Chapter 2

Complexity as a Factor Inhibiting Access to the Law in Canada

The Internet has drastically transformed society in a number of important fields, including the field of law. As was argued in Chapter 1, a key aspect to the rule of law in modern democracies is that citizens must have ready and transparent access to the rules and regulations that govern them and their relations to the state and to other citizens. But access to the law alone would not be the hallmark of a mature democracy that respects the rule of law if the access is to materials that cannot be understood by the average citizen who cannot always afford to pay for or desire to hire a lawyer to represent them. As Friedland has argued, "we should not require high priests to keep the law".[1] Stated differently, and in light of the Kafka-esque nightmare of a society without the rule of law as envisioned in *The Trial*, we should minimize both the number of "doors" one must enter to access the legal system and we should reduce or eliminate the need for a "doorkeeper" to control access to the legal system. And not only should we not require priests to keep the law, we should not require them to explain the legal system as was

[1] *Supra*, Introduction, note 3 at 6.

required by the priest in Kafka's novel. Although the focus in this chapter will be on the average person who needs or wants to interact with the legal system, many of the complexities discussed here also negatively impact a broader range of persons, including researchers gathering data that is law-related or intermediaries who are not necessarily lawyers but who play important roles in the legal system (such as paralegals, community clinic workers and social workers).. If access to law-related information is to be meaningful, it should therefore be reasonable to suggest that the access must be to materials that can be understood by the average citizen. Without access to the rules, or if the access is to rules that are not well-organized or difficult to understand, it is hard if not impossible to comply with the rules and the claim to being a country that follows the rule of law is greatly weakened. This is especially so where there is an increasing number of persons representing themselves in court – without the aid of lawyer – in order to save costs or because of the unavailability of legal aid.[2] Accessing law-related information and accurately understanding and applying that information is – as is suggested throughout this thesis – difficult for the average citizen. If that were not enough, if armed with the relevant information, the average citizen thereafter has a difficult time to access justice via the courts due to the costs of litigation:

> The civil justice system is out of the reach of most Canadians, despite the fact that access to the courts for all citizens is a fundamental pillar of our society. The primary economic barrier to pursuing a lawsuit is legal fees. The Report of the Ontario Civil Justice Review modeled the legal fees of a typical civil case for a three day trial in the Ontario Court (General Division) and calculated a total cost of $38,200 to the plaintiff.[3]

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[2] See, for example, Jim Middlemiss, "Who Needs a Lawyer?: The Self-represented Litigant Crisis" *National* (October 1999) 12 at 14 where the authors asserts that in Ontario courts the number of self-represented people at first appearance now outnumbers the represented 1.6 to 1. See also Marguerite Trussler, "A Judicial View on Self-represented Litigants" (2001) 19 C.F.L.Q. 547 and Lee Stuesser, "Dealing with the Un-represented Accused" (2003), 9 C.R. (6th) 82.

[3] Poonam Puri, "Financing of Litigation by Third-party Investors: A Share of Justice?"(1998) 36 Osgoode Hall L.J. 515 at 527.

These concerns were recently echoed by the Honourable T. Roy McMurtry, Chief Justice of Ontario:

> There is one overwhelming reality that I have learned since my call to the bar in 1958, and it is that the challenges facing the administration of justice in Ontario have grown hugely in the subsequent years. The increasing complexity simply reflects the development of an ever increasing complex society.
>
> While I believe that the citizens of Ontario are very well served by the hundreds of men and women who discharge their daily responsibilities as judges with commitment, impartiality and fairness, all judges recognize that we must continue to strive to earn that confidence. The issues particularly related to access to justice and justice in a timely fashion will continue to demand the collective attention of the bar, government and the judiciary.[4]

Although costs as a barrier to access to justice are a topic beyond this thesis, it is still relevant to the barriers imposed by difficulties in accessing law-related information because if litigants cannot afford to hire their own lawyer and must resort to self-representation, their ability to effectively enforce their legal rights will depend in large part on how successful they are able to access law-related information and conduct their own legal research. As such, the potentially high cost of conducting online legal research for the lay litigant, assuming that the lay litigant is able to obtain subscriptions to the commercial online databases, is a serious problem. Since the current free online sources of legislation and case law on CanLII (for example) are not exhaustive or complete, one must either resort to using print legal research resources or the commercial online databases (or both). For the lay litigant who cannot afford representation, it is reasonable

[4] The Honourable R. Roy McMurtry, "Report of the Chief Justice of Ontario Upon the Opening of the Ontario Courts for 2005" (undated). Available online: <*http://www.ontariocourts.on.ca/court_of_appeal/speeches/opening_speeches/coareport2005.htm*>.

to assume that they may also have difficulty in paying for the costs of online legal research on the commercial databases.[5]

One consequence of the high cost of hiring a lawyer is the rise in the number of *pro se* litigants which means that laypersons will increasingly be needing to access law-related information on their own, something that can be difficult for them toobtain. Due to the complicated nature of the court system, rules of civil procedure and lack of knowledge of the law, this can be a challenge, both for the lay litigant and for the other party to the lawsuit and for the judge. To compound matters, some Canadian courts limit the ability of a litigant to be represented by anyone but a lawyer.[6] As such, the lay litigant has two choices: represent themselves or hire a lawyer. In *Canada (Customs and Revenue Agency) v. Johnson*,[7] for example, the Federal Court denied the applicant the right to be represented by her husband in court on a tax matter:

> An individual has no right, inherent or otherwise, to represent his or her spouse before the court . . . . Whether the court possesses an inherent jurisdiction, in appropriate circumstances, to permit representation by a non-lawyer if the interests of justice so require has not been determined . . . . I need not make such determination because if the jurisdiction does exist, I would not exercise it here. The respondent's request for representation by her husband is denied.[8]

Access to and comprehension of law-related information can be inhibited by a number of factors, ranging from complexities in a country's legal system, delays and cost in the publication of legal materials, and the format of legal materials. Canada's legal

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[5] See, for example, the concerns about cost and access raised by Melissa Barr, "Democracy in the Dark: Public Access Restrictions from Westlaw and LexisNexis" (2003) 11 Searcher 66.
[6] However, under ss. 800 and 802 of the *Criminal Code*, an accused *can* choose to be represented by an agent who is not a lawyer in summary criminal proceedings; however, the court will usually take steps to make sure the accused understands the consequences of doing so – see: *R. v. Romanowicz* (1999), 45 O.R. (3d) 506 (C.A.).
[7] 2003 FCT 568.
[8] *Ibid.* ¶ 4.

system is unfortunately complex, especially for the average person without formal legal training. A consequence of this complexity is that citizens will have difficulty in finding relevant law-related information and in correctly understanding and applying this information.[9] As discussed in Chapter 1, since Canada is a country that follows the rule of law, this can be a problem if the average citizen cannot access information that affects their basic legal rights. There are several factors that contribute to the complexity of our legal system. One factor is our "mixed" legal system, which includes a British common law tradition and a French civil law tradition (and also a First Nations legal tradition). In addition to the inherent challenges in researching legislation, there is also the exclusive (and sometimes overlapping) jurisdiction of federal and provincial legislative powers (with an added layer of municipal bylaws). The Canadian court structure is also quite complicated for the uninitiated. Another complexity is the role of judge-made law – the common law – in determining rights since this body of law is inherently disorganized and relatively chaotic. Individually, each of these factors contributes to the difficulty that the average person has in Canada to access law-related information. In combination, these factors result in complexities that make it difficult even for some lawyers to find and understand the relevant law.

2.1 Mixed systems of law

Although there is much discussion in the literature about Canada's bijuralism and the influence of the British common law and the French civil law on our legal system,[10]

[9] Friedland Study, *supra*, Chapter 1, note 3 at 25-28 *et seq*.
[10] See, for example: Gerald Gall, *The Canadian Legal System*, 5th ed. (Toronto: Carswell, 2004) at 55-65 and 263-84; John E.C. Brierley, "Bijuralism in Canada" in *Contemporary Law: Canadian Reports to the*

one should not overlook the impact of Aboriginal traditions on our legal and political system.[11] This has resulted in there being three legal cultures – British, French and Aboriginal – that inculcate our legal system to different degrees and contribute to its complexity.

2.1.1 The British Influence

The dominant legal tradition in Canada is the British influence, both in our parliamentary and legislative processes and our court system and the adoption of the common law. This British influence was by no means a certainty from the beginning due to the interest by French and Spanish explorers in the North American continent as a source of trade and territorial expansion during the 17th and 18th centuries. In fact, early pre-Confederation history might have predicted a French legal dominance due to early French colonization in the eastern part of Canada as early as 1534. With the *Royal Decrees* of King Louis XIV in 1663 came the establishment in Canada of "New France," an independent colony that adopted a modified version of the Napoleonic Code to govern its legislative affairs. However, various wars with Britain during the time of expansion in early Canada cost the French. With the loss on the battlefield to the English on the Plains of Abraham in 1759 and Montreal falling to the English in 1760 came the *Treaty of Paris*

1990 International Congress of Comparative Law, Montreal, 1990 (Cowansville, Qué.: Éditions Yvon Blais, 1992) at 22-43; Denis LeMay, *La recherche documentaire en droit*, 5th ed. (Montreal: Wilson & Lafleur, 2002); "Researching Québec Law" by Denis LeMay in Chapter 12 of Douglass T. MacEllven et al., *Legal Research Handbook*, 5th edition (Toronto: Butterworths, 2003). See also "The Canadian Legislative Bijuralism Site" – Available online: <*http://www.bijurilex.org/site/index.html*> and "Canadian Bijuralism – Studies in Comparative Law – Available online: <*http://www.compare.law-droit.ca/welcome_en.php*>.

[11] See, for example, Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous L.J. 67 and Daniel Kwochka, and "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Sask. L. Rev. 153. In addition, the *Indigenous Law Journal*, recently launched at the University of Toronto, Faculty of Law, is dedicated to developing dialogue and scholarship in the field of Indigenous legal issues both in Canada and internationally.

(1763) where the French ceded Québec to Britain and which resulted in the English legal system taking root in the colony. However, Britain made concessions to the French population with the enactment of the *Québec Act of 1774*[12] which guaranteed the application of French law for matters involving "property and civil rights."

During the time when "Canada" remained a colony of Britain (i.e., before the enactment of the *British North America Act* in 1867, now renamed to the *Constitution Act, 1867*), much of British law was adopted in Canada through the complicated concept of "reception." What this meant was that, depending on the legislative actions taken in the colony, British law would usually apply in the colonies:

> In English colonies, the nature of this legal substrate was determined by the principle of reception, a complex legal theory based both on common-law practice and on case-law that determined which portions of which European law were considered to have been "received" into the colony, and thus in force. As it stood in the eighteenth century, the theory of reception distinguished between colonies acquired by the English crown through settlement of "uninhabited" territory (which included the territory of "barbaric" native peoples), and those acquired, by conquest or treaty, from other colonial powers. In the latter, which included Québec, the law in effect under the previous colonial power remained unchanged until specifically modified or repealed by British or colonial legislation. Such legislation usually stipulated the reception into the colony of all or part of the law of England as it stood on a specific date, the "date of reception." This had the effect of establishing as the colony's legal substrate the received portion of English law, and whatever portions of the law previously in force that were not specifically superseded. Conversely, no other English law was in force in the colony, including any law made after the date of reception, apart from legislation specifically extended to the colony; and of course, no law made by the previous colonial power after the date of conquest or cession had any force.[13]

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[12] (U.K.) 14 Geo. III, c. 83.

[13] Donald Fyson, Colin M. Coates and Kathryn Harvey, eds., *Class, Gender and the Law in Eighteenth and Nineteenth-Century Quebec: Sources and Perspectives* (Montreal: Montreal History Group, 1993) at 9-10. See also J.E. Côté, "The Reception of English Law" (1977) 15 Alta. L. Review 29, and Gall, *supra* note 3 at 57.

Obviously, for Québec law prior to Confederation, "reception" meant reception from France for matters relating to civil law and British law for federal matters:

> In Québec and Lower Canada, this principle meant that two main bodies of European legislation were in force: legislation made in France and New France that had affected the civil law of New France; and English statutes affecting the criminal law of England. As well, a miscellany of other English legislation was also in effect.[14]

Thus, although the need today to determine whether a particular legal topic is affected by British law under the concept of "reception" does not arise that often, it does arise and adds to the complexity of the Canadian legal system. Fitzgerald and Wright[15] summarize the historical sources of law in Canada that emanate from England:

1. Rules of English common law developed before the date of reception;
2. Rules of English common law developed after this date, because the English courts retained considerable influence and prestige in Canada;
3. Rules of common law developed in Canada;
4. English statutes enacted before the date of reception;
5. British imperial statutes which were possible until the *Statute of Westminster, 1931* and after this date only upon Canada's request and consent until patriation of the constitution in 1982;
6. Statutes of the federal Parliament of Canada; and
7. Statutes of the provincial assemblies.

As a consequence of formal British colonization in Canada, the Canadian legal system has been greatly influenced by British legal traditions. Because the British parliamentary and court systems have arcane procedures that are not well understand by the general population, this makes the Canadian legal system also hard to understand for

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[14] Fyson et al., *ibid.* at 10.
[15] Patrick Fitzgerald and Barry Wright, *Looking at Law: Canada's Legal System*, 5th ed. (Toronto: Butterworths, 2000) at 24.

the average person and even for some lawyers or those who regularly interact with the legal system as part of their job. While it might be argued that no legal system can be so free of complexities as to not require experts to use or manage the system, surely we can insist that a legal system be as complex-free as is reasonably possible to lessen or avoid the need to rely only on professional legal help for all legal transactions or all attempts to gather and comprehend law-related information in a non-litigious circumstance.

2.1.2 The French Influence

The French civil law influence is largely restricted to the province of Québec. However, Québec provincial law is still highly relevant for anyone wishing to conduct business in or trade to and from Québec. In addition, Québec is not isolated from the British "common law" tradition to the extent that Canadian federal laws apply in Québec in addition to "civil" provincial laws; in addition, the so-called "British" common law in Canada is influenced by civilian law and principles, and the Supreme Court of Canada hears and decides cases involving both common law and civil law principles. As such, English-French bijuralism is a challenge, both because of the different legal systems at the root of both traditions and because of language differences:

> . . . Québec, and therefore Canadian, bijuralism offers particular challenges to a number of constituencies functioning within the legal community – to legal education whether for teachers or students, to legal practitioners whether notaries or lawyers, and to judges whether in Québec or federal courts called upon to apply Québec and federal law. Bijuralism makes for complex law . . . .
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> At another level, as well, the historical genealogy of the Québec-Canadian bijuralism also supposes, as already suggested, an ability to be comfortable in two languages, French and English, in so far as current Québec or federal law may still require a return to unilingual continental French or English historical sources. The present climate of language debate in Canada, and especially in

> Québec, gives some reason to fear that, for the future, the actors may be less well equipped to meet that challenge than would be desirable.[16]

Official bilingualism plays a very important role in defining the country and the Canadian legal system; as such, a policy of official bilingualism adds to the complexity of the Canadian legal system:

> Especially during the past three decades, the idea of legal bilingualism has received much attention in Canada. Federal-government policy promoting bilingualism in general, including minority-language educational rights, is a central component of the contemporary Canadian legal order. Statutes, regulations, judicial decisions and government documents are now being translated from English to French and to a lesser degree from French to English. Today, most new federal legislation is actually being drafted in two original language versions. Bilingual courts and administrative agencies have been established. Defendants in criminal cases may insist on being tried in the language of their choice. A comprehensive body of published legal doctrine in French and English is emerging. French-language common law legal education is a reality, and English-language civil law education has a distinguished history. Finally, the constitutional guarantees of legal bilingualism set out in section 133 of the *Constitution Act, 1867* have been elaborated and extended by the *Official Languages Act* and by the Canadian *Charter of Rights and Freedoms*. Many now apply to certain provinces as well as to the federal government.[17]

Because Canada is officially a bilingual country, this raises a number of complexities involving the difficulties of translation of legal terms where the concepts have nuanced differences between both languages:

> [T]he language of law is also embedded in legal tradition: in Canada, there are not only two official languages, but also at least two official legal cultures – the common law and the civil law. A statute that translates "mortgage" as "*hypothèque*" fails to acknowledge how much legal language presumes legal culture. Similarly, a statute entitled the *Federal Real Property Act/Loi sur les immeubles fédéraux* presumes that an "*immeuble*" in common-law legal French is equivalent to "real property", and that "real property" in civil-law legal English is equivalent to "*immeuble.*" Both are, obviously, inexact presumptions.[18]

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[16] E.C. Brierley, *supra* note 3 at 38.
[17] Roderick A. Macdonald, "Legal Bilingualism" (1996-97) 42 McGill L. J. 119) at 127. See also Marie-Claude Gervais and Marie-France Séguin, "Some Thoughts on Bijuralism in Canada and the World" at Department of Justice Canada, Publications – Available online: <*http://canada.justice.gc.ca/en/dept/pub/hfl/fasc2/fascicule_2a.html*>.
[18] Macdonald, *ibid.* at 149-50.

Bilingual and bijural legislation also raise issues of statutory interpretation, a complexity not realized in officially unilingual jurisdictions from the Commonwealth, such as England and Australia. Acts from our federal Parliament and from the legislatures of Québec, New Brunswick and Manitoba are to be published in both official languages.[19] In Ontario, the *French Language Services Act*[20] requires Ontario legislation to be published in both French and English. Professor Sullivan's description of bilingual and bijural legislation hints at the complexities inherent with official legislation being drafted and interpreted in two official languages:

> The legislation of the Parliament of Canada and of some provincial legislatures is bilingual in that it is enacted in both French and English. And federal legislation is bijural in that it applies in both a civil law context in Quebec and a common law context in other provinces and territories. In some respects, like many nations, Canada is becoming a multilingual, multijural nation. For example, international agreements currently exert an important influence on domestic law at both the federal and provincial levels. Legislation designed to implement such agreements may incorporate or adapt provisions that have been drafted in several languages and reflect diverse legal systems. To date, neither federal nor provincial legislation is enacted in any of the First Nations languages, nor does it take into account First Nations law. However, plans to use Inuktitut in Nunavut legislation are currently being developed, and it is evident that First Nations's legal systems will play a role in the government of Aboriginal peoples in the future. These developments contribute to a growing national and international law on the drafting and interpretation of multilingual, multicultural legal instruments.[21]

In addition, as a multicultural country with citizens who speak a variety of languages as their first languages, there are issues of fair and proper translation during criminal trials and other court proceedings that pose their own challenges,[22] let alone the

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[19] Section 113, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.; the *Manitoba Act, 1870* (U.K.), 33 Vict., c. 3, s. 23; the *Constitution Act, 1982*, s. 18, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.
[20] R.S.O. 1990, c. F-32.
[21] Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 1999) at 90.
[22] See, for example, David J. Heller, "Language Bias in the Criminal Justice System" (1995) 37 Crim. L.Q. 344.

challenge that most primary sources of law in Canada (legislation and case law) will be in either English or French and not in the other languages spoken by a large number of Canadians or recent Canadian immigrants who do not speak English or French.[23]

2.1.3 The Aboriginal Influence

Before European settlers came to what is now Canada, our region was occupied by a large number of aboriginal people, including the West Coast Salish and Haida, the centrally located Iroquois, Blackfoot and Huron, the Inuit people to the North, and the Mi'kmaq in the East. However, disease brought by the European settlers decimated the Aboriginal population and land claims treaties later marginalized many of the First Nations population. Recent aboriginal legal scholarship[24] has helped draw attention to aboriginal self-government, land claims disputes, and reparations for physical and sexual abuse of aboriginal persons forcibly sent to residential schools. Despite the early marginalization of aboriginal people, the relatively recent constitutionalization of aboriginal rights in s. 25 of the *Charter* means that most, if not all, legal issues in Canada cannot ignore the possible impact of aboriginal rights.

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[23] Close to 18% of Canadians speak a language other than English or French as their first language: Statistics Canada, "Language Composition of Canada, 2001 Census" (Ottawa: Statistics Canada, 2001). Available online: <*http://www12.statcan.ca/english/census01/home/index.cfm*>.

[24] For an example of recent literature on aboriginal law, see: *Indigenous Law Journal* (University of Toronto, Faculty of Law, 2002); Mary Locke Macaulay, *Aboriginal & Treaty Rights Practice* (Toronto: Carswell, 2000); Jospeh E. Magnet and Dwight A. Dorey, eds., *Aboriginal Rights Litigation* (Toronto: Butterworths, 2003); Timothy A. Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003); J.R. Miller, "Troubled Legacy: A History of Native Residential Schools" (2003) 66 Sask. L. Rev. 357; Jennifer Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice" (2002) 52 U.T.L.J. 253.

2.2 Complexities within the Canadian Legislative Scheme

The Canadian legal system is complex not only because of its bi- (or tri-) juridical and officially bilingual nature but also because the way legislative powers are distributed. As a federal system, legislative powers in Canada are formally divided under the *Constitution Act, 1867*[25] between federal and provincial governments (with provincial governments being given power to create governments at the municipal level that have their own body of law in the form of bylaws). For example, s. 91 of the Act grants exclusive power to the federal Parliament in Canada to legislate in such areas as the postal service, navigation and shipping, currency and coinage, bankruptcy and insolvency, copyrights and marriage and divorce. Section 92, on the other hand, grants exclusive power to provincial legislatures in Canada to legislate in such areas as direct taxation within the province, the establishment, maintenance and management of hospitals, municipal institutions within the province, and property and civil rights in the province. In some circumstances, such as those described above, legislation is exclusive to one jurisdiction; in other circumstances it may be shared. For example, power is shared between the federal Parliament and the provincial legislatures over agriculture, immigration and over certain aspects of natural resources; but federal laws would prevail in the event of any conflict between federal and provincial laws over these subject areas.[26] In deciding whether a particular subject matter falls under federal or provincial jurisdiction (or the jurisdiction of both), there is the added complexity of judicial interpretation of how these legislative powers apply in areas where either level of

[25] *Constitution Act, 1867* (U.K.), *supra* note 12.
[26] See ss. 92A and 95, *ibid*. See also Ted Tjaden, *supra*, Chapter 1, note 2 at 55.

government challenges the authority of the other level of government (e.g., case law falling under the topic of "federalism," falling, for example, within the range of Constitutional Law.VII.5.c.i within the *Canadian Abridgment* classification scheme, being "Constitutional Law – Distribution of legislative powers – Relation between federal and provincial powers – General principles"). In other words, it is not simply a matter of looking at the *Constitution Act, 1867* to determine whether federal or provincial legislation applies to a particular problem; there are other factors one must consider, including judicial interpretation of how those provisions are to be exercised when there is a dispute between levels of government.

If these complexities were not enough, added to these layers of federal and provincial laws are laws at the municipal or city level in the form of bylaws. Municipal legislation tends to regulate local matters such as sign and fence bylaws, business permits and the like. To say that "municipal bylaws can be very difficult to research"[27] is a bit of an understatement. Due to their volume and lack of good indexing and constant revision, it is very difficult for the typical home owner to know the rules and regulations that govern daily activities in their municipality. Even with the advent of the Internet, not all municipalities make their bylaws available online, and even where they are online, they are difficult to navigate and use.

For a researcher not trained in law, knowing whether a particular issue is governed by a federal or provincial statute or municipal bylaw is difficult[28] (it is sometimes difficult for the average lawyer, as well). The difficulties arise for a number of

[27] D.T. MacEllven et al., *supra* note 3 at 33.
[28] Friedland study, *supra*, Introduction, note 3 at 27.

reasons: poor indexing of legislation, publication delays, and a lack of good cross-referencing.

The Canadian government has largely failed in providing easy access to law-related information in print.[29] Official sources of legislation (via Queen's Printers, for example) are notoriously out-of-date and poorly indexed (if indexed at all). When changes are made to a statute, the traditional method of "noting up" the statute to track those changes was through the use of a print "Table of Public Statutes" which itself might be out of date.

If statutes pose their own problems in legal research, regulations are much worse since they are generally not indexed well or at all. The federal regulations were last officially consolidated by the government in 1978 (over 25 years ago). Orders-in-council – a form of government regulation – are not always even published or easily available:

> Searching for Orders in Council can be frustrating at times. The possibility that they are confidential and the likelihood that they are not published means that a researcher may have to consult an array of publications and contact government departments to obtain a copy of an Order.[30]

These difficulties are made worse by the fact that all statutes and regulations – be they federal, provincial or municipal – are subject to being amended, repealed or ruled unconstitutional; keeping track of these changes is difficult. For example, even if one is able to identify which level of government has jurisdiction to legislate on a particular topic, and even if one has found the right statute or regulation, there is always the risk

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[29] *Ibid.*
[30] Wendy Hubley and Micheline Beaulieu, "Locating Canadian Orders in Council" (2001) 26 Can. L. Libraries 8 at 10.

that the legislation was amended or repealed by the government or ruled unconstitutional or interpreted by the courts. On this latter point, where judges rule particular sections of legislation unconstitutional, legislators are very slow to react – if they react at all – to remove the repealed sections from their statute books. As such, one risks relying on out-of-date or incorrect law by relying only on what is found in the statute book. Because the so-called "dialogue" between the courts and legislators[31] is more of an ongoing process among the court, legislatures and society[32] than an actual dialogue recorded in a transcript, a researcher must be cognizant of potential "activity" by both legislatures and courts on any particular issue. One cannot rely solely on legislation (or, for that matter, solely on case law) without entering into this "dialogue" to see how the other branch of government has "responded," if at all, to the other branch, on any particular matter being researched.

Free online government versions of legislation, while usually more current than printed versions, also usually do not indicate whether a particular judge or court has interpreted the legislation or ruled it unconstitutional;[33] as such, even though it may be more convenient to use free online sources of legislation, one cannot be confident that the legislative provision found has not been impacted by judicial interpretation since the free online legislative databases do not include this added information.

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[31] Robert Martin, *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined our Law and Our Democracy* (Montreal: McGill-Queen's University Press, 2003); F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada*, 3rd ed. (Calgary: University of Calgary Press, 2002); Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); F.L. Morton and Rainer Knopff, eds., *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000); Christopher P. Manfredi and James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513; and Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75.

[32] Roach, *ibid*. at 11.

[33] However, there is a feature – for a fee – on WestlaweCARSWELL by which the research can click to determine if there have been any court decisions or commentary on a particular section of a statute.

Although legislative research has its own challenges, it could be argued that the challenges of case law research easily overwhelm the challenges of legislative research.

2.3 The Court System and the Impact of the Common Law

> *The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people*[34]

There are a number of complexities in any legal system, particularly in the way disputes are litigated and decided by the courts. Canada is no stranger to this complexity in its court systems; however, there are a few features of our court system, unique to Canada, that increase the complexity and hence add barriers to the access to law-related information that originates within the court system.

2.3.1 Multiple court systems

There are multiple court systems in Canada, some with exclusive or specialized jurisdiction, most with complicated rules of procedure. To start with, there are generally three levels of court in Canada: (i) a trial court, sitting with a single judge who hears live witnesses, (ii) a provincial or federal appeals court, sitting usually with three judges who hear the appeal based on a written trial record, and (iii) our national Supreme Court of Canada. However, there are also three court systems in Canada that fit over this matrix of

[34] Lord Wolff, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, HMSO, 1995) at Chapter 17, para. 2, cited in Stuesser, *supra* note 2 at 101.

three levels of courts: (1) Superior courts, where the judges are appointed by the federal government; (2) Provincial courts, where the judges are appointed by the provincial government; and (3) Federal courts, where the judges are appointed by the federal government. Unfortunately, the court structure is much more complex than what is described. There are, for example, many different type of trial courts at the provincial level, including specialized family courts, small claims courts and criminal courts. Each level or type of court generally has its own separate rules of court with its own unique forms and deadlines. For self-represented litigants, this can pose problems. It also adds stress to the system because of the lay litigant's "lack of knowledge of procedural and documentary requirements, which often means that matters have to be dismissed or adjourned; and related to this, that litigants in person frequently cannot understand why a judge must refuse to hear a matter."[35] Likewise, Madam Justice Trussler of the Court of Queen's Bench of Alberta echoes this concern that average persons have a difficult time in court as lay litigants due to their lack of knowledge of the law:

> From a judicial point of view, there are numerous practical problems caused by litigants who represent themselves . . . . Frequently these people have a lack of knowledge of the law. Some have read self-help books, researched the law or obtained legal advice but usually they have no idea of the legal principles involved in an application . . . .
>
> The lack of knowledge of court procedure is even more problematic. Frequently on motions, affidavit evidence does not include all the necessary information.[36]

[35] Stuesser, *supra* note 2 at 83, citing an Australian study, John Dewar, Barry Smith and Cate Banks, "Litigants in Person in the Family Court of Australia: A Report to the Family Court of Australia" Research Paper No. 20 (1999).
[36] Trussler, *supra* note 2 at 564.

2.3.2 The Chaotic Nature of the Common law

The decisions of courts – although a primary source of law and binding on citizens – are also not necessarily well-organized and are difficult to research, even for those with training in legal research. In the Canadian judicial system, the "common law" still plays a central role. For sake of simplicity, the common law in this context represents the decisions of past judges on cases involving similar facts and issues. Over time, these decisions form a body of law which can act as binding precedents on future judges, depending on the level of court the past courts decisions are from. The concept of judicial precedent or *stare decisis* is a feature of the common law that ensures stability by requiring that a current judge's decision is not based on personal whim but instead is based on past precedent. More specifically, *stare decisis* requires that a judge is bound by the past decisions of judges from the same or higher court.[37]

As such, finding prior court decisions on point – finding a precedent – is critical when appearing in court on an issue, even when the issue being litigated is not purely a common law subject but may be affected by legislation (since how judges have interpreted legislation in past decisions is also relevant). Print case law reporters have played an important role in access to cases:

> Without [law reports] it would not be possible to ascertain what in any particular field of law had been decided without a time-consuming search of court records, assuming that the reasons given in decided cases are kept by the offices of the Court not as part of the formal record of the case but as archival material. For myself I doubt whether such reasons, particularly when orally expressed, have

[37] See Gerald Gall, "Chapter 11: The Doctrines of Precedent and Stare Decisis" in *The Canadian Legal System*, *supra* note 10.

> always been so kept. But such research is not practicable in the exigencies of the daily administration of the law. Thus, in my opinion, it can confidently be said that in modern times without the availability of law reports in book form the law could not be adequately administered. Justice according to law would be in danger of being supplanted by justice according to whim which is in reality a contradiction in terms. Thus the production of law reports is, in my opinion, clearly beneficial to the whole community because of the universal importance of maintaining the socially sustaining fabric of the law.[38]

As will be seen in Chapter 3, in the early days in Canada, the volume of Canadian court decisions was, relatively speaking, quite small and manageable. But even then, lawyers were complaining about a duplication of cases in various reporting, making it difficult to locate relevant cases and making it unnecessarily more expensive for lawyers to buy all of the relevant case law reporters.[39]

Once the researcher has located relevant cases, it is essential to "note up" the cases to verify that the decisions have not been reversed by an appellate court and to see how later courts may have interpreted the cases, if at all, or applied them as a precedent. To note up case law in Canada is difficult. The most comprehensive print method is to use Carswell's *Canadian Case Citations*, usually available only at academic or courthouse law libraries due to its purchase price and cost to keep it up-to-date. Practically speaking, many lawyers now note up their cases using one of the commercial services, such as Quicklaw, but this option is often not practically available to members of the public due to the need for a subscription, the cost, and the training to learn how to use the online service.

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[38] *Incorporated Council of Law Reporting v. Federal Commissioner of Taxation* (1971), 125 C.L.R. 659 at 668.
[39] Leon Getz, "The State of Law Reporting in Canada" (1979) 37 Advocate 243.

One good solution to the proliferation of case law is the creation of case law digest services. The major one in Canada is the *Canadian Abridgment*, published by Carswell and currently being implemented in a new 3rd series. This publication provides summaries of all important Canadian court cases organized by broad topics (e.g., "Family law") and then further divided into discrete sub-topics (e.g., Family law – Divorce – Grounds – Cruelty). However, the *Canadian Abridgment* in print is usually held by only major law school or courthouse law libraries. It is also expensive to purchase and maintain.[40] As such, the print version may often be out of reach for many laypersons. The CD-ROM version of the *Canadian Abridgment* is cheaper and portable, but its contents are licensed for only authorized licensees and subject to a "time bomb" where the data on the CD-ROM is unreadable once the quarterly payments have ceased.[41] The *Canadian Abridgment* is also available on Westlaw*e*CARSWELL, by subscription fee.

In many situations, it may also be necessary for the Canadian legal researcher to research cases from other Commonwealth countries, especially on issues relating to the common law:

> There has also been a relatively strong tradition in Canada for our courts to rely on case law from individual countries outside of Canada, particularly from Commonwealth countries and the United States, depending on the issues or areas of law. A number of studies have been done to examine the extent to which the Supreme Court of Canada, for example, has relied on British and American precedents or decisions from other countries. As might be expected, in Canada's early history, there was a heavy reliance on British precedent, but over time, as Canadian courts developed their own bodies of decisions, dependence on British

[40] The purchase price for the print version of the *Canadian Abridgment*, 3d series, is $7,198 according to pricing information on the publisher's website accessed May 1, 2005 (*http://www.carswell.com*). The cost of annual volumes with updated cases is usually in the range of $1,000 to $2,000. These costs do not include the other components of the *Canadian Abridgment* such as the journal index or the print noter-upper which are equally important when conducting print-based legal research,

[41] See Tjaden, *supra*, Chapter 1, note 2 at 124. Thus, once payments have ceased (i.e., usually quarterly payments), one cannot access the information on the CD-ROM at all, even those parts of the content that are public domain.

> precedence has declined over time. But given the similarities between our legal systems, Canadian judges still show a great deal of deference to the persuasive value of decisions from the House of Lords or the English Court of Appeal, especially in areas of common law or other areas of law where Canadian law has remained relatively consistent with English law, including such areas of law as contracts, torts, equity, partnership law, sale of goods and land law.[42]

The need, therefore, to consider case law from other jurisdictions is another wrinkle in the process. Thus, for many reasons, case law or common law research in Canada is quite complex and a challenge for most researchers.

2.3.3 Move to Online Judgments

A more recent phenomena in Canadian case law publishing is the use by lawyers and courts of unpublished or unreported decisions. Prior to the advent of computer technology, the body of case law used by most litigants would be that published in print case law reporters or those decisions that, although not published in a case law reporter, might have been digested or otherwise mentioned in an article but available only in the original court file or by ordering a copy from the digest service (such as Canada Law Book's *All Canada Weekly Summaries*). With the advent of Quicklaw in the early 1970's and the development of competitor products (such as LexisNexis Canada and Westlaw*e*CARSWELL in their various incantations), arrangements were made for the courts to provide copies of all (or most) of their current decisions to these commercial online databases. These vendors then added these cases to their databases, usually after only minor editing and other work to "tag" various fields within each case. This greatly increased the body of case law available. However, these databases are not freely

[42] Tjaden, *ibid.* at 135-36.

available and are not something easily searchable by nonlawyers or the general public due to the need for a subscription and training and due to the relatively high cost to search these databases:[43]

> The problem presented by the proliferation of "reported decisions" is compounded by the growing accessibility, and consequently frequent recourse to, "unreported" decisions – unreported, it seems, only in the sense that the process by which they are made available to the profession is neither as glossy or as professional, nor is the form of their availability as permanent, as that of the so called "reported" cases.[44]

One recent, positive development in Canada was the creation of the Canadian Legal Information Institute ("CanLII"), a free website mentioned in Chapter 1 that provides access to recent Canadian case law and legislation. CanLII was formed in July 2001 and is a member of the Free Access to Law Movement, a group of other legal information institutes around the world that provide free online access to case law and legislation. In a Declaration on Free Access to Law made at an October 2002 meeting of legal information institutes, these institutes agreed to a number of key platforms to support access to law:

- To promote and support free access to public legal information throughout the world, principally via the Internet;
- To cooperate in order to achieve these goals and, in particular, to assist organisations in developing countries to achieve these goals, recognising the reciprocal advantages that all obtain from access to each other's law;
- To help each other and to support, within their means, other organisations that share these goals with respect to:
- Promotion, to governments and other organisations, of public policy conducive to the accessibility of public legal information;
- Technical assistance, advice and training;

[43] The topic of proprietary databases and access issues they potentially raise are dealt with in Chapter 5.
[44] *Supra* note 39 at 245.

- Development of open technical standards;
- Academic exchange of research results.
- To meet at least annually, and to invite other organisations who are legal information institutes to subscribe to this declaration and join those meetings, according to procedures to be established by the parties to this Declaration.[45]

CanLII has a number of advantages that provide easy access to recent Canadian case law and legislation: CanLII is free; the database has a single search engine to search across case law or legislation from a single or multiple jurisdictions;[46] and CanLII has a basic "noter-upper" to note up case law. However, CanLII also suffers from a number of disadvantages: Its case law is only relatively current – there is not much of an archive; as a result, the free database does not yet come close to representing the entire universe of Canadian case law. This means that CanLII cannot be the sole source of finding Canadian case law. In addition, the noter-upper on CanLII is very basic and usually only notes up the limited number of cases within its own database. As mentioned above, since most members of the public will not be able to practically use the online noter-uppers on the commercial services, this results in members of the public or other legal researchers on a budget needing to use print products to note up case law, which may not always be easily available.

2.4 Consequences of Complexity of the Canadian Legal System

The foregoing complexities have a number of consequences that affect access to law-related information in Canada:

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[45] *Supra,* Chapter 1, note 35.
[46] Prior to CanLII, case law on the Internet was only available on individual court websites which would require separate searches for each court.

- **Challenges of legislative research**: Due to the complexities discussed above regarding Canada's legislative system, there are a number of consequences that negatively impact the ability to easily access legislation:

    - It is hard for the average person to determine whether particular legislation will be governed by federal or provincial legislation or by municipal bylaw.
    - Bilingual legislation requires additional translation which leads to potential differences between English and French versions and added costs and time delays.
    - Queen's Printers, as officially publishers of legislation, are notorious for delays in publishing; as such Queen's Printer versions of legislation are often out-of-date and hard to use.
    - Regulations and orders-in-council are particularly difficult to research because they are officially consolidated so infrequently or, in the case of orders-in-council, sometimes not even published.
    - Free government online legislative databases are frequently not up-to-date.
    - Free government online legislative databases ordinarily do not have historical versions of legislation thereby making it necessary to go to a large academic or courthouse law library to conduct historical legislative research.

- **Case law and its problems**:

    - Case law is inherently chaotic in its organization, which makes it difficult to research; the multiple levels of court and types of court add to this chaos, as does the periodic need to research case law outside of Canada.
    - Many judicial decisions are reported in print case law reporters, but these are usually held only by large academic law libraries or courthouse libraries.
    - Tools used to find cases by topic, such as the *Canadian Abridgment,* are usually print-based and also only held by large libraries.
    - Free online sources of case law, such as CanLII, tend to only have current cases without much of an archive of older cases which still might have precedential value.
    - Noting up cases using free resources is difficult at best; print noter-uppers will also ordinarily only be held by large law libraries.

- Commercial databases such as Quicklaw, LexisNexis and Westlaw*e*CARSWELL provide many value-added features but are, practically speaking, likely out of the reach of most consumers of legal information, aside from lawyers who can usually bill the costs of those searches to their clients.

- **High cost of the legal system**

  - The high cost of the legal system makes it difficult for the average person to be able to afford a lawyer; there are often limitations on having a non-lawyer act on behalf of a litigant.

  - The complexities of the legal system and legal research make it difficult for the average person to represent themselves at trial or on other legal transactions.

Steps can and should be taken by the Canadian federal and provincial governments to make legislation and case law more accessible (they should not be leaving it to the private publishers to be doing this). In addition, public interest groups can help regarding understanding and applying the law through online help. These are topics I explore further in Chapter 6.

Katsh in his book *Law in the Digital World* is in fact hopeful that new technology can help reduce the informational distance and diminish some of the complexities of the legal system:

> Legal material retains a barrier in terms of style and language. Yet, there are other obstacles and boundaries that will diminish in importance. As software becomes more usable and more able to anticipate and respond to the needs of users, as costs of access to legal materials decline, as the law learns to communicate using visual modes, and as electronic resources become more accessible to non-professionals, informational distance is reduced and pressure to change begins to build.[47]

Whether this optimism is justified or realistic is a topic I will discuss further in Chapter 6 when I look at future opportunities on access to legal information. Even where new

[47] Katsh, *supra*, Introduction, note 8 at 86.

technologies can play a positive role in improving access to law-related information, many of the foregoing complexities of the Canadian legal system will likely remain. To compound some of the challenges imposed by the complexities of the Canadian legal system is the nature of the Canadian legal publishing industry and the impact that this industry has on access to law-related information, a topic I discuss next in Chapter 3.