, [1916] 2 K.B. 1 (C.A.) : London streets are dangerous due to the heavy traffic.
31. *Commonwealth Shipping Representative*, cited above, note 28, 212 ; *R.* v. *Potts*, (1982) 134 D.L.R. (3d) 227 (Ont. C.A.) ; leave to appeal refused (1982) 134 D.L.R. (3d) 227n (S.C.C.). J. SOPINKA and S.N. LEDERMAN, *The Law of Evidence in Civil Cases*, Toronto, Butterworths, 1974, p. 357 and in Quebec, C. FABIEN, « L'utilisation par le juge de ses connaissances personnelles, dans le procès civil », (1987) 66 *Can. Bar Rev.* 433, 453 ff.
32. *Keane* v. *Mount Vernon Colliery Co.*, [1933] A.C. 309 (H.L.) ; *Reynolds* v. *Llanery Tinplace Co.*, [1948] 1 All E.R. 140 (C.A.) ; *R.* v. *Potts*, cited above, note 31 ; *R.* v. *Ferguson*, (1978) 56 A.P.R. 253 (P.E.I. S.C.) ; *Cairns Construction Limited* v. *Government of Saskatchewan*, [1960] S.C.R. 619, 629.
33. D. LEMIEUX and E. CLOCCHIATI, « Official Notice and Specialized Knowledge », (1991) 46 *Admin. L.R.* 126, 128.
34. *R.* v. *Antrim JJ.*, [1895] 2 I.R. 603, 649 (Q.B.) (per Johnson J.) ; *Palmer* v. *Crane*, [1927] 1 K.B. 804.
35. At this stage, I will use the expression « specialized knowledge » to refer to all information which can be officially noticed. Thereafter, I will distinguish « generally recognized facts » and « specialized knowledge ».

on expert testimony[36]. An example of what is considered a fact which cannot be judicially noticed is given in *Puiia* v. *Occupational Training Centre*[37]. The trial judge took judicial notice that the period from 1979 back to 1974 was one of economic uncertainty. On appeal, the Court disagreed with the trial court as to the notoriety of this fact and added: « The statement of the learned trial judge does not fall into either category. I suspect, too, that a great many reasonable people would disagree with his opinion[38]. »

The right of members of tribunals to use specialized knowledge was recognized by the Supreme Court of Canada in a unanimous decision: *La Cité de Ste-Foy* c. *La Société Immobilière Enic Inc.*[39].

In this case, the municipality expropriated a lot that belonged to Enic Inc. The lot was not subdivided into « lots to be built » and the Régie des services publics subdivided it and established its value at 65 cents per sq.ft. The Régie then deducted 33 % for the development of public services. This deduction was based on its own experience of this type of issue. The Superior Court of Quebec ratified this decision and the plaintiff launched an appeal to the Court of Appeal. The latter allowed the appeal and annulled the ratification on the basis that the Régie could not make such a deduction without proof on this matter. On further appeal, the Supreme Court of Canada reinstated the Quebec Superior Court's ratification of the Régie's decision. Abbott J. said:

> Comme je l'ai dit, à mon avis et en l'absence de preuve que la Régie trouve satisfaisante, elle était justifiée de faire une déduction pour l'aménagement des services aux lots à subdiviser, etc., basée sur sa propre expérience des questions de ce genre, une expérience qui en fait est considérable[40].

As opposed to regular courts, members of administrative tribunals are specifically entitled to use their specialized knowledge because generally tribunals are established to provide specialized justice and, in some cases,

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36. See Laskin J. in a dissenting judgment: *Regina* v. *Cameron*, [1966] 2 O.R. 777, 811 (Ont. C.A.).
37. *Puiia* v. *Occupational Training Centre*, (1983) 43 Nfld & P.E.I.R. 291, 294 (P.E.I. S.C.).
38. *Id.*, 289. Another example is where a judge believed the testimony of a woman who declared that she could not have had sexual relations during a meeting with a man because she was having her period. The judge took judicial notice of the fact that « civilised people » do not have sexual relations during a woman's period: *Foster* v. *Foster*, [1955] 4 D.L.R. 710, 715 (Ont. C.A.).
39. *La Cité de Ste-Foy* c. *La Société Immobilière Enic Inc.* [1967] S.C.R. 121. See also *Milliken & Co.* v. *Keystone Industries (1970) Ltd.*, (1986) 12 C.P.R. (3d) 166, 169 (T.M.O.B.); *John East Iron Works*, [1949] A.C. 134, 151; *Canadian National Railways Company* v. *Bell Telephone Company*, [1939] S.C.R. 308, 317.
40. *La Cité de Sainte-Foy* c. *La Société Immobilière Enic Inc.*, cited above, note 39, 126.

in an expeditious manner as with the CRDD[41]. In subsection 68(4), the concept of specialized knowledge is divided into two groups: generally recognized facts and specialized knowledge. The distinction between both concepts will be next examined.

### 2.2 The Distinction between « Generally Recognized Facts » and « Specialized Knowledge »

Generally recognized facts and the specialized knowledge are two sources of official notice which were recognized in the former refugee determination process as was stated in *Maslej* v. *Canada (Minister of Employment and Immigration)*:

> This submission can be disposed of shortly by the observation that no tribunal can approach a problem with its collective mind blank and devoid of any of the *knowledge of a general nature which has been acquired in common with other members of the general public,* through the respective lifetimes of its members, *including* perhaps most importantly, *that acquired from time to time in carrying out their statutory duties.* In our view, the statement made in the Board's reasons for judgment, of which the applicant complains, falls within that category [my emphasis][42].

Like facts judicially noticed, « generally recognized facts » have to come from indisputable sources[43]. They also have to be general as opposed to specific and they have to be well-known to the general public. A definition of « generally recognized facts » is provided in the *CRDD Member's Handbook* which says that:

> « generally recognized facts » could include facts which are usually accepted without question by scholars, governments and United Nations officials, but which are not necessarily commonly known by the general public[44].

One difficulty that Members of the CRDD are encountering is to delineate what is in the store of « common general knowledge » (and, thereby, not needing to be revealed) from « generally recognized facts ». Since facts which can be judicially noticed have to be notorious for ordi-

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41. As said by J.A. SMILLIE, « The Problem of Official Notice », [1975] *Public Law* 64, 66: « A common reason for delegating a function to an administrative agency rather than to the ordinary courts is to place responsibility for deciding questions of a specialized nature in the hands of persons who already possess, or can be expected to acquire, a background of special knowledge and experience in respect of those matters. »
42. *Maslej* v. *Canada (Minister of Employment and Immigration)*, [1977] 1 F.C. 194, 198 (F.C. A.D.). Under the former refugee determination process, the IAB was entitled by common law to use extra-record information as a basis for its decisions.
43. D. LEMIEUX and E. CLOCCHIATI, *loc. cit.*, note 33, 135.
44. CANADA, IMMIGRATION AND REFUGEE BOARD, *Convention Refugee Determination Member's Handbook*, Ottawa, Immigration and Refugee Board, 1990, chap. 11, p. 27 [hereinafter « *Member's Handbook* »].

nary people while « generally recognized facts » are facts well-known by the general public, this would appear to be a case of a distinction without a difference. In the former refugee determination process, judges of the Federal Court of Appeal have used expressions such as « common knowledge » and « judicial notice » to describe general knowledge of world affairs. For example, in *Maslej*, the Immigration Appeal Board (IAB) said :

> It is common knowledge that in Poland there are thousands upon thousands of Poles of Ukrainian origin and surely all these Ukrainians are not in danger of being persecuted[45].

In *Verman* v. *Canada (Minister of Employment and Immigration)*, the IAB took notice that :

> The Congress Party under Mrs. Gandhi was defeated in the federal elections in March, 1977. The Janta Party, a coalition party to which the applicant belonged, took office. The Congress Party was also defeated in the June, 1977 state elections by the Akali Party, which formed part of the Janta coalition federally. The Congress Party resumed office at the federal level after the elections in January, 1980. The Congress Party did not take office in the Punjab until after the state elections in June of 1980, two months after the applicant came to Canada[46].

In this case, the Federal Court of Appeal said : « We are of the opinion that the Board could take judicial or official notice of the political facts referred to in its reasons for decision [*sic*][47] ».

Consequently, decisions under the IAB show that the Federal Court of Appeal did not draw a distinction between facts which can be judicially noticed and those which can be officially noticed as « generally recognized facts ». However, for the purposes of disclosure, subsection 68(5) distinguishes between these expressions and, as a matter of statutory interpretation, each expression should receive a different interpretation so that Members will know when to disclose facts of which they intend to take notice. Subsection 68(5) states :

> Before the Refugee Division takes notice of any facts, information or opinion, other than facts that may be judicially noticed, in any proceedings, the Division shall notify the Minister, if present at the proceedings, and the person who is the subject of the proceedings of its intention and afford them a reasonable opportunity to make representations with respect thereto.

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45. *Maslej* v. *Canada (Minister of Employment and Immigration)*, cited above, note 42.
46. *Verman* v. *Canada (Minister of Employment and Immigration)*, Immigration Appeal Board, no M82-1115, 28 March 1983, p. 5.
47. *Verman* v. *Canada (Minister of Employment and Immigration)*, F.C. A.D. no A-481-83, 27 October 1983, p. 1. Later in *Singh* v. *Canada (Minister of Employment and Immigration)*, (1984) 6 *Admin. L.R.* 38, 39, the same kind of facts as in *Verman* were noticed and the majority of the Court said they were facts which could be judicially noticed. However, Thurlow C.J. dissented and thought that the facts could not be judicially noticed, or that, if they could, an opportunity to respond should have been given to the claimant.

It is suggested that the scope of « generally recognized facts » should embrace general information about affairs of foreign countries while the realm of facts which can be judicially noticed should embrace only those facts that are notorious and related to the day-to-day life of Canadians. In this way, information which will likely be more contentious for refugee claimants will have to be disclosed to them. It also means that the notion of judicial notice in a refugee determination process is of very limited assistance since a claimant for refugee status must establish that she was persecuted in her country of origin.

Specialized knowledge is the knowledge acquired by Members of the Refugee Division in the exercise of their functions as decision-makers[48], but excludes their personal knowledge[49]. Personal knowledge cannot be used in the decision-making process[50]. Personal knowledge is the knowledge acquired :

> incidentally by the Members of an administrative tribunal in the exercise of their functions. It is not part of the usual knowledge associated with that function nor has it been acquired in the course of the training and experience associated with the tribunal's duties[51].

The sources of specialized knowledge include facts established in previous cases, consultation of agency records, and findings of Members in the sense of information « acquired in the course of their training or through their extensive experience in the field[52] ». It also includes inquiries or group studies, reference to other legal systems, and training sessions or specialized lectures dealing with the field of adjudication[53]. Specialized knowledge is essentially the past knowledge acquired by the CRDD Members in exercising their function.

### 2.3 Qualifying the Documents under either Category of Official Notice

As said before, although the standardization of SCFs is not yet complete, the information produced by the Research Directorate of the Documentation Centre is normally included in these files. For this reason, I will determine whether the content of the Country Profiles, the Question and Answer series, the Responses to Information Requests and the Media Weekly Review can be officially noticed. I will not make this determination

48. D. LEMIEUX and E. CLOCCHIATI, *loc. cit.*, note 33, 144.
49. *Id.*, 145.
50. *Ibid.* It is unfortunate that some CRDD Members use their personal knowledge to make adverse findings of facts. See Convention Refugee Determination Division, no U91-07746, 13 December 1991.
51. D. LEMIEUX and E. CLOCCHIATI, *loc. cit.*, note 33, 145.
52. *Id.*, 150.
53. *Id.*, 149-152.

for either Information Packages or Overviews since the content of these documents are now incorporated in Country Profiles.

For Country Profiles and Questions and Answers, some of their content may be general enough to be well-known to the general public such as the sections on « General Information and Introduction » and « Chronology of Events ». Indeed, in these two sections, the information found is similar to that which was officially noticed in *Maslej*[54] and *Verman*[55]. With respect to the « Human Rights Issues » and « Issues in Brief » sections, the information found is similar to that which was officially noticed in *Permaul* v. *Canada (Minister of Employment and Immigration)*[56] :

> [T]he existence of racial violence in Guyana is common knowledge and that [...] the serious incidents recounted by the applicant... and her violent rape in 1976, from the facts provided, could be attributed to deterioration in law and order rather than to political harassment[57].

However, in this case, the Federal Court of Appeal said that the facts noticed by the IAB regarding the existence of racial violence in Guyana was not « the kind of information of which judicial notice could be taken in court proceedings, nor [was] it of a general character well known both to the Board and to the general public[58]. »

As for the remaining sections, « Maps », « Exit and Return » and « Political Movements and Other Groups », there is no decision which indicates whether these facts can constitute generally recognized facts. However, they cannot be considered facts well-known by the general public since they are not, in the first place, general information, but specific and detailed[59]. But, more importantly, the indisputability of the content of Country Profiles and the Question and Answer Series is far from being established. At most, they can be qualified credible information.

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54. *Maslej* v. *Canada (Minister of Employment and Immigration)*, cited above, note 42.
55. *Verman* v. *Canada (Minister of Employment and Immigration)*, cited above, note 47.
56. *Permaul* v. *Canada (Minister of Employment and Immigration)*, (1983) 53 N.R. 323, 324 (F.C. A.D.).
57. *Id.*, 323-324. See also *Galindo* v. *Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 781, 782 (F.C. A.D.).
58. *Permaul* v. *Canada (Minister of Employment and Immigration)*, cited above, note 56, 324.
59. Of course, in « Political Movements and Groups », information similar to *Verman* v. *Canada (Minister of Employment and Immigration)*, cited above, note 47, and *Singh* v. *Canada (Minister of Employment and Immigration)*, cited above, note 47, can be found. However, it is not the primary purpose of the section. It contains information on the structure, mandate, ideology and strengths of the various political parties, including legal restrictions on the formation of parties.

Members of the Refugee Division claim that once they have dealt with a country several times, they know the conditions inside that country. Therefore, this would entitle them to take notice of Country Profiles and their up-dates because it has become part of their specialized knowledge. The claim has some basis since specialized knowledge refers to a broad category of knowledge acquired in past cases. However, in the context of mass-adjudication such as the refugee determination process, it is difficult to believe that it is possible to remember all facts, information or opinion stated in a specific Country Profile even where a Member has read that document several times[60].

As for Information Requests emanating from a Board Member, since any prospective information cannot enter into the specialized knowledge category, it follows that answers to Information Requests cannot be qualified as specialized knowledge[61]. It is also unlikely that Information Requests qualify as generally recognized facts either. Indeed, questions asked are normally specific as opposed to general. Moreover, even if a general question were to be asked, it would be difficult to argue, thereafter, that the fact was well-known to the general public if the Board Member, having some expertise in the field, does not immediately know the answer. Therefore, Information Requests cannot be considered either specialized knowledge or generally recognized facts. This interpretation is confirmed by *Lawal* v. *Canada (Minister of Employment and Immigration)*[62].

In this case, the applicant, a Nigerian, sent a letter to the CRDD after the hearing requesting a reopening of the hearing to enter into evidence a page from the « Daily Times » of Nigeria of May 10, 1989 containing an article in which the applicant was mentioned by name as one of those charged with « economic sabotage » as a result of a labour dispute at « NEPA ». Members of the Division did not respond to the request for a reopening, but accepted the newspaper article as evidence. They also instituted their own inquiries by requesting the Documentation Centre to conduct more research on the events described in the newspaper article

60. The definition of specialized knowledge given in the *Member's Handbook*, (CANADA, IMMIGRATION and REFUGEE BOARD, *op. cit.*, note 44, chap. 11, p. 27), is incorrect. It states that « [t]he specialized knowledge possessed by the Refugee Division comes from its studies in its own Documentation Centre and other sources, and from evidence presented in other cases before it, which would not necessarily be known to the parties in a particular claim ».

61. Indeed, if a CRDD Member requests information on a specific subject, it is because she or he did not know the answer. Therefore, it cannot be said to be part of her or his specialized knowledge.

62. *Lawal* v. *Canada (Minister of Employment and Immigration)*, (1991) 13 Imm. L.R. 163 (F.C. A.D.).

and also on the authenticity of the clipping. With respect to the authenticity of the clipping, Members initiated further inquiries after they received from the Documentation Centre a copy of another « Daily Times » article of May 10, 1989 in which the name of the applicant did not appear. Counsel for the claimant wrote to the publisher who confirmed the authenticity of the clipping. Members wrote to the published as well and enclosed the two versions of the article. The publisher answered : « We hereby confirm the two publications were from our office, as we normally print two editions daily. There is nothing wrong with the two publications. »

Members were still not satisfied with the information and requested the Documentation Centre to find out how many editions of the « Daily Times » are published daily. Based on an interview with an official of the Nigeria High Commission, the Centre reported that the « Daily Times » published only once daily. This material was communicated to the claimant and the Members advised counsel for the claimant that it proposed to take judicial notice of the information. Counsel for the claimant objected to this search for evidence arguing that « the Board was not entitled to go searching for evidence and that, in any event, a hearing was necessary[63] ». Members did not respond to this objection and rejected the claim on the basis that the claim did not have a credible basis[64].

On the question whether the information falls into either category of section 68(4) of the Act[65], the Federal Court of Appeal said unanimously :

> The members of the panel obviously misapprehended the nature of the power conferred by subsections 68(4) and 68(5). By its terms, subsection 68(4) is limited to facts which may be judicially noticed, generally recognized facts, and information or opinion that is within the Board's specialized knowledge. By no stretch of the imagination, could the details of the charges and of the dispositions against the persons involved in the Nigerian blackout of October 1988, or the details of the publication schedule of the Nigerian Daily Times fall into any of those categories[66].

From this case, it would also flow that details found in newspaper clippings such as in the Media Weekly Review would not fall in the ambit of subsection 68(4). However, any general information such as the dismantlement of former USSR or the Tiananmen Square massacre in China will fall into either category.

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63. *Id.*, 166.
64. *Ibid.* Before the recent amendments to the *Immigration Act*, cited above, note 3, s. 69.1(12) and 82.3(2), stated that where, if a CRDD Member wrote in her reasons that the claim had no credible basis, an appeal was not possible.
65. *Lawal* v. *Canada (Minister of Employment and Immigration)*, cited above, note 62, 170.
66. *Ibid.*

Save the knowledge acquired by a Member of the Refugee Division from previous hearings and decisions in which he or she participated[67] or the previous responses from Information Requests they filed with the Documentation Centre[68] both of which are in the store of his or her specialized knowledge[69], virtually no documents from the Documentation Centre can be officially noticed under section 68(4)[70]. Consequently, an SCF cannot also be officially noticed. However as said before, the Federal Court of Appeal did not comment on the fact that the CRDD Members took notice of an SCF at the beginning of the hearing in *Sivaguru*. This may be interpreted as an indication that the Court will not reject the practice if it were to become an issue. In fact, in a recent decision *Hassan* v. *Canada (Minister of Employment and Immigration)*[71], the Court said in *obiter dictum* that an SCF is precisely the type of « information or opinion that may be expected to be within the specialized knowledge of the Board. » Therefore, the restrictive interpretation that the Court gave to subsections 68(4) and (5) in *Lawal* may only apply in cases when information is found by Members as a result of a secret search for evidence. However, when information contained in an SCF is found after the hearing as a result of Members reading more closely the SCF, this is not a secret search for evidence. Indeed, counsel for claimant should expect that a closer look will be paid to an SCF in the process of making the decision. Consequently, the possibility of taking official notice of an SCF will be next examined from the point of view of how fair this practice is.

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67. Which can be accessed through the database « REFDEC » of the Resource Centre. The « REFDEC » database comprise decisions of the CRDD only. It is important to emphasize that it is only the decisions in which a Member participated, read or became aware of as a result of training sessions which form part of the specialized knowledge of that Member and not all the decisions rendered by all CRDD Members across the country and contained in the « REFDEC » database.
68. Which can be accessed through the database « REFINFO » and for which the same comment as in the previous footnote can be made.
69. *Maldonado* v. *Canada (Minister of Employment and Immigration)*, (1979) 31 N.R. 34, 36 (F.C. A.D.). Past experience was used to contradict the testimony on how the claimant had acquired his passport compared to the official procedure of obtaining a passport in Chile. See also *Villaroel* v. *Canada (Minister of Employment and Immigration)*, (1979) 31 N.R. 50, 52.
70. Another decision needs to be pointed out: *Aquino* v. *Canada (Minister of Employment and Immigration)*, F.C. A.D., no A-344-89, 4 June 1992, in which it was said that the Personal Information Form filled out by the claimant at her arrival in the country cannot be noticed under subsection 68(4).
71. *Hassan* v. *Canada (Minister of Employment and Immigration)*, F.C. A.D., no A-757-91, 8 February 1993.

### 3. Taking Official Notice of an SCF at the Beginning of a Hearing

According to the now defunct Law Reform Commission, the rationale for taking official notice of an SCF at the beginning of a hearing is to ensure that documentary information will be « incorporated into the determination process[72] ». This is an important concern since, in *Boucher* v. *Canada (Minister of Employment and Immigration)*[73], Desjardins J.A. of the Federal Court of Appeal said that the Division cannot make findings of fact adverse to the claimant if there is no evidence on the record to support it. She said :

> In the circumstances, I find it difficult to allow an administrative organization to draw a conclusion in the absence of evidence on a significant point which could influence it[74].

However, although subsection 68(2) of the *Immigration Act* entitles CRDD members to use more expeditious procedures, it cannot be at the expense of fairness. Subsection 68(2) states : « The Refugee Division shall deal with all proceedings before it as informally and expeditiously as the circumstances and the considerations of fairness permit. »

Therefore, the first question to be resolved is whether it would result in less fairness towards claimants if CRDD Members take notice of an SCF at the beginning of the hearing under subsection 68(4), rather than having the Refugee Hearing Officer or a counsel for a claimant introduce the same file under subsection 68(3). In other words, I will determine if the rules of disclosure for information which is officially noticed are different from the rules of disclosure for information which is formally introduced as evidence in a refugee determination process. The second question raised by

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72. *Id.*, 127.

73. *Boucher* v. *Canada (Minister of Employment and Immigration)*, (1989) 105 N.R. 66 (F.C. A.D.). In this case, the Applicant, a Haitian, claimed persecution for political reasons. He arrived in Canada in 1982. His claim was dealt with at the IAB level in 1988. The IAB dismissed the claim for the reason that elections had occurred in or after 1988, so that conditions had changed for the better. However, there were no documents to support this inference of the Board contained in the statement that the « situation seems to be growing calmer ». Before the Federal Court of Appeal, the Applicant argued that the Board had erred in law in basing its decision on matters completely foreign to the evidence. Indeed, he filed documentary evidence until 1988, but none after that year. However, because there was an election staged after 1988, the Board believed that the situation was growing calmer. Desjardins J.A. said : « Could the Board still, in the absence of evidence to that effect, state that the situation seems to be growing calmer, or even that Haiti has no longer been on the front pages of the newspapers ? I do not think so. At most it could say that there was no evidence showing what the political situation in Haiti was after 1988. » See also *Rahman* v. *Canada (Minister of Employment and Immigration)*, (1989) 8 Imm. L.R. (2d) 170 (F.C. A.D.).

74. *Boucher* v. *Canada (Minister of Employment and Immigration)*, 253.

this practice is whether CRDD Members can use any adverse information after the hearing.

### 3.1 Disclosure and Fairness in Taking Official Notice of an SCF

At common law, the question with respect to official notice is the extent to which it is fair to allow its use by an administrative tribunal. As a rule of evidence, the use of official notice is meant to enable an administrative tribunal to be more expeditious, but disclosure is meant to enable applicants to know the case to be met. Indeed, because official notice does not require that the information be formally introduced as evidence, it follows that disclosure is not necessarily required and, therefore, an opportunity to respond is not given either. It is for this reason that K.C. Davis proposed a theory of disclosure based on a distinction between legislative and adjudicative facts[75]. The distinction, well-accepted among authors, is explained in these terms:

> When a court or an agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive or intent — the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts [...].
>
> When a court or an agency develops law or policy, it is acting legislatively, the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgments are called legislative facts[76].

Since official notice, just as judicial notice, cannot be a substitute for evidence[77], as a general rule, adjudicative facts would need to be disclosed, but not legislative facts. However, the distinction between these facts is often difficult to draw. As Davis says:

> [S]ome facts are clearly adjudicative, some are clearly legislative, some are probably one or probably the other but not clearly, and some impossible to classify[78].

For this reason Davis proposes that tribunals guide their decisions to disclose upon the assessment of three variables:

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75. K.C. DAVIS, « An Approach to Problems of Evidence in the Administrative Process », (1942) 55 *Harv. L. Rev.* 364, 410 ff. Later on, he proposed it for regular courts as well: K.C. DAVIS, « Judicial Notice », (1955) 55 *Colum. L. Rev.* 945, 952 ff.
76. K.C. DAVIS, *Administrative Law Treatise*, St. Paul (Minn.), East Publishing Co., 1958, par. 15.03, p. 353.
77. *Weatherall* v. *Harrison*, [1976] Q.B. 773; *Re Department of Labour and University of Regina*, (1975) 62 D.L.R. (3d) 717 (Sask. Q.B.). D. LEMIEUX and E. CLOCCHIATI, *loc. cit.*, note 33, 145.
78. K.C. DAVIS, *Administrative Law of the Seventies, Supplementing Administrative Law Treatise*, Rochester (N.Y.), The Lawyers Co-Operative Publishing, 1976, p. 375.

> (a) whether the facts are close to the centre of the controversy between the parties or whether they are background facts at or near the periphery, (b) whether the facts concern the particular parties or whether they are general or legislative facts, and (c) the degree of certainty or doubt about the facts—whether they are certainly indisputable or probably disputable or probably debatable or certainly debatable[79].

In the actual refugee determination process, section 68(5) makes it mandatory for the CRDD Members to disclose all the material of which it intends to take official notice and offer an opportunity to respond to the claimant. As stated by subsection 68(5):

> Before the Refugee Division takes notice of *any facts, information or opinion*, other than facts that may be judicially noticed, in any proceedings, the Division shall notify the Minister, if present at the proceedings, and the person who is the subject of the proceedings of its intention and afford them a reasonable opportunity to make representations with respect thereto [my emphasis].

Consequently, because the statute requires that all facts, information or opinion be disclosed, the distinction between legislative and adjudicative facts is unnecessary. Therefore, when an SCF is officially noticed at the beginning of the hearing, any facts, information or opinion contained in them and, more particularly, any material intended to be used against the claimant, will have to be disclosed and an opportunity to refute the material will have to be given to the claimant. If the prescriptions of subsection 68(5) are not respected, the decision can then be reviewed by the Trial Division of the Federal Court under section 18 of the *Federal Court Act* in virtue of section 82.1 of the *Immigration Act*. (Before February 1st, 1993, decisions were appealed to the Federal Court of Appeal as either a breach of the rules of natural justice or an error of law under par. b) and c) of subsection 82.3[80].)

Common law rules with respect to the use of evidence adduced at the hearing in refugee case have the same effect. Indeed, any information used adversely to a claimant's interest must be disclosed and an opportunity to

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79. K.C. DAVIS, *Administrative Law Text*, 3rd ed., St. Paul (Minn.), East Publishing, 1972, p. 314. For another approach to disclosure, see J.R. ROBERTSON, « The Use of Official Notice by Administrative Tribunals », (1980-81) 6 *Queen's L.J.* 3.

80. Former subsection 82.3 stated : « An appeal lies to the Federal Court of Appeal with leave of a judge of the Court from a decision of the Refugee Division under section 69.1 on a claim or under section 69.3 on an application, on the ground that the Division [...] (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe ; (c) erred in law in making its decision, whether or not the error appears on the face of the record. »

respond must be given[81]. If these requirements are not fulfilled, the decision can also be reviewed by the Trial Division of the Federal Court. In *Gracielome* v. *Canada (Minister of Employment and Immigration)*[82], the CRDD rejected the testimony of the claimant because there were contradictions. However, because the claimant had to be confronted with them at some point during the proceedings and was not given an opportunity to explain these contradictions, the Federal Court of Appeal set aside the decision. Since the rules of disclosure are the same whether an SCF is officially noticed at the beginning of a hearing, rather than being filed as evidence, it will not result in less fairness for claimants to adopt the former procedure. However, in order to make disclosure meaningful under subsection 68(5), the precise information on which the CRDD Members intend to rely on adversely to the claimant should be precisely disclosed to her. Indeed, the content of an SCF can be quite substantial and it is not realistic to expect counsels to prepare their clients in order that they be able to respond to any information contained in an SCF. In addition, one has to be sensitive to the fact that claimants for refugee status do not normally speak either French or English sufficiently to be able to prepare their case adequately in reading an SCF[83]. Finally, for the purpose of a judicial review, it will be easier to locate the information on which the CRDD Members based their findings of fact[84].

### 3.2 Using the Information Contained in an SCF after the Hearing

Members can use official notice to support or contradict the testimony of the claimant on one or several elements of the definition of refugee.

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81. Disclosure is a basic element of the common law of natural justice and is usually required unless some competing interest prevails. The justification for the requirement is simply to enable a party to know and respond to information that the agency has and that may influence its decision. See J.M. EVANS, H.N. JANISCH, D.J. MULLAN and R.C.B. RISK, *Administrative Law, Cases, Text, and Material*, 3rd ed., Toronto, Emond Montgomery Publications, 1989, p. 179 ; *Kane* v. *The Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 (B.C.).

82. *Gracielome* v. *Canada (Minister of Employment and Immigration)*, (1990) 9 Imm. L.R. (2d) 237, 239 (F.C. A.D.).

83. And it is not financially practicable to translate each SCF in the language spoken in that country.

84. See *Hassan* v. *Canada (Minister of Employment and Immigration)*, cited above, note 71. In this case, the question was whether the IRB should have produced the entire SCF at the Federal Court of Appeal for the Appeal Book. The Court, after ordering the IRB to show cause in writing why the SCF has not been produced, was satisfied by the answers given by the Board and the Court said that it acted properly in not producing the whole of the contents of its SCF as part of the paper relevant to the matter before the Court. « To the extent that any such material has not been specifically referred to by the Board in its reasons for decision it need not be produced to form part of the record in this Court. »

When Members use the information they have found in an SCF against the claimant, it is because they believe the version stated in that SCF offers a greater guarantee of credibility than the claimant's version. Therefore, the question is whether CRDD Members can use information they find in the SCF after the hearing without giving the claimant an oral opportunity to respond.

In *Lawal*[85], the Court held that the hearing should be reconvened when the research conducted after the hearing results in finding facts not within the scope of section 68(4) or even with respect to facts which may be officially noticed, unless the claimant waives her right to reconvene the hearing[86]. This decision was confirmed by *Canada (Minister of Employment and Immigration)* v. *Salinas*[87] in which Stone J. said:

> In our view the issue has already been implicitly decided for this Court in *Lawal* [...], where Hugessen J.A. held for the Court that the only way for the Refugee Division, after the end of a hearing but before decision, to consider new evidence beyond that of which it might take judicial notice was by reopening the hearing, and that it should do so.

The rationale behind the ruling is that since information in an SCF influences the fact-finding process and that official notice cannot be a substitute for evidence, Members should not use either generally recognized facts or their specialized knowledge to provide evidence on one or several elements of the definition of Convention refugee on the basis that there is an absence of evidence on the record. Indeed, as par. 67(2)(d) says, CRDD Members have a positive duty to ensure that claimants are provided with a full hearing:

> The Refugee Division, and each member thereof, has all the powers and authority of a commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of a hearing
>
> (d) do any other thing necessary to provide a full and proper hearing

Therefore, Members and Refugee Hearing Officers have a duty to ensure that the claimant testifies on all the elements of the definition, or that there is evidence on all elements and that an opportunity to refute any information adverse to her claim has been provided to the claimant. If there is an absence of evidence on elements of the Convention refugee definition, one may question whether, in fact, the claimant has been given a fair hearing. However, when the claimant had the opportunity to give evidence

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85. *Lawal* v. *Canada (Minister of Employment and Immigration)*, cited above, note 62.
86. On the question of waiving a right for claimants to refugee status, see *Mashinini* v. *Canada (Minister of Employment and Immigration)*, F.C.A.D., no A-523-90, 13 September 1990.
87. *Canada (Minister of Employment and Immigration)* v. *Salinas*, F.C. A.D., no A-1323-91, 25 June 1992.

on a fact, information or opinion during the hearing for which CRDD Members found contradictory information in the SCF, one may question how efficient it will be to reconvene a hearing each time that CRDD members found adverse information in an SCF after the hearing.

As a useful analogy, it is interesting to refer to what Gonthier J. said in *Consolidated-Bathurst Packaging Ltd.* v. *The International Woodworkers of America, Local 2-69 and The Ontario Labour Relations Board*[88] about the discussions that took place after the hearing among the Members after the hearing. He stated that those discussions were not breaching the rules of natural justice because the parties had had the opportunity to discuss the issue at length during the hearing:

> I agree with Cory J.A. [as he then was] that the parties must be informed of any new ground on which they have not made any representations. In such a case, the parties must be given a reasonable opportunity to respond and the calling of a supplementary hearing may be appropriate. The decision to call such a hearing is left to the Board as master of its own procedure[89].

He further added that the rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members:

> On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties[90].

In the same manner, given the number of decisions that CRDD Members has to make every year, if they have to reconvene a hearing each time they find adverse information, it may have the impact of preventing them from using their evidentiary powers in subsection 68(4) and 68(5). In addition, it may unduly delay the rendering of decisions.

Section 68(5) states that an opportunity to make representations must be given to the claimant when information is intended to be officially noticed. The word « representations » imply that giving an oral or a written opportunity to make representations can be acceptable. Therefore, subsection 68(5) gives a discretionary power to the CRDD Members to decide in each case what would be the fair manner in which a claimant can respond to the information. It will only be in cases where that discretionary power was

88. *Consolidated-Bathurst Packaging Ltd.* v. *The International Woodworkers of America, Local 2-69 and The Ontario Labour Relations Board*, (1990) 68 D.L.R. (4th) 324 (S.C.C.).
89. *Id.*, 338.
90. *Id.*, 327.

unfairly exercised that the decision will be reviewable by the Trial Division of Federal Court as a breach of the rules of natural justice[91].

The decision to reconvene the hearing should take into account whether the claimant has had an opportunity to state her version of the facts during the original hearing. If the answer is yes, the CRDD Members should still disclose the information to the claimant as required by section 68(5). However, CRDD Members should have discretion to decide which of the oral or written representations will give to claimants a fair, but expeditious opportunity to respond to the information.

**Conclusion**

In an administrative procedure such as refugee determination, the use of official notice is an important evidentiary rule to enhance the expedition process. The rule gives the flexibility Members need to fulfil their tasks in an efficient manner, because it allows them to take into consideration information which was not formally introduced as evidence.

Taking official notice of an SCF will not result in a lesser opportunity to refute any information which could be used against claimants. Indeed, CRDD Members have to observe the same standards of fairness when it takes evidence under section 68(3) as when it takes official notice of information under section 68(4). However, because the content of an SCF can be rather extensive, it is necessary that the Members point out during the hearing the specific information that contradicts the claimants' testimony so that a fair opportunity to respond be given. If after the hearing, CRDD Members find information adverse to the claimant, they can choose to reconvene the hearing. Their decision should take into account whether the claimant has had an opportunity to state her version of the facts during the original hearing. In addition, taking official notice of an SCF at the

91. *Saleh* v. *Canada (Minister of Employment and Immigration)*, (1989) 11 Imm. L.R. (2d) 290, 296. In this case, the applicant, Lebanese by origin, claimed refugee status as he was caught in a conflict between rival factions. The presiding member of the CRDD mentioned an apparent truce between the faction, whereupon counsel for the applicant entered two newspaper articles to show hostilities still existed. The presiding member mentioned more recent articles, which counsel requested to adduce. The presiding member declined, and counsel requested an adjournment. The presiding member declined but allowed counsel to make submissions in writing. An application was made for a writ of prohibition and relief under *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s. 24. Joyal J. dismissed the application and said : « For the rules of natural justice to apply in the case at Bar, the Court must above all determine whether the particular events which occurred at the applicant's inquiry were such as to infringe his rights and justify intervention by the Court. »

beginning of a hearing is useful to ensure that documentary information relevant to the claim is on the record.

Finally, the Federal Court of Appeal has already granted leave to appeal on a number of cases related to the use of SCFs in a refugee determination process. It can be expected that the Court will decide that the practice of taking notice of an SCF at the beginning of a hearing is a legal procedure since the Court already said in *Hassan* that the content of an SCF may be expected to fall within the ambit of the specialized knowledge of the CRDD Members.