**The Right to Access to Justice: Expanding the Court's Protections Against a Complex Law**

by

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## Abstract

The Canadian legal system has become increasingly inaccessible to those it governs. Cost, delay and complexity have created barriers preventing meaningful access to justice. To date the courts have recognized cost and delay as barriers that trigger a constitutional right to access to justice. This thesis argues that this constitutional right should be extended to include the barrier of complexity.

Grounded in an expectation that Canadians understand both their legal rights and responsibilities, the complexity of Canadian laws and processes has created a fundamental contradiction where persons are required to adhere to laws that they cannot understand. Using both a qualitative content analysis research approach and a doctrinal analysis research approach, this thesis explores the history of complexity, its impacts on specific populations, and its modern day treatment by courts. It then concludes by providing a legal framework against which the constitutional right to access to justice can be extended to include the barrier of complexity.

## Dedication

To my dad. For always pushing me to grow.

To my babes, Ellis and Bobbie. The world is so much better with you in it.

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## Chapter 1: Starting the Conversation

*It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend.*[1]

### Introduction

Canada's legal system is inaccessible to many of those it is said to serve.[2] This inaccessibility limits the ability of Canadians to meaningfully engage with the law, therefore preventing the provision of legal remedy and the development of legal precedent. In an effort to address and better understand this problem over the past decade a number of different national reports have been released that focus on access to justice.[3] These reports have identified key barriers as including cost,[4] delay[5] and complexity[6] and have consistently concluded that

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[1] Francis Bennion, *Statute Law*, 2nd ed (London: Oyez Longman, 1983) at 8.

[2] See Rt Hon Beverly McLachlin, PC, "The Challenges We Face", citing the former Chief Justice of Ontario (remarks presented at Empire Club of Canada, Toronto, 8 March 2007), online: <http://www.scc-csc.gc.ca/court/ju/spe-dis/bm07-03-08-eng.asp> [McLachlin, "The Challenges we face"] ("access to justice is the most important issue facing the legal system"); *Hryniak v Mauldin*, [2014] 1 SCR 87 at para 1 [*Hryniak*] ("[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today"). See also Rt Hon Richard Wagner, "Access to Justice: A Societal Imperative" (7th Annual Pro Bono Conference delivered at Vancouver, British Columbia, October 4, 2018), online: < https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx#:~:text=Access%20to%20Justice%20is%20a%20Human%20Rights%20Issue,equal%20benefit%20of%20the%20law .

[3] See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa 2013), online: < http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [*Roadmap for Change*]; Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa 2013), online: < http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> [*Reaching Equal Justice*]; House of Commons, Standing Committee on Justice and Human Rights, *Access to Justice Part 1: Court Challenges Program* (September 2016) (Chair: *Anthony* Housefather), online: http://www.parl.gc.ca/content/hoc/Committee/421/JUST/Reports/RP8377632/justrp04/justrp04-e.pdf [*Court Challenges Program*].

[4] *Court Challenges Program, supra* note 3 at 6 ("[m]any of [the witnesses] reminded us of the ever-increasing cost of litigation and the fact that, unfortunately, money is often the biggest barrier in accessing justice"); *Reaching Equal Justice, supra* note 3 at 17 ("[t]he primary barrier to feeling as though one could access legal rights was, not surprisingly, a lack of financial resources"); *Roadmap for Change, supra* note 3 at 4, citing Nigel Balmer et al, *Knowledge, Capability and the Experience of Rights Problems* (London: Public Legal Education Network March 2010), online: < http://lawforlife.org.uk/wp-content/uploads/2010/05/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf> at 31-36 ("[o]f those who do not seek legal assistance, recent reports indicate that between 42% and 90% identified cost – or at least perceived cost – as the reason for not doing so").

[5] See *Reaching Equal Justice, supra* note 3 at 18 ("[e]xcessive and harmful delay was often cited as a frustration. … Delay is a frustrating barrier to enforcing legal rights and attaining some measure of justice").

[6] See *Roadmap for Change, supra* note 3 at 1 ("[t]he civil and family justice system is too complex, too slow and too expensive"), at 5 (quoting a participant in a recent study on access to justice "the 'language of justice tends to be…

Canadian citizens do not have adequate access to justice.[7] Over time the courts have responded by recognizing access to justice as a constitutionally protected right foundational to the rule of law[8] and have moved to include both delay and financial cost as protected elements of that right;[9] however, matters of complexity have yet to receive clear judicial acknowledgment as giving rise to the same constitutional protections.

This exclusion is particularly problematic given the inherent contradiction of a complicated legal system: that not only does it create a barrier to the courts, but that these barriers exist in the context of a legal system that operates on the presumption that its citizens know the law.[10] This principle is infused throughout both the common law[11] and statute law.[12] Where the complexity of the law effectively rebuts that presumption, it is Canadian citizens[13] who are at a disadvantage, often through unrealized benefits[14] or the imposition of punitive measures.[15]

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foreign to most people'"); *Reaching Equal Justice, supra* note 3 at 15 ("[l]ack of knowledge seemed to be the greatest initial hurdle to enforcing legal rights").

[7] See *Reaching Equal Justice, supra* note 3 at 15 ("[t]he vast majority of community members acknowledged that the law affords rights and protections, but felt those rights and protections were not honoured or accessible"), at 50 ("[t]he reality today is that not everyone has meaningful access to justice regardless of income"); Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa 2013), online: < http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf> at 1 [*Meaningful Change for Family Justice*] ("Canadians do not have adequate access to family justice").

[8] See *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* [2014] 3 SCR 31 at para 39 [*Trial Lawyers*] ("[t]he s. 96 judicial function and the rule of law are inextricably intertwined … As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice").

[9] See e.g. *Ibid*; *BCGEU v British Columbia (Attorney General),* [1988] 2 SCR 214 [*BCGEU*]; *Christie v British Columbia (Attorney General),* [2007] 1 SCR 873 [*Christie*].

[10] *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers,* [2013] 3 SCR 756 at para 69, citing *Traité de droit pénal canadien* (4th ed. 1998), at p 1098 [*Souveraine*] ("[TRANSLATION] [t]he presumption of knowledge of the law becomes the *quid pro quo* for the principle of legality. The legislature assures citizens that it will not punish them without first telling them what is prohibited or required. But in exchange, it imposes on them an obligation to ask for information before acting. . . .").

[11] See e.g. *ibid* at para 69 ("ignorance of the law is no excuse").

[12] See e.g. *Criminal Code,* RSC 1985, c C-46 s 19 [*Criminal Code*] ("[i]gnorance of the law by a person who commits an offence is not an excuse for committing that offence").

[13] Note that, unless otherwise indicated, for the purposes of this thesis, the use of the term "Canadian" or "Canadian citizens" refers to all persons in Canada regardless of status.

[14] See e.g. Manitoba Advocate for Children and Youth, *A Place Where it Feels Like Home: The Story of Tina Fontaine* (Manitoba: Manitoba Advocate for Children and Youth, 2019) Part 4/5 [*Tina Fontaine*].

[15] See e.g. *Souveraine, supra* note 10*; Criminal Code, supra* note 12*; Rogers v Sudbury (Administrator of Ontario Works),* 2001 CanLII 28086 (ON SC) [*Rogers*] and *Verdict of Coroner's Jury into the Death of Kimberly Ann Rogers* (Sudbury: Office of the Chief Coroner, 2002) [*Inquest into Rogers*].

## Outline

Following this first introductory chapter, the second chapter of this thesis outlines the research methodologies employed throughout this work, defines key terms, and provides a literature review that establishes the problems created by a complex legal system and the need for additional supports and remedies.

Chapter three provides a historical review of legal complexity. Looking as far back as the 1300s, it outlines both how complexity has long plagued legal drafting and the efforts at reform that have developed in order to improve an understanding of the law. Chapter four then moves to establish the effects of a complex legal system as well as the statistical characteristics of human populations most impacted. This review ultimately uncovers that many within the communities identified belong to section 15 protected groups.

Chapter five introduces a trio of cases that arguably amount to a legal trilogy establishing and advancing a constitutional right to access to justice. Applying principles from the trilogy, a case is made for the inclusion of complexity as a barrier which amounts to an infringement on this constitutional right.

Chapter six takes on the theme of equality by further emphasizing the consequences of complexity barriers, specifically highlighting that many of those most impacted are members of Charter protected equity-seeking groups. It then proceeds to outline the potential remedies available for responding to the complexity of the law as well as their legal basis.

## Case example

Woven throughout this thesis is a case example arising from the decision of *Murray v Director of Employment Assistance (Man),*[16] a matter involving the cancellation of Employment and Income Assistance (EIA) benefits on the basis that Ms Murray was in a relationship that met the threshold for common law status. The case of *Murray* dealt with a young single mother on EIA. In September of 2011 she began renting a basement suite that belonged to her boyfriend's parents, with whom he lived upstairs. She and her boyfriend had only been together for a couple of months and did not present themselves to the world as married or in a common law

[16] *Murray v Director of Employment Assistance (Man),* 2015 MBCA 66 [*Murray*]. Note that the author assisted in presenting this case before the Manitoba Court of Appeal. All materials referenced in this thesis are part of the public record. Note also that *Murray* is an administrative law case and so when referenced throughout this thesis it should be considered within that context.

relationship. They did not share financial or parenting responsibilities nor did they claim each other as beneficiaries for any insurance or benefit plan.

Notwithstanding, because Ms Murray had been living in a suite in her boyfriend's parents' basement for three months, the Department of Family Services and Housing[17] ("the Department") applied a "shared residency plus one" test (a test requiring that persons who share a residence and demonstrate either family/social interdependence or financial interdependence must re-apply for benefits as common law partners) and deemed them to be in a common law relationship for the purposes of the Employment and Income Assistance Act.[18]

Ms Murray was given the option of either adding her boyfriend to her file as a common law partner or having her file closed. Because Ms Murray did not agree to have her boyfriend added, her file was closed and her benefits terminated. Soon after, as a result of her financial status, she applied to the Department for emergency supports, upon which she received a $30 voucher to purchase food and diapers.[19]

Ms Murray appealed to the Social Services Appeal Board (SSAB) where she appeared without a lawyer, appealing on the basis that "my worker states that I am in a common law relationship when in fact I am not. We have separate bedrooms & are boyfriend/girlfriend but do not fit any of the other criteria on the common law assessment sheet."[20] The SSAB denied her appeal on January 20, 2012, upholding the application of the "shared residency plus one" test.

Ms Murray then retained the services of the Public Interest Law Centre (PILC)[21] who appealed to the Court of Appeal on the following two questions:

> 1) Did the Board err in law in its interpretation of s. 5(5) of the EIA Act, in particular the meaning of "cohabiting in a conjugal relationship"?
> 2) Did the Board err in improperly fettering its discretion when it relied on s. 8.1.4 of the Policy to determine whether [Ms Murray] was cohabiting in a conjugal relationship?[22]

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[17] Now the Department of Families.
[18] *The Employment and Income Assistance Act*, CCSM, c E98.
[19] *Murray v Director of Employment Assistance (Man)*, 2015 MBCA 66 (Factum of the Appellant at para 15) [*Murray Factum of the Appellant*].
[20] *Ibid* at para 14.
[21] The Public Interest Law Centre is an independent office of Legal Aid Manitoba, operating at arms length from government, providing representation on matters including those impacting human rights, environment, low-income persons and Indigenous persons.
[22] *Murray, supra* note 16 at para 2 ("[t]he right of appeal under subs. 23(1) of the *SSAB Act* is limited to questions of jurisdiction or a point of law, and then only with leave from a judge of the Court of Appeal. Leave was granted on December 3, 2014 (2014 MBCA 110), on … two questions of law").

In particular, counsel for Ms Murray pointed to harm caused by the "shared residency plus one" test, relying on a 2010 Manitoba Ombudsman report which found that the practice ran the risk of "forcing women into unhealthy dependent relationships through the premature termination of social benefits"[23] as well as case law establishing that narrow interpretations of "spouse" are a violation of section 15 equality rights.[24]

Notwithstanding the importance of these legal questions, in particular as they relate to women with low-economic status, the Court of Appeal found that it could not consider the matter for the reasons below, specifically that 1) these arguments raised new issues not addressed before the SSAB, 2) the matter was now moot.

**New issues raised on appeal**

Administrative tribunals play a parallel role to courts where they are intended to provide a more affordable, accessible and specialized decision making process. As a result, in some instances (such as before the SSAB) there is no transcription or recording of proceedings. In Ms Murray's case, this meant that the Court of Appeal had only the SSAB's decision from which to infer what had been or had not been argued at the tribunal level. Because the SSAB decision did not reference arguments relating to "shared residency plus one" the court inferred that they must not have been raised.[25]

Finding that the matter of "shared residency plus one" had not been raised before the SSAB, the court held that it could not be considered on appeal. It is worth noting here that the arguments put forward by counsel on appeal involved nuanced interpretations of multiple pieces of complex legislation, case law and secondary sources. Notwithstanding, the message from the

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[23] *Murray Factum of the Appellant, supra* note 19 at para 52, citing Manitoba Ombudsman Report on Manitoba's Employment and Income Assistance Program, December 2010, at 92 [*Manitoba Ombudsman Report*].

[24] *Murray Factum of the Appellant, supra* note 19 at para 51, citing *Falkiner v Ontario (Ministry of Community and Social Services)*, (2002) 212 DLR (4th) 633 (Ont CA) at para 60 [leave to appeal allowed in 2003, 181 OAC 197] [*Falkiner*] (the Court of Appeal found that an overly-broad definition of "spouse" infringes on section 15(1) equality rights, stating: "The Regulation captures as part of a "couple", individuals who have not formed relationships of such relative permanence as to be comparable to marriage, whether formal or common law. It makes couples, or family units, out of individuals like the Respondents who have made no commitment to each other, with accompanying voluntary assumption of economic interdependence. There is all the difference in the world between a person, with her own money, sharing accommodation in the hope that an inchoate relationship may flourish, versus a person whose financial support is largely in the hands of her co-habitant who has no legal obligation towards her and her children"). Also citing, at para 52, *Manitoba Ombudsman Report, supra* note 23 at 92 ("[d]efining common-law unions more narrowly than is reflected in society may run the risk of forcing women into unhealthy dependent relationships through the premature termination of social benefits").

[25] *Murray, supra* note 16 at para 15.

court was that, in order for it to make any determinations on the matter Ms Murray would have had to have introduced this evidence before the SSAB where she faced a thirty day filing deadline and was not represented by counsel.

**Mootness**

The SSAB provided their decision denying Ms Murray's appeal on January 20, 2012. Her appeal before the Court of Appeal wasn't heard until June 10, 2015. By the time of her appeal Ms Murray was no longer receiving EIA benefits. On appeal counsel argued that her matter should still be heard because of the importance of the legal questions at stake and the reality that, given the timeframe for reaching the Court of Appeal, many who rely on EIA will have to make alternative housing and income arrangements in the interim.[26] Notwithstanding, the Court of Appeal found that her appeal presented no live issue and was therefore moot.

The case, as explored throughout this thesis, provides a clear example of both the ways in which a complex legal system prevents access to justice as well as the impact of inaccessibility in advancing the law, in particular as it reflects the needs of vulnerable populations.

## Conclusion

The aim of this thesis is to provide a constitutional grounding for a right to access to justice in the form of comprehension. Where conversations surrounding access to justice have focused on access to counsel and delay, they have sought to answer the question of how to create access without considering why. This thesis reveals that the barrier of complexity is at least equally as problematic as those of cost and delay, if not even more foundational. But for an inaccessibly complex legal system, the need for access to lawyers as legal translators would be significantly reduced. Further, where the law is so complex that one does not even know their rights, one will hardly be concerned with timely access.

[26] Note that counsel relied on the test from *Borowski v Canada (Attorney General*, (1989) 92 NR 110 (SCC) at para 16 ("[f]irst it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case"), paras 31, 34, 40 (please note also the rationales for this test as provided in the Supreme Court case; "[t]he first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system"; "[t]he second broad rationale on which the mootness doctrine is based is the concern for judicial economy"; "[t]he third underlying rationale of the mootness doctrine is the need for the couret to demonstrate a measure of awareness of its proper lawmaking function").

Through a review of historical and present day reporting and judicial decision making, this work identifies a need for a more robust and directed conversation about complexity as a key barrier to access to justice, ultimately providing a legal framework for recognizing the barrier of complexity as constitutionally protected and in need of remedy.

## Chapter 2: A Complex Legal System is a Barrier to Access to Justice - The Problem

*There is truth in the proposition that if we cannot understand our rights, we have no rights.*[27]

### Introduction

It is well established that the Canadian legal system is facing a critical challenge in terms of access to justice. Provincial,[28] national[29] and even international[30] reports have consistently found that Canadian citizens do not have adequate access to the legal system.[31] This same conclusion has been echoed by the Canadian judiciary,[32] including the former Chief Justice of the Supreme Court of Canada, Beverly McLachlin who famously stated that "access to justice is the most important issue facing the legal system."[33] This access issue is exacerbated by the pervasive nature of the law, with statistics showing that almost every Canadian will experience a "justiciable event" in their lifetime.[34]

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[27] Rt Hon Beverley McLachlin, PC, "Preserving Public Confidence in the Courts and the Legal Profession" (Distinguished Visitor's Lecture, University of Manitoba, Winnipeg, Manitoba, February 2, 2002) [McLachlin, "Preserving Public Confidence"].

[28] See e.g. *Justice Starts Here*, *supra* note 3; Access to Justice Committee, *Review of the Law Society's Access to Justice Approach: Call for Comment* (Ontario: Law Society of Ontario, February 2019), online: < https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2019/access-to-justice-consultation-report.pdf>.

[29] See e.g. *Roadmap for Change*, *supra* note 3; *Reaching Equal Justice*, *supra* note 3; *Court Challenges Program*, *supra* note 3.

[30] See e.g. World Justice Project, *Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries* (Washington, DC, 2019), online: < https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf> [*Global Insights on Access to Justice*]; Task Force on Justice, *Justice for All: The Report on the Task Force on Justice* (New York: Center on International Cooperation, 2019), online: < www.justice.sdg16.plus> [*Justice for All*].

[31] See *Reaching Equal Justice*, *supra* note 3 at 15; *Meaningful Change for Family Justice*, *supra* note 7 at 1; *Global Insights on Access to Justice*, *supra* note 30 at 29; Allison Fenske & Beverly Froese, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba* (Manitoba: Canadian Centre for Policy Alternatives, November 2017), online: <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2017/11/Justice_Starts_Here_PILC.pdf> [*Justice Starts Here*].

[32] See e.g. Hon Thomas A Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (2012) 63:1 UNBLJ 38 at 39 (according to "nearly any standard, our current situation falls far short of providing access to the knowledge, resources and services that allow people to deal effectively with civil and family legal matters").

[33] *Roadmap for Change*, *supra* note 3 at 1. See also R Wagner, *supra* note 2, citing Kirk Makin, "Supreme Court judge warns of 'dangerous' flaws in the system," *The Globe and Mail* (13 December 2012) at A1 (this sentiment was echoed by the current Chief Justice of Canada, Richard Wagner, in his 2018 address "If you don't make sure there is access to justice, it can create serious problems for democracy").

[34] Social Sciences and Humanities Research Council of Canada, *Everyday Legal Problems and the Cost of Justice in Canada* (Toronto: Canadian Forum on Civil Justice, 2018), online: < https://cfcj-fcjc.org/wp-content/uploads/Everyday-Legal-Problems-and-the-Cost-of-Justice-in-Canada-Cost-of-Justice-Survey-Data.pdf> at 25 [*Cost of Justice in Canada*]; *Reaching Equal Justice*, *supra* note 3 at 34.

This chapter outlines the research to date on access to justice,[35] flagging the three most common barriers to the legal system: access to legal representation/cost of legal representation,[36] delay, [37] and the complexity[38] of the law.[39]

First off, this chapter walks through the legal theories and methodologies applied within this thesis. It then provides a literature review on both qualitative and quantitative materials relating to access to justice, highlighting that while complexity is routinely mentioned as creating barriers to justice, it has not been clearly identified as a subject for direct review. This gap will be addressed through the remainder of the thesis.

## Theory & Methodology

*[L]aw is politics…* [40]

### Legal Theory

The research and analysis conducted throughout this thesis are grounded in critical legal theory,[41] underscored by a belief that the law is inherently subjective[42] and influenced by political and economic biases.[43] Notwithstanding this overarching approach, however, where a critical legal theory lens would be too limited, this work has incorporated perspectives beyond that theoretical scope.

For example, critical legal theory has received criticism for failing to incorporate intersectional experiences such as race and gender.[44] Given the significant gap that this creates,

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[35] See e.g. *Reaching Equal Justice, supra* note 3 at 36.
[36] See *Ibid,* at 15; *Court Challenges Program, supra* note 3; *Roadmap for Change, supra* note 3 at 4.
[37] See *Reaching Equal Justice, supra* note 3 at 18.
[38] See *Ibid* at 15; *Roadmap for Change, supra* note 3 at 1.
[39] Note that it has not been uniformly accepted that financial cost, delay and complexity make up the three most common barriers to access to justice, however, I would argue that this is the case. For support of this position, see R Wagner, *supra* note 2 (Chief Justice Wagner identifies cost, delay, and lack of information as three key barriers to access to justice); Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 978 [Farrow, "What is Access to Justice"] ("[s]pecific opinions and ideas about what could be done to promote a more accessible justice system (particularly from a procedural perspective) often included cost, simplicity, and speed").
[40] Raymond Wacks, "Theories of Justice" Chp 9 in *Understanding Jurisprudence*, 4th ed (New York: Oxford University Press, 2015) at 324.
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid* at 319 ("… far from expressing rationality, the law reflects political and economic power…the law is neither neutral or objective").
[44] See *ibid* at 324-326, 339-355; Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1997); Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991).

particularly when studying legal access, this thesis specifically identifies and incorporates intersecting and compounding experiences of and impacts on equity-seeking groups.[45]

Secondly, in response to concerns that a critical legal theory approach suffers from an inability to provide realistic and constructive outcomes,[46] efforts have been made to provide practical tools for moving forward. These efforts include a legal analysis framework that has been developed based on precedent that has already been successfully applied and a review of remedies grounded in practices that have seen success in other forums.[47]

**Methodology**

Using a qualitative content analysis approach[48] and a doctrinal analysis approach,[49] this thesis seeks to provide the following information:

1. A historical and present day review of the state of access to justice within Canada and comparable jurisdictions,[50] specifically as it relates to barriers of complexity.
2. An overview of the effects of the barrier of complexity and the demographics most impacted.
3. A framework for expanding the legal definition of access.
4. A legal basis for a Charter remedy as well as practical recommendations for addressing the barrier of complexity.

[45] Note however, that this thesis is limited in how far it addresses intersectionality and the perspectives of groups based on race, ability, etc. A further exploration of intersectionality is beyond the scope of this thesis.
[46] Wacks, *supra* note 40 at 324; Mark V Tushnet "Critical Legal Theory" in Golding, Martin P & William A Edmundson eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing Ltd, 2004).
[47] Note that this thesis does not include a full review of available and reasonable solutions to the barrier of complexity as that in-depth work would be beyond the scope of this thesis. However, a practical starting point has been provided.
[48] Hsiu-Fang Hsieh & Sarah Shannon, "Three Approaches to Qualitative Content Analysis" (2005) 15:9 Qualitative Health Research 1277 at 1278 ("qualitative content analysis is defined as a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns"); Barbara Downe-Wamboldt, "Content analysis: Method, applications and issues" (1992) 13:3 Health Care for Women International 313 at 314 ("[t]he goal of content analysis is 'to provide knowledge and understanding of the phenomemon under study'").
[49] See, e.g. Paul Chynoweth, "Legal Research in the Built Environment: A Methodological Framework" (University of Salford, 2008) 670 at 672, online: http://usir.salford.ac.uk/id/eprint/12467/1/legal_research.pdf (a doctrinal analysis is "concerned with the formulation of legal "doctrines" through the analysis of legal rules. Within the common law jurisdictions legal rules are to be found within statutes and cases (the sources of law)").
[50] Note that Canadian sources have been the primary focus of this work. Materials from comparable jurisdictions have been used to supplement Canadian information and to provide a more robust narrative.

A qualitative content analysis approach was used in responding to objectives one and two: outlining the historical and current state of the law generally, establishing the extent of the barriers faced by Canadian citizens and identifying patterns based on shared characteristics.

In responding to objectives three and four, a doctrinal analysis approach was used to provide a legal framework for expanding the legal definition of 'access', articulate a legal basis for charter remedies addressing the barrier of complexity, and offer recommendations for potential solutions.

A qualitative and quantitative[51] review of literature and research on access to justice was conducted with a focus on the Canadian legal system but also including international common law systems.[52] Jurisdictions outside of Canada were included in this scope in order to enhance available research, particularly historical research as the Canadian legal system is comparatively new[53] in relation to some of its common law counterparts.[54]

A variety of legal databases were used in conducting this research, including the University of Manitoba Library database, Westlaw, Lexis Nexis, CanLii, vLex, HeinOnline. Major legal platforms including Canadian and American law societies, bar associations and provincial, state and federal justice reporters were also used to identify relevant sources.

This thesis relied on both primary[55] and secondary sources,[56] seeking relevant materials through the use of search terms and phrases including:

- Access to justice
- Plain language
- Complexity and
- Legal barriers
- Legal literacy
- Literacy
- Self-represented litigants
- Legal cost

[51] Looking at both personal experiences and patterns.
[52] Such as the United States, England and Australia.
[53] Note that this statement refers to the Canadian legal system after colonization and that the laws and traditions of Indigenous people existed long before colonization.
[54] For example, England and the United States.
[55] Including case law, hansard, factums, transcripts, treaties and legislation.
[56] Including journals, case briefs and reports.

- Legal delay

A strict timeframe for materials was not followed, but the date of publication and decision were relied on in assessing a source's strength and value. Similarly, research was not limited by specific areas of law such as criminal, family or civil as research to date has not followed a consistent form of categorization.

**Limitations**

In conducting this research it was clear that while there exists considerable research and commentary on the topic of access to justice generally, materials specifically identifying complexity as a barrier to access to justice are not as readily available. As such it was necessary that this work draw on a variety of sources, teasing from each key information that was then distilled into a comprehensive narrative on complexity as a barrier to justice.

This broad scope admittedly gives rise to a number of concerns that must be acknowledged. Specifically, because this research spans multiple areas of law, the impact[57] and judicial treatment[58] of complexity could vary greatly depending on the context. Similarly, reliance has been placed on data collected by various sources which have not necessarily used uniform research methods or drawn from standardized demographics. Efforts have been made to address these concerns by categorizing legal areas where possible, clearly acknowledging potential gaps where they arise and providing a standard list of definitions for the purpose of this thesis.

On a final point, it should be noted that while the limitations within this research run the risk of creating inconsistencies, the intention of this work is not to create a definitive piece on complexity as a barrier to access to justice, but rather, to provide a starting point for the discussion to be taken forward and further.

**Definitions**

As discussed above, terminology and corresponding definitions around access to justice

[57]Including the constitutional impacts in criminal cases – particularly around section 11(b) – that may or may not be arise in other matters.
[58] E.g. loss of money versus loss of freedom.

have not been standardized across Canada. While various writers use common language around access to justice, there is no set list of terms or meanings that are consistently applied. Given the diverse sources relied on within this thesis, the following definitions are based as closely as possible on common terms and uses from the sources relied upon in this thesis and are intended to clarify the use of these terms throughout this work.

***Access to Justice:*** According to the Canadian Department of Justice, access to justice enables "…Canadians to obtain the information and assistance they need to help prevent legal issues from arising and help them to resolve such issues efficiently, affordably, and fairly, either through informal resolution mechanisms, where possible, or the formal justice system, when necessary."[59]

***Access to legal representation/cost of legal representation:*** When discussing access to legal representation the main barrier described is the cost of representation.[60] For that reason and for the purposes of this review, the concepts of access to legal representation and costs of legal representation have been used interchangeably.

***Complexity/Language:*** For the purposes of this analysis, when discussing the barriers of language and complexity, the terms 'complexity' and 'language' will be used interchangeably to refer to an inability to understand the law in one of the official languages, be it through the written word, forms, processes or services of the law.

***Judiciable event:*** According to the Canadian Bar Association's *Reaching Equal Justice* report,[61] a "judiciable event" is a matter which raises "legal issues whether or not it was recognized … as being 'legal' and whether any action taken … to deal with the event involved the use of any part

[59] Research and Statistics Division, *Development of An Access to Justice Index for Federal Administrative Bodies* (Ottawa: Department of Justice, 2017) at 37 [*Access to Justice Index*]. Note that while this is the definition of 'Access to Justice' for the purpose of this thesis, there is broad debate over the appropriate definition of this concept; for further reading see Gerard Joseph Kennedy, *Hryniak, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s* (PhD Dissertation, York University, 2020) at 3 – 6.
[60] *Reaching Equal Justice, supra* note 3 at 17 ("[t]he primary barrier to feeling as though one could access legal rights was, not surprisingly, a lack of financial resources"); *Justice Starts Here, supra* note 31 at 15 ("[e]conomic factors are arguably the most significant determinants of access to justice").
[61] *Reaching Equal Justice, supra* note 3.

of the … justice system."[62]

***Justice**:* For the purposes of this analysis, the term 'justice' is equated with the Canadian legal system. It is made up of the Common Law, statutes, legal forms and legal processes including courts and tribunals. The process of justice can span from the triggering of a judiciable event through to its resolution and enforcement.

***Literacy:*** According to the National Judicial Institute, literacy is "[t]he ability of individuals to use printed and written information to function in society, reach their objectives, broaden their knowledge and increase their potential."[63] 'Functional literacy' is a subset of literacy which is defined by the level of comprehension required to function in society; assessed at a grade 8 reading level and above.[64]

**A review of the literature**

Seven major national studies as well as a number of supplemental references form the foundation of the review provided here. The seven national studies are:

- *Reaching Equal Justice Report: An Invitation to Envision and Act.*[65] This report was prepared by the Canadian Bar Association's Access to Justice Committee in 2013. Referenced throughout this thesis as *Reaching Equal Justice.*
- *Access to Civil & Family Justice: A Roadmap for Change.*[66] Led by former Supreme Court Justice Thomas Cromwell, this report was published by the Action Committee on Access to Justice in Civil and Family Matters in 2013. Referenced throughout this thesis as *Roadmap for Change.*
- *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*.[67] This report was authored by Allison Fensky and Beverly Froese of the

[62] *Ibid* at 34, citing Dame Hazel Genn, *Paths to Justice: What people do and think about going to law* (Oxford: Hart Publishing, 1999) at 12.
[63] Committee on Literacy and Access to Administrative Justice, *Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language* (Ottawa: Council of Canadian Administrative Tribunals, 2005) at 6 [*Literacy and Access to Administrative Justice*], citing Susan Goldberg, *Literacy in the Courtroom: A Guide for Judges* (Ottawa: National Judicial Institute, 2004) p 9.
[64] *Literacy and Access to Administrative Justice, supra* note 63 at 6.
[65] *Reaching Equal Justice, supra* note 3.
[66] *Roadmap for Change, supra* note 3.
[67] *Justice Starts Here, supra* note 31.

Public Interest Law Centre and was published in 2017 by the Manitoba branch of the Canadian Centre for Policy Alternatives. Referenced throughout this thesis as *Justice Starts Here.*

- *Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations*.[68] This report was prepared for the Canadian Bar Association's Access to Justice Committee in 2013 by Amanda Dodge. Referenced throughout this thesis as *Access to Justice Metrics.*
- *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self- Represented Litigants, Final Report*.[69] Written by Julie Macfarlane, this report was published by the National Self-Represented Litigants Project in 2013. Referenced throughout this thesis as *The National Self-Represented Litigants Project Final Report*.
- *Everyday Legal Problems and the Cost of Justice in Canada: Cost of Justice Survey Data*.[70] Lead by a research team including Trevor Farrow (Principal Investigator), Lisa Moore, Nicole Aylwin and Les Jacobs, this report was published by the Canadian Forum on Civil Justice in 2018. Referenced throughout this thesis as *Cost of Justice in Canada*.
- *Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language.*[71] This report was written by the Committee on Literacy and Access to Administrative Justice and published by the Council of Canadian Administrative Tribunals in 2005. Referenced throughout this thesis as *Literacy and Access to Administrative Justice.*

**An introduction to the issue**

> *[W]e should do what we can to make the law clear and accessible to average Canadians. The law is, perhaps, the most important example of how words affect people's lives.*[72]

[68] Amanda Dodge, "Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations" (Ottawa: Canadian Bar Association, 2013), online: www.cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf [*Access to Justice Metrics*].
[69] Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report* (Ottawa: National Self-Represented Litigants Project, May 2013), online: < https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [*The National Self-Represented Litigants Project Final Report*].
[70] *Cost of Justice in Canada, supra* note 34.
[71] *Literacy and Access to Administrative Justice, supra* note 63.
[72] McLachlin, "Preserving Public Confidence", *supra* note 27.

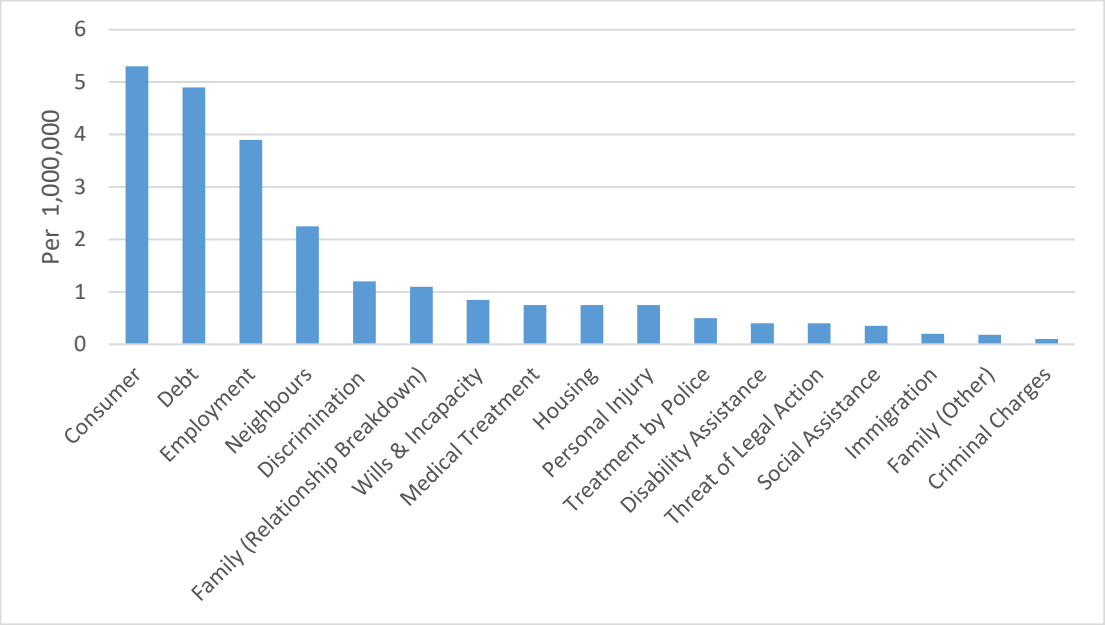
The inaccessibility of Canada's legal system has been and continues to be a critical issue preventing Canadians from meaningfully engaging with the law.[73] The barriers to justice that are experienced by Canadians are made all the more troubling when considered against the ubiquitous nature of the law and its impact on almost every aspect of daily life. In 2018 the Canadian Forum on Civil Justice released a report on the *Cost of Justice in Canada*.[74] This report relied on survey data compiled from 3,263 interviews[75] and found that, throughout their lifetime, almost every Canadian will face a "justiciable event".[76] More specifically, it found that within the span of 3 years, 48.4% of Canadian adults will "experience one or more everyday legal problems that they consider to be serious or difficult to resolve."[77]

**Table 2.1: Total Number of People Experiencing One or More Legal Problems**[78]

| Within a given three-year period, an estimated 11,420,889 adults in Canada (or 48.4% of people over 18) will experience one or more everyday legal problems that they consider to be serious or difficult to resolve. | | |
|---|---|---|
| Number of Problems | Percentage of People | Population Estimate |
| 1 | 18.6% | 4,376,784 |
| 2 | 9.7% | 2,291,551 |
| 3 | 5.9% | 1,384,864 |
| 4 | 3.9% | 918,953 |
| 5 | 3.3% | 771,913 |
| 6 | 1.7% | 412,456 |
| 7 | 1.6% | 387,034 |
| 8 | 1.0% | 230,900 |
| 9 | 0.6% | 138,785 |
| 10 | 0.5% | 112,372 |
| 11 | 0.3% | 65,083 |
| 12 | 0.3% | 68,011 |
| 13 | 0.2% | 58,522 |
| 14 | 0.3% | 76,211 |
| 15 | 0.2% | 44,044 |
| 16-17 | 0.1% | 18,582 |
| 18 | 0.1% | 30,092 |
| 19 or more | 0.1% | 34,732 |
| Total | 48.4% | 11,420,889 |

[73] See McLachlin, "The Challenges we face", *supra* note 2; *Hryniak*, *supra* note 2.
[74] *Cost of Justice in Canada*, *supra* note 34.
[75] *Ibid* at 5-6.
[76] *Ibid* at 25; *Reaching Equal Justice*, *supra* note 3 at 34.
[77] *Cost of Justice in Canada*, *supra* note 34 at 25; see also *Reaching Equal Justice*, *supra* note 3 at 34.
[78] *Cost of Justice in Canada*, *supra* note 34 at 25.

**Table 2.2: Number of People Experiencing One or More Legal Problems Within Problem Types**[79]




In and of themselves, these statistics may not seem all that alarming; however, when considered in the context of an inaccessible justice system, they paint a picture of the difficult relationship faced by Canadians between the prevalence of their legal matters and access to their resolution.

**Cost**

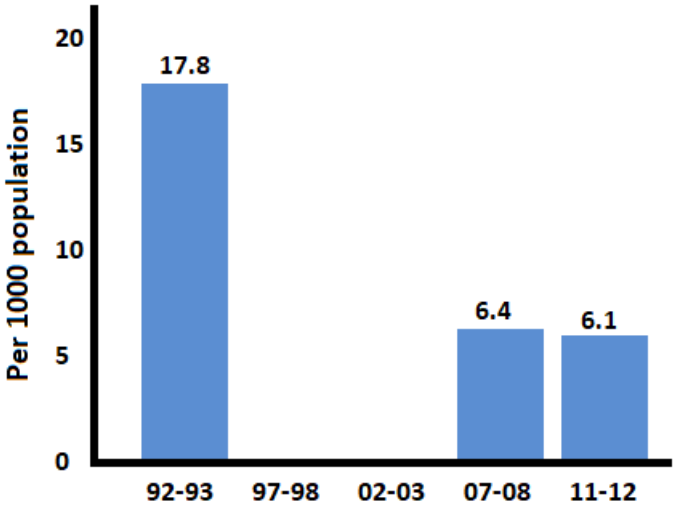
The most common barrier to justice experienced by Canadians is the cost of legal representation.[80] In the development of its 2013 report: *Access to Justice Metrics*[81] the Canadian Bar Association's (CBA) Access to Justice Committee conducted thirteen community consultations with marginalized Canadians.[82] From these consultations they found that "[t]he primary barrier to feeling as though one could access legal rights was, not surprisingly, a lack of

[79] *Ibid* at 25.
[80] See *Reaching Equal Justice, supra* note 3 at 17; *Justice Starts Here, supra* note 31 at 15; Ontario Civil Legal Needs Project, *Listening to Ontarians* (Toronto: Ontario Civil Legal Needs Project Steering Committee, May 2010) at 39 [*Listening to Ontarians*]; *Access to Justice Metrics, supra* note 68 at 2, quoting a person with a disability in Toronto ("[t]he good old dollar defines what our legal rights are"). Note that for the purpose of this thesis, the cost of legal representation and access to legal representation are treated as one in the same. The matter being addressed is not whether there are enough lawyers, but that persons cannot afford their services.
[81] *Access to Justice Metrics, supra* note 68.
[82] *Ibid* at 1.

financial resources."[83] These same findings were echoed in a recent Manitoba-specific report published by the Manitoba branch of the Canadian Centre for Policy Alternatives entitled *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba.*[84] In producing this report, seven focus groups were conducted across Manitoba. When asked what access to justice meant to them, the most common answer from participants was "access to legal representation."[85]

This financial barrier to legal representation is not a new problem; however, it is a growing problem as Legal Aid funding and eligibility have been steadily on the decline since the 1990s. Across Canada, civil Legal Aid funding has decreased by over 20% between 1994 and 2012[86] and the approval of civil Legal Aid applications has decreased by 65.7% between 1992 and 2012:[87]

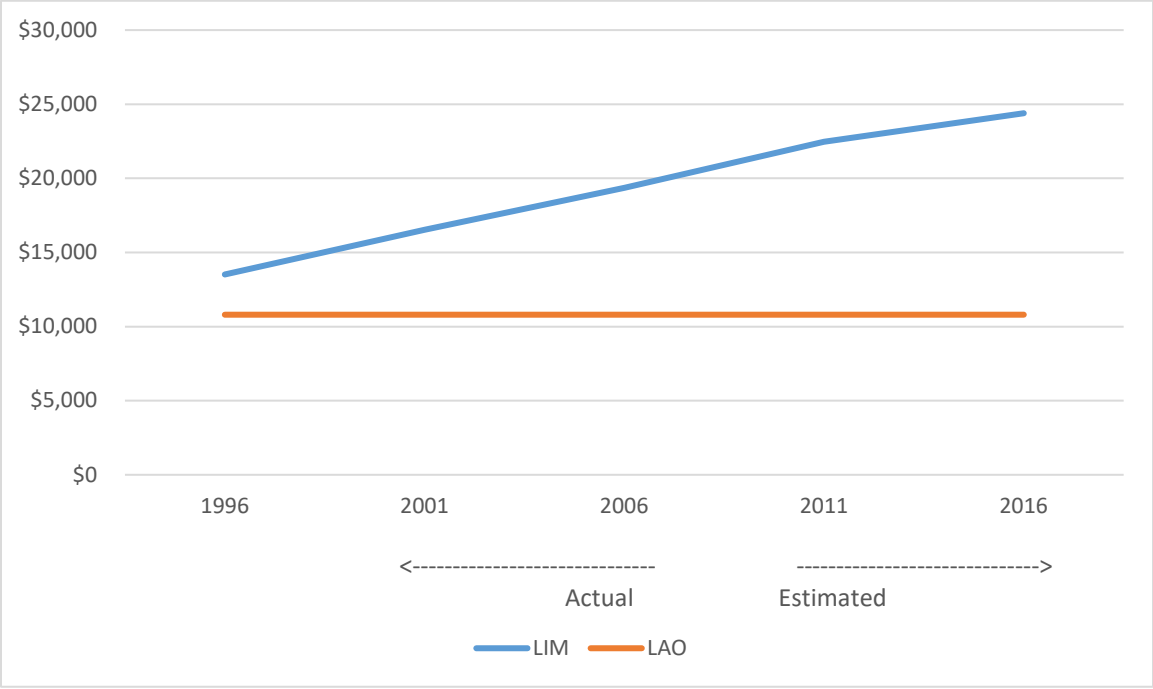
**Table 2.3: Approved Applications for Civil Legal Aid, 1992-2012[88]**




[83] *Ibid* at 2.
[84] *Justice Starts Here, supra* note 31.
[85] *Ibid* at 2.
[86] *Reaching Equal Justice, supra* note 3 at 40.
[87] *Ibid* at 40, citing Ab Currie, "The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012" (Toronto: CFCJ, 2013), online: <www.cfcj-fcjc.org/commentary/the-state-of-civil-legal-aid-in-canada-by-thenumbers-in-2011-2012> ("[c]urrent levels of expenditures and services are considerably lower than the historical high levels in the early to mid 1990's. In 1994-1995 direct service expenditures on civil legal aid were $329,787,000. This was $11.37 per capita. In 2007-2008 per capita direct service expenditures had declined to $7.89 per capita ($259,946,000). Per capita direct service expenditures on civil legal aid increased to $8.96 in 2011-2012 ($309,022,000). This represents a 13.6% increase in per capita direct service expenditures over the recent five-year period. However, it reflects a 21.2% decline from the level of per capita direct service expenditure in 1994-1995").
[88] *Reaching Equal Justice, supra* note 3 at 40.

In many jurisdictions, the threshold for qualifying for Legal Aid is so low that persons must either be receiving income assistance or be earning a sum only slightly over that amount.[89] Worse still, the *Reaching Equal Justice* report found that the eligibility criteria in Alberta was so difficult to meet that even recipients of *Assured Income for the Severely Handicapped* did not qualify for provincial Legal Aid.[90] In Ontario, the gap for eligibility has become so great that a review of household income[91] found that while 16% of Ontarians live below the Low Income Measure (LIM),[92] only 7% would qualify for Legal Aid.[93]

**Table 2.4: Certificate Eligibility and LIM (Single Person Household) [94]**




[89] *Ibid* at 39.
[90] *Ibid* at 39.
[91] Note this is a single Person Household.
[92] Statistics Canada, *Dictionary, Census of Population, 2016* (Ottawa: Statistics Canada, 2017) ("[t]he Low-income measure, after tax, refers to a fixed percentage (50%) of median adjusted after-tax income of private households. The household after-tax income is adjusted by an equivalence scale to take economies of scale into account. This adjustment for different household sizes reflects the fact that a household's needs increase, but at a decreasing rate, as the number of members increases").
[93] *Reaching Equal Justice*, *supra* note 3 at 39, citing Nye Thomas (Presentation delivered at the CBA Envisioning Equal Justice Summit, Vancouver, April 2013) online: <www.cba.org/CBA/cle/PDF/JUST13_Slides_B1.pdf>.
[94]Policy & Strategic Research Department, "Thinking about Legal Aid Eligibility" (PowerPoint, Legal Aid Ontario, April 2013) at 8, online: www.cba.org/CBA/cle/PDF/JUST13_Slides_B1.pdf (comparing certificates of eligibility against LIM for a single person household).

Little relief is projected for this growing chasm as the Ontario government has cut Legal Aid spending by 30% in their 2019 budget[95] and is moving, with the introduction of Bill 161, to remove the words "access to justice" from Legal Aid Ontario's Mandate,[96] an almost ironic act as their reduction in spending has the paralleled effect of literally removing access to justice.

**Delay**

In addition to the barriers created by cost, Canadian research has identified delay within the justice system as a significant barrier to access.[97]

According to the *Reaching Equal Justice* report, consultations with persons living in marginalized conditions[98] found "excessive and harmful delay"[99] to be an often cited frustration. Referencing the legal system itself as the cause for delay, those consulted described needing to take time off work to attend court only to face multiple adjournments, months of waiting to have a chance to be heard by the court and delays in receiving help through legal aid; the culmination of these experiences leading to negative impacts in other areas of their lives.[100]

These frustrations lend support to findings by the World Justice Project[101] which, for the

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[95]Legal Aid ON Lawyers Union, "New Legal Aid Legislation Removes Access to Justice – Literally" *Society of United Professionals* (9 December 2019), online: https://www.thesociety.ca/new_legal_aid_legislation_removes_access_to_justice_literally .

[96] Paola Loriggio, "Proposed law would undermine access to justice in Ontario, experts warn", *Canadian Press* reported in *National Post* (10 June 2020), online: https://nationalpost.com/pmn/news-pmn/canada-news-pmn/proposed-law-would-undermine-access-to-justice-in-ontario-experts-warn.

[97] See *Reaching Equal Justice, supra* note 3 at 46, referencing the following annual reports: Supreme Court of BC 2012 Annual Report at 24: www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2012%20Annual%20Report.pdf; Alberta Court of Queen's Bench Annual Report at 41: www.albertacourts.ab.ca/LinkClick.aspx?fileticket=q1Bq8QoSaIk%3D&tabid=92&mid=704; The Provincial Court of Manitoba 2010 Annual Report at 10, 17, 18: www.manitobacourts.mb.ca/pdf/annual_report_2010-2011. Pdf; Ontario Superior Court of Justice Annual Report at 25: www.ontariocourts.ca/scj/en/reports/annualreport/10-12.pdf Ontario Court of Justice Biennial Report 2008-2009: www.ontariocourts.ca/ocj/ocj/publications/biennialreport-2008-2009 ("[a] scan of recent annual reports shows an ongoing concern in many courts and tribunals with delays and the growing length of proceedings").

[98] *Reaching equal justice, supra* note 3 at 17 ("[a]s part of the CBA's Envisioning Equal Justice Initiative, the Committee worked with community partners in Calgary, Saskatoon, Toronto, Montreal and the Maritimes to hold 13 consultation sessions. These focus group sessions were held exclusively with people living in marginalized conditions: low-income adults and youth; racialized groups; single mothers; and people with disabilities").

[99] *Ibid* at 18.

[100] *Ibid* at 18 ("[e]xcessive and harmful delay was often cited as a frustration. The system itself creates delay. Community members described having to attend court for repeated adjournments, to wait many months to be heard in court, to miss work for repeated court appearances and to wait for legal aid's help. Delay is a frustrating barrier to enforcing legal rights and attaining some measure of justice. Second, delay is created by community members' lack of information. Insufficient guidance wastes their time. Often the delay is harmful, leading to negative consequences in other areas of their lives").

[101] The World Justice Project, "Rule of Law Index" (2012), online:http://worldjusticeproject. org/country/canada [*Rule of Law Index*].

year 2011, when assessing access to justice on civil justice matters, ranked Canada as 9th out of 12 North American and Western Europe Countries. Two factors which impacted this finding were "inadequate access to legal counsel" and "delays in the resolution of civil matters". [102]

**Complexity**

*… unknown rights are not rights at all.*[103]

While cost of legal representation and delay have been accepted as key barriers to accessing justice, the complexity and language of the legal system has also often been cited as a major barrier to accessing justice in Canada.[104] According to *Reaching Equal Justice,* following the barrier of cost, "[l]ack of knowledge seemed to be the greatest hurdle to enforcing legal rights".[105] This barrier was well laid out in the CBA's 1996 *Systems of Civil Justice Task Force Report*:

> Many aspects of the civil justice system are difficult to understand for those untrained in the law. Without assistance it is difficult, if not impossible, to gain access to a system one does not comprehend. Barriers to understanding include:
>
> unavailability and inaccessibility of legal information;
> complexity of the law, its vocabulary, procedures and institutions;
> and linguistic, cultural and communication barriers.[106]

The barrier of complexity cannot be studied in a vacuum, but must be considered in conjunction with other barriers to access, particularly access to legal representation as access to one largely nullifies the need for the other. It is logical that complexity follows cost of representation as a key access barrier as lawyers often act as both navigators[107] and translators of the justice system, working as intermediaries between a complex system and the persons seeking to use it. Whether or not someone is able to comprehend the legal system is much less significant

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[102] *Reaching Equal Justice, supra* note 3 at 48, referencing *Rule of Law Index, supra* note 101 ("[t]wo particular sub-factors contribute to Canada's low ranking − delays in the resolution of civil matters and inadequate access to legal counsel").
[103] *Justice Starts Here, supra* note 31 at 14, quoting a representative of the Community Legal Education Association.
[104] Farrow, "What is Access to Justice", *supra* note 39 at 978 ("[m]ake the whole thing much less complex"). See also R Wagner, *supra* note 2.
[105] *Reaching Equal Justice, supra* note 3 at 17.
[106] *Roadmap for Change, supra* note 3 at 8, citing Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, August 1996) at 16.
[107] *Justice for All, supra* note 30 at 65 ("…people with more complicated problems need navigators to guide them on their journey. This is the traditional role of lawyers…").

when they have someone (a lawyer) available to explain it. Where one is unable to afford legal representation[108] and, essentially, such translation and navigation services, it makes sense that understanding a complex legal system would become the next obstacle in accessing justice.[109] It is here where the unaffordability and the complexity of the law collide, which creates a space where persons either do not know their rights, do not believe that they can enforce their rights, or, as is commonly the case, where they decide to represent themselves:

> It is a fact that today thousands of people in our country cannot afford a lawyer and must rely on their own skills and resources to access the justice system, be it through the courts or one of the many administrative tribunals. Those who represent themselves often do not understand the legal system, the role of courts and tribunals, or the law. When these self-represented litigants also suffer from low literacy skills, the challenges for them and the justice system are compounded.[110]

Largely as a result of the expense of legal representation,[111] increasing numbers of people have no choice but to represent themselves,[112] even where they would prefer to have a lawyer.[113]

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[108] See *The National Self-Represented Litigants Project Final Report, supra* note 69 at 12 ("the primary reason for self representation is financial."); *Reaching Equal Justice, supra* note 3 at 30 ("[m]ore than half the SRLs started with counsel but were unrepresented at the time of the interview almost always for financial reasons").

[109] *The National Self-Represented Litigants Project Final Report, supra* note 69 at 62 ("...as a person with a chronic illness it has been challenging to learn about court procedures and laws. I chose to represent myself because I am on a fixed income and can no longer afford counsel. I have spent all my life savings and more on a five-year divorce process").

[110] *Literacy and Access to Administrative Justice, supra* note 63 in the forward.

[111] See e.g. *The National Self-Represented Litigants Project Final Report, supra* note 69 at 8 ("[b]y far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel"); *Reaching Equal Justice, supra* note 3 at 44, citing Rachel Birnbaum, Nick Bala, Lorne Bertrand, "The rise of self-representation in Canada's family courts: The complex picture revealed in surveys of judges, lawyers and litigants" (2013) 91 Canadian Bar Review 67 ("[t]hey conclude that the reasons for not having counsel are complex. The main reason is financial, including ineligibility for legal aid"). See also footnote 18, citing John Dewar, Barry W Smith and Cate Banks, "Litigants in Person in the Family Court of Australia: Research Report No. 20," (2000) online: http://mail.familylawcourts.gov.au/wps/wcm/resources/file/ebb87e04879610d/report20.pdf ("However, Dewar ... found that there was an identifiable link between the unavailability of legal aid and self-representation in the Family Courts.").

[112] *The National Self-Represented Litigants Project Final Report, supra* note 69 at 15 ("[t]here have been dramatic increases in the numbers of people representing themselves (self-represented litigants or SRL's) themselves in family and civil court over the past decade across North America. In some family courts this number now reaches to 80% and is consistently 60-65% at the time of filing").

[113] *Reaching Equal Justice, supra* note 3 at 44 ("[u]nrepresented people are now so common place that we tend to quickly refer to them as 'SRLs' (self-represented litigants), despite the fact that the vast majority state that they would prefer to have access to counsel to assist them with their legal matter"). See also *Pintea v Johns*, 2017 SCC 23, [2017] 1 SCR 470 (Factum of the Intervener, National Self-Represented Litigants Project at para 8) [*Pintea Factum*], citing *The National Self-Represented Litigants Project Final Report, supra* note 69 at 127 ("[s]elf-representation is therefore rarely a choice. It is usually a last resort or necessity for this growing number of litigants in Canada").

This population of people is often referred to as self-represented litigants or SRLs.[114]

In Canada, we have seen a surge in SRLs appearing before our courts. Where twenty years ago it was estimated that fewer than 5% of litigants were self-represented, those numbers now range from 10% to as high as 80% depending on the court. With civil and family law matters reflecting the highest number of SRLs, it is estimated that approximately 50% of litigants in family matters are self-represented.[115]

Much of the data available surrounding access to justice looks at the experiences of SRLs, as it is a population that typically interacts with the justice system without formal legal training. While these perspectives are key in understanding access to justice, it is important to note that the voices that are often missed in this research are those of persons who, though they have likely experienced a judiciable event in their lifetime, are unaware of the legal nature of their matters and are therefore unable to make a choice about whether or not to address their matter. An example of how this plays out can be found in the case of Ricky Melanson,[116] a recipient of EIA benefits who was evicted from his home for refusing to sign a waiver allowing his landlord to open his mail. Through the help of his case manager and PILC he was able to file a claim at the Residential Tenancies Branch which confirmed the illegality of the landlord's actions and provided Mr. Melanson with an award of damages. Although Mr. Melanson's legal rights were ultimately realized, that was not the reality for many other tenants in his building who signed waivers allowing their mail to be opened as they did not realize they had any other options available to them.[117]

The complexity faced by people attempting to access the legal system can put Canadian citizens in a position where they are responsible for both knowing and conforming to a law that they do not understand.[118] This can arise at any point throughout the legal process, from knowing

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[114] *Reaching Equal Justice, supra* note 3 at 28.
[115] *Ibid* at 44, citing Birnbaum, *supra* note 111. See also *Pintea Factum, supra* note 113 at para 7, citing *The National Self-Represented Litigants Project Final Report, supra* note 69 at 15 ("[t]here has been a dramatic increase in the number of people representing themselves in family and civil courts across Canada over the past decade. In certain courts the number of SRLs now reaches 80% of litigants, and is regularly above 60% at the time of filing").
[116] Carol Sanders, "Welfare recipient fights hotel's policy: Refused to let landlord open mail, evicted", *The Brandon Sun* (27 January 2011) online: https://www.brandonsun.com/breaking-news/welfare-recipient-fights-hotels-policy-114706174.html.
[117] *Ibid* ("'[i]t's going to affect a large number of people...There are many tenants on social assistance at the Garrick Hotel who signed waivers under the threat of eviction,' Novek said. 'From our perspective, it's going to help all of them and send a strong message to landlords across the city'").
[118] See e.g. *Criminal Code, supra* note 12 s 19.

whether a justiciable event has occurred to responding to legal matters and enforcing legal resolutions.[119]

### *Literacy in Canada*

> *Most people, literate or not, don't understand even the simplest legal expressions.*[120]

The complexity of the legal system can manifest itself in many ways, from understanding the language of the law and its interpretations to the content of the law, the hierarchy of legal precedents and understanding legal process: how and where to engage with courts and tribunals and the etiquette of participation. Notwithstanding these many components, however, the starting point for even attempting to engage with the legal system often requires an ability to consider the law in its written form.[121] To best understand, then, how Canadians experience the legal barriers of complexity and language, it is important to first review literacy levels of Canadians, which is understood to be:

> [T]he ability of individuals to use printed and written information to function in society, reach their objectives, broaden their knowledge and increase their potential.[122]

According to a report by the Committee on Literacy and Access to Administrative Justice (CLAAJ),[123] using a measurement based on school grade levels as the benchmark, functional literacy is generally accepted as being a grade eight reading level.[124] In applying this

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[119] See *The National Self-Represented Litigants Project Final Report, supra* note 69 at 54 ("[f]our particular stages/ tasks within the legal process featured consistently in stories of feeling overwhelmed. These were: completing, filing and serving paperwork and forms; participating in the discovery process as a SRL … and conducting one's case at a hearing. Finally there were also many disappointed and frustrated expectations regarding the post-trial process, especially regarding collections").

[120] *Literacy and Access to Administrative Justice, supra* note 63 at 11, citing Lawyers for Literacy, *Communicating Clearly: How to Recognize When Your Client Doesn't Understand and How You Can Help* (Vancouver: Canadian Bar Association, BC Branch).

[121] Note that this is a generalization. Persons can use accessibility aids such as electronic screen readers, however, this requires access assistive technology as well as an understanding of complex vocabulary. This thesis has not specifically considered the impact of literacy and legal literacy in the context of visual impairment.

[122] *Literacy and Access to Administrative Justice, supra* note 63 at 6, citing Goldberg, *supra* note 63 at p 9.

[123] *Literacy and Access to Administrative Justice, supra* note 63.

[124] *Ibid* at 6. But see Ruth Sullivan, "Some Implications of Plain Language Drafting" (2001) 22:3 Statute Law Review 145 at 149, footnote 8 [Sullivan, "Some Implications of Plain Language Drafting"], citing Dorothy Deegan, "Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law" (1995) 30:2 Reading Research Quarterly 154, at 154 ("[a] common-sense notion that most educated adults generally read the same way pervades both lay and professional communities… despite clear evidence that differences in reading

benchmark, it was reported that 48% of Canadians had low literacy and that 98% of Canadians with less than a grade 8 education had low reading skills. [125] Although grade 8 is the standard applied, the CLAAJ warned against relying too heavily on this benchmark as 88% of those with grade 8 education[126] and 11% of Canadians with university education were still found to have low reading skills.[127]

The reality of these figures plays out in the day-to-day lives of Canadians, where "[a]lmost 50 percent of Canadians aged 16 and over have difficulty understanding and using information in documents such as job applications, bus and train schedules, instructions for taking medicine or for operating machinery."[128] Given these difficulties, it is perhaps unsurprising that persons with lower levels of literacy find it more difficult to gain employment and stay employed.[129] Once employed, those with lower levels of literacy are more likely to be paid less as compared to those with higher literacy.[130] Further, according to the Correctional Service of Canada, literacy and incarceration are closely tied, with over 80% of offenders having less than a grade ten education.[131]

The chart below outlines the distribution of low literacy in Canada, demonstrating how factors such as socio-economic status, education, language or age relate to rates of literacy:

achievement levels increase with years of schooling"). Note that the readability of this thesis is a Grade level 10.8. The irony of this is not lost and will need to be revisited in future work.

[125] *Literacy and Access to Administrative Justice*, *supra* note 63 at 22.

[126] *Ibid* at 7.

[127] *Ibid.*

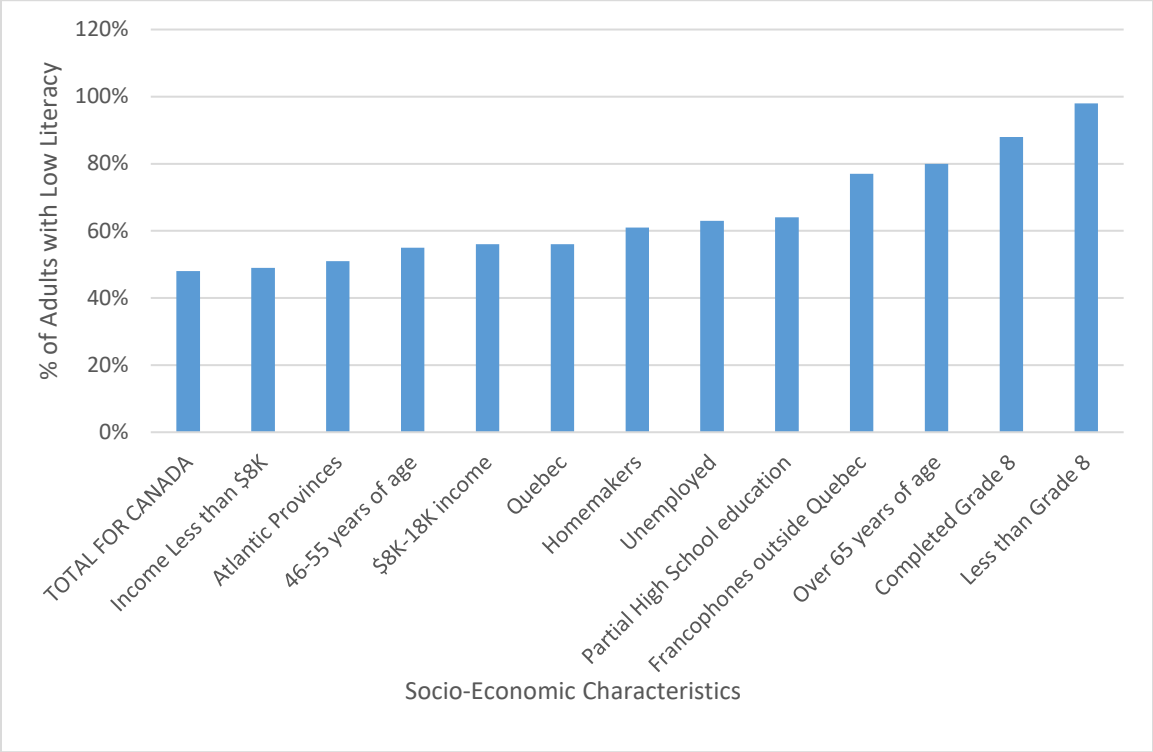
[128] *Ibid* at 1.

[129] Donald Jamieson, "Literacy in Canada" (2006) 11 Child Health 573, online: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2528650/#b10-pch11573, citing Statistics Canada, *Learning a Living: First Results of the Adult Literacy and Life Skills Survey* (Ottawa: Statistics Canada, 2006). See also Frontier College, "National Forum: Literacy and Poverty" (Discussion Paper delivered at the National Forum on Literacy and Poverty, 26 April 2017) online: <https://www.frontiercollege.ca/getattachment/6f6bd77f-043f-4ce3-96a0-9a2ec2902d73/Discussion-Paper-Literacy-and-Poverty-by-Frontier.aspx> at 2 ("[a]dults with higher levels of literacy and education make more money").

[130] Paul Lalonde, David Gyarmati, Zinaida Foltin, and Sonya Howard, *Literacy and Essential Skills as a Poverty Reduction Strategy: National Research Report* (Frontier College, 2019) at 9, citing Scott Murray, Richard Shillington, *From Poverty to Prosperity: Literacy's Impact on Canada's Economic Success* (Canadian Literacy and Learning Network, 2011) ("[a] similar effect can be found when assessing labour market participation, as adults with low literacy skills are less likely to be employed and tend to stay unemployed for longer periods").

[131] Correctional Service of Canada, *Education and Employment Programs* (current as of 24 February 2012), online: <https://www.csc-scc.gc.ca/correctional-programs/002001-3000-eng.shtml> ("[u]pon arrival in institutions, approximately 65% of offenders test at a completion level lower than Grade 8, and 82% lower than Grade 10").

**Table 2.5: Literacy in Canada** [132]




***Legal literacy***

While literacy in and of itself is a challenge for Canadians, reading and understanding legal materials adds another dimension to this challenge. For the purposes of this thesis, I have adopted the CBA's definition of legal literacy, specifically "… the ability to understand the words used in the legal context and to access rights in the justice system."[133] When attempting to understand the legal system, one is often required to have more than basic literacy, one must have general literacy beyond basic and some proficiency in legal literacy.[134] This was

[132] *Literacy and Access to Administrative Justice*, *supra* note 63 at 22, relying on data from Human Resources Development & the National Literacy Secretariat, *Reading the Future: A Portrait of Literacy in Canada (Highlights from the Canadian Report)* (Ottawa: Statistics Canada, 1996) at 5 (note that the figures from the original study states that "[t]he survey asked respondents to identify their mother tongue and gave them the choice of taking the literacy test in either English or French. Only 72% of the respondents who said their mother tongue was French (francophones) took the test in French; most of those whose first language was French, but who took the test in English, lived outside Québec or New Brunswick").

[133] *Literacy and Access to Administrative Justice*, *supra* note 63 at 11, citing Canadian Bar Association Task Force on Legal Literacy, *Reading the Legal World: Literacy and Justice in Canada* (Ottawa: Canadian Bar Association, 1992) at 23-24 [*Reading the Legal World*].

[134]Charles Dyer et al, "Improving Access to Justice: Plain Language Family Law Court Forms in Washington State" (2013) 11:3 Seattle Journal for Social Justice 1065, online: <https://pdfs.semanticscholar.org/1082/0d65e447163d7317722b95ef36db5fd4e3be.pdf> at 22 ("[a]s traditional legal

emphasized in the interviews conducted by Manitoba's Legal Help Centre, a free legal information and referral service,[135] which found that the biggest hurdle faced by its clients is language, including legal terminology:

> And I would say, in terms of what barriers do most [people] face, the biggest would be language. That is the biggest hurdle we have to overcome here. Being able to complete court documents, to understand what court documents are asking people to do.[136]

In order to better understand how literacy translates into legal tasks, the CBA converted scenarios from a Statistics Canada Survey on daily tasks to simple legal tasks and found the following:

- Level 1: 7 per cent read at this level; they would have difficulty
  - signing a simplified lease in the space designated for the tenant's signature if there were several places for signatures;
  - finding the appointment time in a simply written letter from a lawyer;
  - finding out when to reply or to appear after receiving a court notice or summons.
- Level 2: 9 per cent read at this level; they would have difficulty
  - consulting the Yellow Pages to find a local legal aid office in a list of several offices;
  - finding the two mornings a week when their counsellor is available in a schedule of office hours of three family court counsellors;
  - looking at a catalogue of brochures about legal subjects and filling in an order form with publication numbers and prices.
- Level 3: 22 per cent read at this level: they would have difficulty
  - reading a standard rental agreement or lease and finding the section that deals with a particular issue, such as who is responsible for repairs;
  - finding and using information in documents or letters if the information is not stated clearly and explicitly or if it is written in "traditional" legal language;
  - preparing a financial statement for an application for child support.
- Level 4: 62 per cent read at this level and
  - can read most everyday material;
  - can integrate information from several parts of a document;
  - would have some problems rewording a news account of a legal decision.[137]

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forms were typically written by lawyers and for lawyers, they inherently required that the user have a very high level of education in order to accurately understand and complete the form") [*Plain Language in Washington State*].

[135] Legal Help Centre, "What we do", online: <http://legalhelpcentre.ca/what-we-do>.

[136] *Justice Starts Here, supra* note 31 at 46, quoting a Legal Help Centre representative.

[137] See *Literacy and Access to Administrative Justice, supra* note 63 at 8, summarizing Statistics Canada, *The Survey of Literacy Skills Used in Daily Activities* (Ottawa: Statistics Canada, 1990).

These numbers are demonstrative of how reading levels correlate to legal capabilities. Reflecting these numbers, in 2013 the National Self-Represented Litigants Project conducted a study on the experiences of SRLs in three Canadian Provinces: British Columbia, Alberta and Ontario. According to the study:

> Virtually every SRL in the sample complained that they found the language in the court forms confusing, complex and, and some cases, simply incomprehensible – referring to terms and concepts with which they were unfamiliar.[138]

More recently, National Self Represented Litigant Project conducted a study that found that almost all respondents felt that the system was "complex, difficult to understand, and for many, its complexity and their lack of knowledge made it effectively inaccessible."[139] Of particular import is the fact that over half of those who responded had a university degree and even with that education, faced comprehension-based barriers when attempting to access the legal system. The ability to read the words of an act in isolation versus the ability to interpret those same words in a legal context are two different things, where otherwise straightforward language cannot be taken at face value.[140]

The principles of statutory interpretation require not just a standard understanding, but that the words of an Act are considered in their entire context, in their grammatical sense and with regard to the purpose of the Act and the intention of parliament.[141] Where any uncertainty arises there are then a myriad of rules to consider and debate before an interpretation can be relied upon[142] and that can change still where an Act is being applied to new circumstances or facts. Even where all the words of an Act have been considered, its application may still be

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[138] *The National Self-Represented Litigants Project Final Report, supra* note 69 at 60.
[139] *Pintea Factum, supra* note 113 at para 9, citing *The National Self-Represented Litigants Project Final Report, supra* note 69 at 54.
[140] Rabeea Assy, "Can the Law Speak Directly to its Subjects? The Limitation of Plain Language" (2011) 38:3 Journal of Law and Society 376 at 378 (skills beyond literacy that are required in understanding the law include "the ability to identify the pertinent legal rules, principles, and doctrines, to recognize the relevant facts and classify them into the pertinent legal categories, and to engage in a particular type of interpretation and reasoning").
[141] *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21 ("[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament").
[142] See e.g. Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82:1 The Canadian Bar Review 51 at 54-55 ("[t]o resolve statutory interpretation disputes, judges must analyze and integrate a variety of factors, including textual meaning, legislative purpose, acceptable consequences, and presumptions of intent. The attention paid to these factors and the amount of emphasis each receives depend on the circumstances of the case – the type of legislation, the subject matter and the audience, how precise the language is, the lapse of time since enactment, and the like"). See also Ruth Sullivan, "The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation" in Ejan Mackaay, ed, Certainty and the Law (Montreal: Thémis, 2000) 151.

unknown as the omission of words can also affect its interpretation.[143]

A prime example of the unpredictability of legal terminology can be found in *Canada v Perrier*[144] where the court discussed the appropriate interpretation of the term "beverage". What to many might seem to have an obvious definition, the decision is demonstrative of the complex and involved process of legal interpretation. In this case the court relied on the Canadian Trade Tribunal's nuanced distinctions such as the fact the English use of "beverage" does not exclude water, while the French use of "boisson" does not include water, "but both may include water if it is a prepared drink."[145] This is not to suggest that the court made any error in its interpretive process, but rather to demonstrate that even the most routine terminology may be up for debate when considered in a legal context. How then can one, literate or not, be expected to understand the words of the law without the assistance of a lawyer?

While a lack of legal literacy is a barrier to access to justice, a lack of knowledge around the law's content and application can often precede that barrier, as one must first know that they are dealing with a legal matter before they seek legal interpretation. According to the World Justice Project, on a global level, only 29% of people faced with a legal issue understand their matter to be legal in nature and to have a "legal remedy":

> People face a variety of obstacles to meeting their justice needs, beginning with their ability to recognize their problems as having a legal remedy. Indeed, fewer than 1 in 3 people (29%) understood their problem to be legal in nature as opposed to "bad luck" or a community matter.[146]

In Canada, around 65% of the population are unsure of their legal rights, consider the justice system to be too expensive and delayed, or are afraid and uncertain of how to respond to legal issues.[147] This was seen in the example of Mr. Melanson and his fellow tenants and is affirmed in the CBA's *Access to Justice Metrics* study which reported that marginalized community members across Canada were clear that because they did not understand their rights, they did not feel able to enforce them.[148]

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[143] See e.g. *Information Commr. V Can* (SCC), [2011] ACS no 25 at para 27("…the Latin maxim of statutory interpretation expressio unius est exclusio alterius ('to express one thing is to exclude another')").
[144] *Perrier Group of Canada Inc v Canada*,1995 CanLii 3554 (FC).
[145] *Ibid*, citing *Perrier Group of Canada Inc v Canada* (1993), 52 CPR (3d) 385 at p 2425.
[146] *Global Insights on Access to Justice*, *supra* note 30 at 7.
[147] See Farrow, "What is Access to Justice", *supra* note 39 at 964-965.
[148] *Access to Justice Metrics*, *supra* note 68 at 19 (quoting a deaf man in Toronto: "I need education to protect my rights").

Moreover, even where persons do understand their problems to be legal in nature, they do not know how to proceed with that information, either because they do not understand the legal process or do not have knowledge on how to access the services available to them:[149]

> The community made it clear that it is not sufficient just to have information about the law; information about the processes is needed.[150]

This was further emphasized in the *Cost of Justice* report, which found that, of the 10,254,008 adult Canadians who encounter at least one (and up to seven) family or civil law issues, 37.9% did not know where to go to get appropriate assistance in addressing their matter.[151]

## Conclusion

The findings within these materials clearly signal a sizeable gap between the population of people experiencing legal issues and those within that population who know how to address these issues or, further still, know how to identify them. One must then ask oneself, what is the impact of this knowledge gap? Where citizens are ultimately prevented from addressing their legal issues, what is the impact on the individual? What is the impact on a society specifically grounded in the rule of law?

Cost and delay aside, can there be true access to justice where one is unable to understand the rights and benefits to which they are entitled?

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[149] See Trevor Farrow et al, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*: *A White Paper for the Association of Canadian Court Administrators* (Toronto and Edmonton: Association of Canadian Court Administrators, 27 March 2012) at 46 ("[t]he general public has no idea about court procedures, requirements, the language, who or where to go for help").

[150] *Access to Justice Metrics, supra* note 68 at 19. See also *Justice Starts Here, supra* note 31 at 2 ("[t]his speaks to a repeated recommendation arising out of the focus groups: people need to be aware of, understand, and access the legal system as well as the supports and services available in navigating that system").

[151] *Cost of Justice in Canada, supra* note 34 at 165 ("59.2% (or approximately 6,071,575 people) know where to obtain good information and advice about resolving the first problem when it first starts … 37.9% (or approximately 3,883,520 people) do not know where to obtain good information and advice about resolving the first problem when the problem starts 2.9% (or approximately 298,913 people) don't know/refused").

## Chapter 3: Accessible Legal Language - A Tale as Old as Time

*Statute law governs almost every facet of our lives from birth to death, and even after. A statute requires our parents to register us at birth and tells them how to provide for us during their lifetime and after their death. There are statutes that tell us how to grow our food, how to process it and how we must offer it for sale. We are told by statute when we can leave school, go to work, vote, drink, drive and marry. The list is endless. The time has long passed when any one person could be familiar with all current written law.*[152]

### Introduction

For centuries the basic contradiction of the law has been that although written to regulate human experience, it is composed in a language foreign to most humans. This chapter provides an overview of the history of the complicated language used by lawmakers and the responding movements that affected national and global change. Focusing predominantly on the United States, the United Kingdom and Canada, I will provide a timeline dating back to the 1200s demonstrating the long tradition of complex legal drafting as well as the plain language reforms that are working towards clarity.

### The law's historic resistance to simplicity

*Complaints about the excessive complexity of the law are as old as the law itself.*[153]

Access to the law through language has been a struggle at least as far back as the 1200s. At the time, the majority of Englanders spoke English while their laws were drafted in both French and English, leaving statutes composed in French largely unintelligible by the masses.[154] Responding to the inability of his citizenry to understand the laws, in 1362 King Edward III enacted what some have considered to be the first plain English law,[155] the *Statute of*

[152] Susan Krongold, "Writing Laws: Making Them Easier to Understand" (1992) 24:2 Ottawa Law Review 495 at 499-500.
[153] Assy, *supra* note 140 at 367. See also Jim Schachter, "Humor in the Court! It's Legal—and a Fast-Selling Book", *The LA Times* (11 October 1987), online: < https://www.latimes.com/archives/la-xpm-1987-10-11-me-13275-story.html> ("[j]udge: The charge here is theft of frozen chickens. Are you the defendant? Defendant: No, sir, I'm the guy who stole the chickens").
[154] Gillian Gillies, "The Anglicisation of English Law" (2011) 8:17Auckland University Law Review 168 at 171, citing George Woodbine, "The Language of English Law" (1943) 18 Speculum 395 at 399 ("by around the reign of Edward I (1272-1307) English was the mother tongue of the realm of England, and French was a language of prestige only learnt by special instruction").
[155] Gillies, *supra* note 154 at 171.

*Pleading*,[156] which became one of the earliest recorded laws to not only acknowledge the need for publicly readable statutes, but to also legislatively enforce the use of more comprehensible language on the basis of public access.[157] The statute recognized that French was "much unknown in the said Realm" and therefore, required that all pleas be "pleaded, shewed, defended, answered, debated, and judged in the English Tongue."[158]

Centuries later in the 1700s, philosopher Jeremy Bentham spoke out on both the language and linguistic style of laws, advocating for clearer drafting of statutes. Dismissing the language of lawyers as "excrementitious matter" and "literary garbage",[159] and the common law as "giving uncertainty in volume,"[160] Bentham believed that citizens had a right to know the "exact idea of the will of the legislator"[161] and thus pushed for systemic codification, believing it would bring clarity to long and convoluted legal materials.[162] Famously claiming that until "the nomenclature

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[156] *Statute of Pleading*, 1362 (Eng) 36 Edw III c 15 [*Statute of Pleading*].
[157] Gillies, *supra* note 154 at 171.
[158] *Statute of Pleading*, *supra* note 156. See also Gillies, *supra* note 154 at 171-172.
[159] Jeremy Bentham, *The Works of Jeremy Bentham*, vol 3, ed by John Bowring (Edinburgh: William Tait, 1843) at 260, online: https://oll.libertyfund.org/titles/bentham-works-of-jeremy-bentham-11-vols [Bentham, *The Works of Jeremy Bentham*] ("[f]or this redundancy—for the accummulation of excrementitious matter in all its various shapes, in all that variety of forms that have been passing under review—for all the pestilential effects that cannot but be produced by this so enormous a load of literary garbage,—the plea commonly pleaded—at any rate, the only plea that would or could be pleaded, if men who are above law could be put upon their defence by any pressure from beneath, is, that it is necessary to *precision*—or, to use the word which on similar occasions they themselves are in the habit of using, certainty").
[160] Assy, *supra* note 140 at 291.
[161]Bentham, *The Works of Jeremy Bentham*, *supra* note 159 at 207 ("[t]he desirable object of the laws in regard to style is, that it may be such that at every moment in which they ought to influence the conduct of a citizen, he may have presented to his mind an exact idea of the will of the legislator in this respect").
[162] Dean Alfange Jr., "Jeremy Bentham and the Codification of Law" (1969) 55:3 Cornell Law Review 58 at 61. Note also that notwithstanding Bentham's beliefs, it is not clear whether codification is in fact the answer to a complex legal system. Not much has been written on the differing impacts of the Quebec civil code versus the common-law in the rest of Canada and a more thorough study of that relationship would be beyond the scope of this thesis. However, anecdotally there have been opinion pieces from the legal community pointing to two things that suggest that even with two different legal traditions, the common law and civil code of today are functionally quite similar: 1) that increased codification across Canada would increase clarity of laws: Ken Chasse, "A Canada Evidence Code Should Replace the Canada Evidence Act, Part 2", (16 January 2014), SlawNET, online: <http://www.slaw.ca/2014/01/16/a-canada-evidence-code-should-replace-the-canada-evidence-act-part-2/ > ("[a]n important advantage provided by codification over statutory amendments and court decisions is that it more effectively improves "access to justice." The other two are more likely to diminish access to justice, for they spread and fragment the law among a greater number of sources necessary to be consulted in order to gather an adequate statement of the law. As a result, law is less readily understood, and therefore less respected by the people it is supposed to serve, especially so by the unconscionably high percentages of unrepresented litigants in our courts. Legal research takes longer and therefore costs more. "Access to justice" diminishes as the costs of legal research increase"), and 2) that even with its civil code, the Quebec legal system relies heavily on caselaw in its interpretations and applications: Xavier Beachamp-Tremblay and Antoine Dusséaux, "Not your Grandparents' Civil Law: Decisions are Getting Longer. Why and What Does It Mean in France and Québec?", (20 June 2019), SlawNET, online: http://www.slaw.ca/2019/06/20/not-your-grandparents-civil-law-decisions-are-getting-longer-why-and-what-does-it-mean-in-france-and-quebec/ .

and language of law shall be improved, the great end of good government cannot be fully attained",[163] Bentham spent his life working for law reform in England.[164]

At around the same time as Bentham's calls for reform, the laws in Sweden were seemingly similarly complex. In 1713, addressing a need for increased clarity in legal drafting, King Charles XII issued a royal requirement "that the Royal Chancellery in all written documents endeavour to write in clear, plain Swedish and not to use, as far as possible, foreign words". [165] Shortly thereafter and an ocean apart, America's founding fathers[166] shared similar criticisms of the convoluted language of legalese. Attempting to work his way through colonial charters, John Adams condemned the language of the law as consisting of "useless words" and hoped that America would see "common sense in common language" "become fashionable."[167] Likewise, Thomas Jefferson sought statutory reform as he was frustrated with current legislation which, he complained, "from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty by saids and aforesaids, by ors and by ands, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to lawyers themselves."[168]

In the Canadian context, debates focusing on comprehension of the law and access through language existed prior even to the enactment of the Canadian Constitution.[169] From its very drafting its founders[170] fought tooth and nail for the language rights that would flow, understanding that access to the physical text of a law drafted in an unknown language would not be true access. Unless the Constitution provided the right to both understand and be understood

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[163] Bentham, *The Works of Jeremy Bentham, supra* note 159 at 271.
[164] Frederick Judson, "A Modern View of the Law Reforms of Jeremy Bentham" (1910) 10:1 Columbia Law Review 41 at 41.
[165] Roslyn Petelin, "Considering Plain Language: Issues and Initiatives" (2010) 15:2 Corporate Communications: An International Journal 205 at 207, citing Michèle Asprey, *Plain Language for Lawyers*, 3rd ed (Sydney: Federation Press, 2006) at 66.
[166] I would like to note here that this chapter makes numerous references relating to colonial concepts such as "founding fathers", the formation of Canada and creation of legal systems. I use this language to reflect the progression of laws as they relate to the government imposed legal system; acknowledging that the laws and traditions of Indigenous populations originated long before colonization [*Note on colonization*].
[167] Letter from John Adams to William Tudor (10 September 1818) in John Adams, *The Works of John Adams*, vol 10, ed by Charles Francis Adams (Boston: Little, Brown and Co., 1856) at 352, online: https://oll.libertyfund.org/titles/adams-the-works-of-john-adams-vol-10-letters-1811-1825-indexes.
[168] Thomas Jefferson, *Autobiography of Thomas Jefferson (1821)* (EU: Arcadia Press, 2017) at 40.
[169] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.
[170] See *Note on colonization, supra* note 166 (note the colonial language and assumptions here).

in legislatures and courts of law, the colonies would be unable to fully participate both in their daily lives as well as in the development of their newly "founded"[171] country:

> Antoine-Aimé Dorion [Hochelaga]—... But it is not simply for the use of the French language in the Legislature that protection is needed—that is not of so great importance as is the publication of the laws and proceedings of Parliament. The speeches delivered in this House are only addressed to a few, but the laws and proceedings of the House are addressed to the whole people, a million or nearly a million of whom speak the French language…
>
> In truth, what kind of liberty have we, who do not understand the English language? We are at liberty to hold our tongues, to listen, and to understand if we can. (Hear, hear, and continued laughter.) Under the Confederation, the Upper Canadians will speak their language, and the Lower Canadians theirs, just as we do now; with this difference, that they who count a large majority of their countrymen in the House, may hope to hear their language spoken the oftenest, as new members will use the language of the majority.[172]

Admittedly, these debates took place in the context of a historic power struggle between the French and English colonies. As such, references to language carried with them the weight of an ongoing dispute over national control.[173] Nonetheless the debates over the inclusion of constitutionally engrained language rights make clear: from the very outset of the Canadian legal system[174] there was an acknowledgment that an ability to understand the law was critical in ensuring participation in Canada and, further yet, that those who could understand the law would have the power.[175]

Now with French and English language rights firmly entrenched within the Constitution, the Canadian legal system, following the long tradition of its European colonists, began to develop in French, English and above all, legalese.

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[171] *Ibid.*

[172] Province of Canada, Parliament, *Parliamentary Debates on the Subject of the Confederation of the British North America Provinces*, 8th Parl, 3rd Sess, 1865 at 950.

[173] See *ibid* generally.

[174] See *Note on colonization*, *supra* note 166 (note the colonial language and assumptions here).

[175] Note that while this thesis is not an examination of official language rights, it is important to note these early debates as they demonstrate an acknowledgment from the Constitution's very drafting, that unless one can understand the law, they cannot access it. Note also *MacDonald v City of Montreal*, [1986] 1 SCR 460 at para 117 [*MacDonald v City of Montreal*] ("… language rights such as those protected by s. 133, while constitutionally protected, remain peculiar to Canada. They are based on a political compromise rather than on principle and lack the universality, generality and fluidity of basic rights resulting from the rules of natural justice"). See also Norma Hall, Clifford Hall & Erin Verrier, *A History of the Legislative Assembly of Assiniboia/le Conseil du Gouvernement Provisoire* (Winnipeg: Manitoba, Department of Aboriginal and Northern Affairs, 2010) at 19 (this document notes that it was a condition of Manitoba entering into confederation that French and English languages be afforded equal rights).

**Plain language in the USA**

Described as "a mass of rubbish", "a language of nonsense and solemn hocus pocus", "a dark jungle, full of surprises and mysteries",[176] and "gobbledygook",[177] the English common law has been ascribed many titles over the past century in an attempt to convey its complexity. Procedure, volume and language have been the target of much criticism and, over the last 100 years, the focus of many attempts at law reform across Common Law countries. In the United States, the first coordinated efforts at addressing legalese began around the mid 20th century with the beginnings of the Plain English Movement[178] and the adoption of drafting rules by the Conference of Commissioners on Uniform State Laws in 1953.[179] At the time there existed a burgeoning consumer movement that was becoming more vocal about frustrations surrounding incomprehensible jargon and bureaucracy.[180] Scholarly writing on the topic began to emerge and, in 1963, David Mellinkoff published "The Language of the Law",[181] still cited for its stance on legal speech:

> [T]hat the language used by lawyers [should] agree with common speech, unless there are reasons for a difference.[182]

Combined with the growing consumer movement, Mellinkoff's publication (and the literature it inspired) marked the beginning of the Plain English Movement in the United States.[183]

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[176] Assy, *supra* note 140 at 377, citing Jeremy Bentham, *The Rationale of Judicial Evidence*, Vol 4, Book 8 (1842) ch 17, 290, 294-5; Edwin Tanner, "The Comprehensibility of Legal Language: Is Plain English the Solution?" (2000) 9 Griffith Law Rev 52, at 52-3; David Mellinkoff, *The Language of the Law* (1963) 4, 265.

[177] Joe Lau, *An Introduction to Critical Thinking and Creativity: Think More, Think Better* (New Jersey: John Wiley & Sons, 2011) at 50 ("[t]he word gobbledygook was coined by Texan lawyer Maury Maverick in 1944 to describe obscure and convoluted language full of jargon. It is an extreme form of linguistic pitfalls, where simple ideas are made unnecessarily complicated and clichers are dressed up as profound truths.").

[178] Assy, *supra* note 140 at 377.

[179] Committee on Legislative Drafting of the Conference of Commissioners on Uniform State Laws, "Drafting Rules" (Adopted in 1953 and amended in 1954),in Dennis Owens, "A Handbook on Research and Drafting of Legislation" (1975) 1:1 Journal of Legislation 1 at 17 ("[t]he essentials of good bill drafting are accuracy, brevity, clearness and simplicity. The purpose and effect of a statute should be evident from its language; the language should convey one meaning only").

[180]Assy, *supra* note 140 at 377.

[181] Mellinkoff, *supra* note 176.

[182] *Ibid* at vii.

[183] Assy, *supra* note 140 at 377, fn 4 ("…[i]t is fair to say that it was David Mellinkoff who fired the first shot in 1963 when he published The Language of the Law (op. cit., n. 2), an incisive study that has inspired a large amount of literature which, along with the growing popularity of consumer movements, would translate into the PEM"). See also Douglas Martin, "David Mellinkoff, 85, Enemy of Legalese" *The New York Times* (16 January 2000), online: https://www.nytimes.com/2000/01/16/us/david-mellinkoff-85-enemy-of-legalese.html ("Mr. Mellinkoff's work provided ammunition for a mounting movement in the 1970's and 1980's to simplify insurance policies and other

Given its strong consumer influence, the early years of the Plain English Movement focused largely on insurance policies, government forms and consumer information materials, expanding only later to include reform to legislation.[184] Echoing the sentiments of Jeremy Bentham centuries before, the movement pushed for the accessible drafting of laws so that all those affected by the law could understand it.

The movement famously gained traction in 1975 with First National City Bank's (now Citibank) plain language consumer loan note.[185] Prior to its re-drafting, First National City Bank's promissory notes were so complex that judges, lawyers and even Citibank's own lending officers were incapable of deciphering them, leading to errors on the part of customers and an increase in consumer suits.[186] In response to these incidents and growing consumer pressure, First National Bank developed a plain language consumer loan note.[187] This move was so successful that many American States began to push for similarly clear language in Federal legislation.[188] By the late 1970s American leadership was adopting broad plain language platforms and in 1978 President Carter signed executive order 12044 requiring that Federal Regulations be "as simple and clear as possible".[189] At about that same time, New York enacted the first general plain language law in the US, with several states having followed suit since.[190]

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consumer documents, to streamline state and federal legislation and to add writing instruction to law school curriculums." … 'Serious reform did not begin until 1963 when David Mellinkoff published his scholarly and influential book,'' John M. Lindsey, a Temple University law professor, wrote in 1990").

[184] Paula Rodríguez-Puente, Teresa Fanego, eds, *Corpus-based Research on Variation in English Discourse* (Amsterdam: John Bengamins Publishing Company, 2019) at 3.

[185] Petelin, *supra* note 165 at 207, citing Asprey, *supra* note 165 at 66 ("[t]he document that . . . 'marks the coming-of-age of the plain language movement in the United States is the plain language consumer loan note launched on 1 January 1975 by First National City Bank (now Citibank).' A committee that had been appointed in 1970 to analyse consumer-related problems with what had been called a "promissory note" discovered that lawyers, judges and Citibank's own lending officers had had trouble understanding the note. The note was re-written in plain language").

[186] Petelin, *supra* note 165 at 207, citing Asprey, *supra* note 165 at 66.

[187] Petelin, *supra* note 165 at 207, citing Asprey, *supra* note 165 at 66. See also Rodríguez-Puente, *supra* note 184 at 3.

[188] Rodríguez-Puente, *supra* note 184 at 3, citing Christopher Williams, "Legal English and Plain Language: an introduction" (2004) 1 *ESP Across Cultures* 111 at 116 ("[t]he initiative was so successful with both the public and the media that several states began urging the drafting of federal legislation along the same lines of clarity").

[189] US, Maureen Breitenberg, US Department of Commerce, *Need for Economic Information on Standards Used in Regulatory Programs: Problems and Recommendations* (NBSIR 80-2123) (Washington, DC: 1980) at 36.

[190] *New Your Plain English Law*, NY Gen Oblig § 5-702 (1978) (passed in 1977, amended in 1978); Rosemary Moukad, "New York's Plain English Law" (1980) 8:2 Fordham Urban Law Journal 451 at 451. See also *Connecticut Plain Language Law*, Conn Gen Stat § 42-152 (1980); *Pennsylvania Plain Language Consumer Contract Act*, Pa Stat Ann tit 73, § 2201 (1993).

Throughout the past three decades the United States has continued to be a leader in the enactment of plain language laws, both enacting laws legislating the use of plain language, and drafting laws with the use of plain language.[191]

**Plain language in the UK**

Outside of the United States, the campaign for more clearly drafted legislation was similarly progressing within other English speaking countries.[192] Around the same time of Citibank's promissory note plain language initiatives were emerging internationally.

In the UK, the Plain English Campaign officially began in 1979,[193] triggered by the actions of Liverpool resident, Chrissie Maher. Maher, fed up with the complexity of government materials, attended the steps of parliament and publicly shredded stacks of government forms she had deemed incomprehensible.[194] When asked to leave, having been read an official warning by police, Ms Maher famously responded by asking "does that gobbledygook mean we have to go?"[195] Following this performance, leadership within the UK began to revisit their documentation, redrafting with a mind to clarity and simplicity.[196] Soon after, under the direction of Sir Derek Rayner, 58,000 government forms were rewritten in plain language[197] and in 1984 *The word is …Plain English*, a guide to clear writing was distributed amongst government employees.[198]

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[191] See e.g. *Truth in Lending Act*, 5 USC § 1601-1667f; *Fair Credit Reporting Act*, 5 USC § 1681-1681x; *Plain Language Contract Act*, Minn Stat 325G.29 to 325G.36; *Plain Language Consumer Contract Act*, 73 PS § 2201-2212. See also Betsy Bowen, Erwin Steinberg & Thomas Duffy, Analyzing the Various Approaches of Plain Language Laws" (1986) 20:2 Visible Language 155 at 158 ("[t]wenty-eight states have passed legislation to control the readability and, therefore, the usability of life, property and casualty, and health insurance contracts"). See also US, Plain Language Action and Information Network, *Award Winners*, (Plainlanguage.gov retrieved on May 7, 2020), online: https://plainlanguage.gov/examples/awards/ ("[d]uring the Clinton Administration, the National Partnership for Reinventing Government awarded one plain language prize (No Gobbledygook Award) a month since the award was established in July 1998 for a total of 17 awards. Vice President Al Gore created the award to recognize federal employees who use plain language in innovative ways after President Clinton issued a June 1998 memorandum directing agencies to write all forms, documents, and letters in plain language").
[192] Rodríguez-Puente, *supra* note 184 at 3.
[193] C Williams, *supra* note 188 at 116.
[194] Chrissie Maher, Martin Cutts & James Dayananda, "Plain English in the United Kingdom" (1986) Cambridge University Press 10 at 10.
[195] Kim Sengupta, "How to slag off your boss, in plain English" *Independent* (9 November 1997), online: https://www.independent.co.uk/news/how-to-slag-off-your-old-boss-in-plain-english-1292977.html
[196] C Maher, *supra* note 194 at 10.
[197] Emma Wagner, Martin Cutts, eds, "A Movement to Simplify Legal Language" (1990) 16 Clarity 1 at 1, online: http://clarity-international.net/journals/16.pdf . See also Peter Butt, Richard Castle, *Modern legal Drafting: A Guide to Using Clearer Language* (Australia: Cambridge University Press, 2001) at 67.
[198] Butt, *supra* note 197 at 67.

In 1993, the Council of European Communities (European Union)[199] adopted a resolution on the "quality of drafting of Community legislation" stating that:

> The general objective of making Community legislation more accessible should be pursued , not only by making systematic use of consolidation but also by implementing the following guidelines as criteria against which Council texts should be checked as they are drafted :
>
> > 1 . the wording of the act should be clear, simple , concise and unambiguous ; unnecessary abbreviations, 'Community jargon' and excessively long sentences should be avoided.[200]

Two years later it published its *Opinion on Plain Language*, which, in response to a declining acceptance of the EU, found that "Plain language is essential to a more open Community."[201]

**Plain language in Canada**

Canadians have followed a similar trajectory and timeline with regard to plain language; however, it must be noted that we also carry our own legal contexts and traditions. First of all, Canada is a country based in both bilingualism and bijuralism, meaning that at a federal level and within certain provinces,[202] our laws must be both French and English and must apply equally in circumstances of both civil and common law.[203] Secondly Canada was formed a century or more after some of its English-speaking counterparts. As a result, its founding laws were drafted in an entirely different time and environment.

Further, much of the drafting of Canadian laws has been under the influence of the Uniform Law Conference (ULC). Developed in 1918, the ULC set the rules for legislative drafting across the country, with an aim to maintain conformity and clarity on a national basis.[204]

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[199] I recognize that the EU and the UK are not synonymous, however, the reference relates to the overlapping countries that they represent.
[200] *Official Journal of the European Communities*, No C 256/8 (8 June 1993) Appendix A.
[201] *Official Journal of the European Communities*, No C 256/3 (2 October 1995).
[202] See *Manitoba Act, 1870*, RSC 1970, App II, s 23 [*Manitoba Act*]; *Official Languages Act*, SNB 2002, c O-0.5.
[203] See Department of Justice, "Canadian Legislative Bijuralism: An expression of Legal Duality", (Ottawa: 2015), online: < https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/gaudr/duality-dualite/index.html>. Note that the reality of bijuralism in Canada likely has an impact on the access to justice matters discussed in this thesis. However, pursuit of those implications is outside the scope of this thesis.
[204] Krongold, *supra* note 152 at 508 ("[t]he Uniform Law Conference and regular statute revision has substantially contributed to the present level of clarity of statutes in Canada"), at fn 22 ([s]ince 1918 in Canada the Uniform Law Conference has been actively developing a set of rules for legislative drafting across Canada").

It has used its role to reduce legalese and improve comprehension of Canadian laws, more recently calling for simplicity in its drafting conventions:

> An Act should be written simply, clearly and concisely, with the required degree of precision, and as much as possible in ordinary language.[205]

Although its original purpose was based more in legal continuity rather than legal simplification, the ULC has influenced how laws have been drafted across the country. Whether as a result of the ULC or other Canada-specific factors, Canadian legislation has historically earned a reputation for being more clear and, to some extent, simpler than its British predecessor:

> Most statutes in Canada today have quite a different look. In fact, Elmer Driedger maintained that there has been, since the 1940s, a distinct Canadian style, unlike any British style. His observation was confirmed, tongue in cheek, by Sir Robert Megarry in an address to the Bars of Alberta and British Columbia:
>
> > The complaint is about your statute books, both federal and provincial. They are too plain. I have read many, many pages of them; and I found that I could understand all that I read or nearly all. That is not the sort of thing that one ought to find in any well-mannered statute book.[206]

Whether its laws have been historically clearer by comparison, Canada has still struggled with complex legalese and how to make its laws more comprehensible to the Canadian public. The campaign for more simplified legal language in Canada closely mirrored the UK and American timelines, taking its form as a third wave in Canada's access to justice movement.[207] Preceding this third wave, the first wave of Canada's access to justice movement began post World War II and focused on access to legal assistance, taking shape as legal representation for the economically disadvantaged through Legal Aid. Soon after, around the 1960s, the second

[205] "Proceedings of the Seventy-First Annual Meeting" (Uniform Law Conference of Canada, Yellowknife, August 1989) at 27.
[206] Krongold, *supra* note 152 at 508, citing Elmer Driedger, *A Manual of Instructions for Legislative and Legal Writing*, vol 5 (Ottawa: Department of Justice, 1982) at 12.
[207] Department of Justice, *Canada's System of Justice: Legislative Drafting (Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework),* (Ottawa: Department of Justice, 2018), online: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/p2.html [*Riding the Third Wave*].

wave of the movement developed to address public interest and broader equality matters.[208] By the 1970s the third access to justice wave emerged, promoting legal simplification as access.[209]

In 1990 a Joint Committee on Plain Language had been developed, made up of members of the Canadian Bar Association and the Canadian Bankers' Association. The Committee took on the fight for accessible language through its publishing of: *The Decline and Fall of Gobbledygook: Report on Plain Language Documentation*.[210] One year later the Department of Multiculturalism and Citizenship Canada took a similar stance, producing: *Plain Language Clear and Simple*,[211] a resource for effective writing for public servants. The Federal government now has a *Policy on Communications and Federal Identity*,[212] which requires that "Government communications must be objective, factual, non-partisan, clear and written in plain language."[213] The Federal Government also has the *Content Style Guide* which must be followed by Federal Government organizations when publishing online content.[214] Specifically considering

[208] John Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*, (England: Palgrave MacMillan, 2014) at 17 ("[i]n the USA the Ford Foundation sponsored public interest firms. US government initiatives included the Office of Public Counsel under the Regional Rail Reorganization Act 1973 to represent communities in their dealings with the rail industry, and law centres set up under the US Economic Opportunity").

[209] *Riding the Third Wave*, *supra* note 207 ("[a]lthough there are many antecedents, the access to justice movement emerged in a major organized way in most western countries during the immediate post World War II era. The "first wave" was the emergence of legal aid. This wave focused on providing access to legal representation in the courts for the economically disadvantaged. Subsequent waves of change progressed from an emphasis on assuring the right to legal representation in the first wave, to an emphasis on group and collective rights in the "second wave". In this phase, test case and public interest litigation began to address systemic problems of inequality. In the "third wave" of the access to justice movement one sees the development of a range of alternatives to litigation in court to resolve disputes and justice problems, as well as reforms that simplify the justice system and thus facilitate greater accessibility"). See also Peysner, *supra* note 208 at 18.

[210] Canadian Bar Association and the Canadian Bankers' Association Joint Committee, *The Decline and Fall of Gobbledygook: Report on Plain Language* (Ottawa 1990).

[211] Multiculturalism and Citizenship, *Plain language, clear and simple*, (Ottawa, Multiculturalism and Citizenship, 1991) [*Plain language, clear and simple*].

[212] *Policy on Communications and Federal Identity*, C 2016, online: < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=30683>.

[213] *Ibid* at 4.3.

[214] Treasury Board of Canada Secretariat, *Content Style Guide*, (Ottawa: 2020), online: https://www.canada.ca/en/treasury-board-secretariat/services/government-communications/canada-content-style-guide.html [*Content Style Guide*].

readability for those with literacy challenges[215] the guide mandates that web-content be intuitive, comprehensive, targeted and consistent.[216]

With regard to statutes, the Canadian government has also taken steps towards legislative drafting in plain language. However, Canada has yet to follow the actions of its southern neighbors[217] by requiring plain language in written statutes. Instead, Canada has taken a piecemeal approach to its legislative drafting, providing, at times, plain language legislative summaries to assist readers and at other times none.[218] Similarly, while Canada does have legislation composed in accessible formats,[219] the standard is inconsistent, leaving citizens relying on the luck of the draw when engaging with an act.[220] In the year 2000, the Department of Justice and Human Resources Development Canada commissioned a report on the "usability testing" of plain language versions of the Employment Insurance Act. According to the report, a

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[215] See *ibid* ("[r]eadability is the ease with which a person can read and understand a text. Readable content means better task completion and higher client satisfaction. To make your content readable, consider your audience's reading level and literacy needs. Not everyone reads at the same level or understands content in the same way. Even when content is presented clearly and simply, people who have low literacy levels and other difficulties can find it hard to understand text. According to Statistics Canada (2012) and Canadian literacy organizations, almost 50% of Canadians have literacy challenges").

[216] It appears as though these mandates are intended to be self-imposed as there does not seem to be an oversight body that ensures compliance.

[217] See e.g. *An act to enhance citizen access to Government information and services by establishing that Government documents issued to the public must be written clearly, and for other purposes*, 5 USC § 105 (2010).

[218] See e.g. Department of Justice, *A Plain Language Guide: Bill C-45-Amendments to the Criminal Code Affecting the Criminal Liability of Organizations*, (Ottawa: Department of justice 2019), online: https://www.justice.gc.ca/eng/rp-pr/other-autre/c45/; Canadian Transportation Agency, *A plain language summary of the Accessible Transportation for Persons with Disabilities Regulations*, (Canada Transportation Agency, 2019), online: https://otc-cta.gc.ca/eng/a-plain-language-summary-accessible-transportation-persons-with-disabilities-regulations; Government of Northwest Territories, *Protected Areas Act: Plain Language Summary*, (Northwest Territories: 2019), online: https://www.enr.gov.nt.ca/sites/enr/files/resources/plain_language_summary_-_paa.pdf; Government of Northwest Territories, *Bill 42, An Act to Amend the Petroleum Products Tax Act: Plain Language Summary* (Department of Finance, 2019), online: https://www.fin.gov.nt.ca/sites/fin/files/resources/plain_language_summary_of_bill_42.pdf; Government of Canada, *Proposed Accessible Canada Act – Summary of the bill*, (Ottawa, 2019), online: https://www.canada.ca/en/employment-social-development/programs/accessible-people-disabilities/act-summary.html [*Proposed Accessible Canada Act*].

[219] See e.g. *Canada Occupational Health and Safety Regulations*, SOR/86-304, online: https://laws.justice.gc.ca/PDF/SOR-86-304.pdf.

[220] Note that there have been numerous reports developed on how to amend Canadian legislation in order to be more accessible, however, it is unclear as to whether or not these recommendations have been applied. See e.g. GLPi, Vicki Schmolka, *A report on Results of Usability Testing Research on Plain Language Draft Sections of the Employment Insurance Act: A Report to Department of Justice Canada and Human Resources Development Canada*, (Unpublished, August 2000),: https://davidberman.com/wp-content/uploads/glpi-english.pdf [Schmolka, *Usability Testing*]; Vicky Schmolka, *Consumer Fireworks Regulations: Usability Testing, TR1955-2e* (Unpublished, Department of Justice Canada, 1995) [Schmolka, *Consumer Fireworks Regulations*]. See generally Clarity, "A Movement to Simplify Legal Language" (January 1997) 38 Clarity, online: < http://www.clarity-international.net/journals/38.pdf> [*A Movement to Simplify Legal Language*].

component of its creation was supposed to be the potential development of a plain language version of the act, an initiative described as "precedent-setting" and which would have "implications for legislative drafters and users of legislation across the Country."[221] However, notwithstanding the report's findings of increased usability with plain language and accessible design, it does not appear as though the government followed up that work with targeted amendments.[222] The opportunity for wide-spread implementation was apparently lost.

And so, notwithstanding the headway that has been made in the promotion of plain language government materials in Canada, the accessibility of legislative language is inconsistent and, at times non-existent. This variability can be partly explained by the additional Canadian-specific factors articulated above: bilingualism and bijuralism. Because Canadian laws must factor additional languages and structures into their drafting, uniform plain language standards are difficult to implement. Part of this difficulty lies in the fact that both language versions of bilingual legislation are equally authoritative, requiring that legal interpretations of plain language terminology and phrasing be the same. Where that is not possible, translators must choose to either translate in accordance with plain language guidelines or legal drafting principles. In addition, the civil-law requires the use of certain legal terminology that may not be deemed 'accessible'. For example, the use of terms such as "hypothec" and "immovable" are dictated by civil law and must be used, whereas in the common-law, one would find it more simple to say "mortgage" and "real property".[223]

While the reality of a dualistic legal system may provide some explanation for Canada's lack of simplified legislation, it does not change the fact that much of our legislation is incomprehensible to those whom it governs.[224] Drafters have, to some degree, responded by

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[221]Schmolka, *Usability Testing, supra* note 220 at 1.

[222] In reviewing the Act against the report, the recommended changes do not appear in the Act. I also reached out to one of the authors, Vicki Schmolka, by email on July 24, 2020. That same day she responded explaining that she was not sure if any changes were ever made. I have also reached out to government for more information and have not received a response.

[223] Note that this is made more difficult to have standards for plain language in Canada as we have to have laws in French and English and considering common law and civic code. See Lena Day, "Plain English in Quebec Legislation" (2007) 30:1 Canadian Parliamentary Review 40 at 41 ("[a]lso, since the Civil Code is central to our legal system, we are bound to use civil-law terms such as "hypothec" and "immovables" rather than the common--law terms more familiar to most English-speaking readers--"mortgage", "real property" and so on. And because we do not have the authority to rewrite existing legislation, we can apply the plain language approach only to new legislation. We may, of course, use plain language techniques when translating bills that amend current statutes but must do so cautiously, as the new text introduced by the amending bill must fit in with the existing text").

[224] See *The National Self-Represented Litigants Project Final Report, supra* note 69 at 60.

attaching plain language summaries to legislation, but these summaries are not standard practice nor are they legally enforceable.[225]

In addition to the content of the laws, a further level of complexity arises from Canada's volume of laws. Today, Canadians are governed by over 800 federal Acts.[226] This does not include subsequent regulations or provincial/territorial statutes; nor does it touch on regulatory policies or guidelines. The sheer volume of laws in Canada makes it additionally impossible for citizens to know not only the content of applicable laws, but also their existence.[227] Consider, for example, Ms Murray's appeal to the Court of Appeal. One might reasonably expect that an appeal on an Employment and Income Assistance matter would require consultations with one or two statutes, for example *The Employment and Income Assistance Act* and *The Social Services Appeal Board Act*. However, when working with the aid of legal counsel, her appellate factum relied on 7 separate acts and 2 regulations[228] and ultimately argued that the EIA policy manual was inconsistent with the purpose of the EI Act. Leaving aside the concerns about understanding the content of a single applicable statute, it would be unreasonable to expect an unrepresented litigant to be able to know the volume of applicable statutes and regulations. Add to that a hierarchical analysis of policy versus statute as well as questions of legislative purpose, the average person would be lost before even reading the relevant acts. While accessible websites and plain language statutory introductions are steps in the right direction, Canadian legislation has a long way to go before citizens can fully comprehend the rights and responsibilities it dictates.

## Conclusion

Notwithstanding the centuries-old steps taken to promote plain language within the legal system, complex language and legalese remain a seemingly increasing barrier worldwide and in

[225] See e.g. *Proposed Accessible Canada Act*, *supra* note 218 at fn 1 ([n]ote that these summaries do not have legal standing "The text provided in this document is not to be interpreted as the bill and has no legal standing. Rather, this document is to provide a high level summary of the proposed federal accessibility legislation"). See also *Interpretation Act* (RSC, 1985, c I-21) at s 13 ("[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object").

[226] Canada, *Justice Laws Website: Consolidated Acts*, (accessed on July 23, 2020), online: < https://laws-lois.justice.gc.ca/eng/acts/> (832 Statutes).

[227] Note that an exploration of the implications of volume of laws is beyond the scope of this thesis, but it it worth noting the many ways that complexity arises throughout the legal system – through language, process and sheer volume of laws.

[228] As well as 21 cases and three secondary sources, see *Murray Factum of the Appellant, supra* note 19.

Canada. With access to justice rhetoric reverberating through the halls of legal institutions and continued calls for simplicity and clarity from ever growing numbers of self-represented litigants one wonders what it will take to slow the growth of gobbledygook in order to make way for consistent and clear language.

## Chapter 4: A Complex Legal System is a Barrier to Access to Justice - The Impact

### Introduction

The figures outlined in chapter two paint a picture of the many barriers to access to justice experienced by Canadians. These figures are particularly concerning when considered in our current context: an increasingly complex legal system[229] with rising numbers of SRLs and depleting Legal Aid resources.[230]

This chapter will outline the impacts of these barriers, addressing factors such as increased and compounding legal issues, poorer outcomes, non-enforcement of legal rights and the associated financial, physical and mental costs. It will then outline how these impacts vary by demographic, particularly amongst marginalized groups including those protected by section 15 of the Charter.

### Impacts of a complex legal system

#### Legal problems increase and compound

*… legal problems tend to multiply; one sort of problem is often compounded by another type of legal problem.*[231]

The complexity of the system can lead to unresolved legal issues and delays in addressing legal matters. [232] This can give rise to additional and compounding legal problems which, in turn, can make navigating the justice system more complex.[233] According to the 2019 report *Justice*

[229] *Reaching Equal Justice, supra* note 3 at 50 ("[t]he growing complexity of law and legal process, including vocabulary, protocols, procedures and institutions, contributes to an inaccessible justice system").
[230] *Ibid* at 40 ("[a]pproved applications for civil legal aid, 1992-2012. Over two decades, the number of approved civil legal aid applications was reduced to a third: in 1992-1993, there were almost 18 approved applications for every 1000 Canadian residents, by 2011-2012 this number hovered over six for every 1000 people. This represents a 65.7% decline"); 44 ("[h]istorically, we did not keep track of unrepresented litigants and courts do so only inconsistently today. As a result, data on this phenomenon is still limited. Twenty years ago, best estimates are that less than 5% of litigants were not represented by counsel. Today anywhere from 10-80% of litigants are unrepresented, depending on the nature of the claim and the level of court… one international study has demonstrated a link between cuts to legal aid and the growth of unrepresented litigants"); see also 49.
[231] Farrow, "What is Access to Justice", *supra* note 39 at 963.
[232] *Reaching Equal Justice, supra* note 3 at 22.
[233] Farrow, "What is Access to Justice", *supra* note 39 at 963. See also *Roadmap for Change, supra* note 3 at 4 ("[a]n important result of the inaccessibility of legal services and the fact that many people do nothing to address their legal problems is that a proportion of legal problems that could be resolved relatively easily at an earlier stage escalate and shift to ones that require expensive legal services and court time down the road"), citing Balmer, *supra*

*for All*, an international document presented by the Task Force on Justice:

> Justice is frequently too slow and time-consuming, too expensive, and unnecessarily stressful for those who need help. For many people, justice institutions are physically inaccessible, or they are rendered unapproachable or inefficient by linguistic or cultural barriers. The delays this causes allow justice problems to become more serious, imposing still greater costs and stress on users and on justice institutions themselves.[234]

Similarly, Deborah Doherty's piece, *Promoting access to family justice by educating the self- representing litigant*, found that delays were more common amongst SRLs as compared to those who have retained counsel.[235] While the report notes the additional legal costs incurred for the represented party, delays can have a snowball effect on those who are not represented, adding to their costs as well as the complexity and number of legal issues they face.

The matter of Ashley Murray (the single mother renting her boyfriend's parent's basement apartment) provides an example of how this can play out. The first issue faced by Ms Murray was a threat from EIA requiring that she and her boyfriend either identify as common law partners or move out of her apartment in order to maintain her benefits. Having not made a decision within her directed 3 months, Ms Murray was then withdrawn from EIA, thus facing the arguably more pressing matter of how to cover the costs of housing and food for both herself and her young son.

In Ms Murray's case, the timeline as well as the fact that she only received legal advice at the appellate level could have meant going three and a half years without benefits, potentially leading to increased issues related to housing, health, custody and even Child and Family Services. In her case the delay resulted in a moot issue and the stunting of the development of case law; however, it is not difficult to see how that could have easily escalated in other circumstances.

When SRLs experience additional forms of marginalization such as poverty or disability, not only can their legal issues compound, but they can face serious implications outside of a court such as hunger, loss of shelter, and deterioration of mental and physical health. With fewer

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note 4 at 31-36.

[234] *Justice For All*, *supra* note 30 at 33.

[235]Deborah Doherty, "Promoting Access to Family Justice by Educating the Self-Representing Litigant" (2012) 63 University of New Brunswick Law Journal at 2 citing Province of New Brunswick, *Report of the access to Family Justice Task Force* (2009), online at <http://www.gnb.ca/0062/familyjustice/finalreport-e.pdf>.

resources, addressing these legal matters can be virtually impossible for some.[236]

**Poorer outcomes**

*Judges, lawyers and litigants were united in the belief that unrepresented litigants fare worse in court and experience poorer outcomes compared to those who have access to lawyers.*[237]

Persons who undertake to resolve their legal matters without representation are more likely to experience worse results when attending court.[238] According to the 2013 Action Committee on Access to Justice in Civil and Family Matters report: *A Roadmap for Change*, Canadians generally have a 17%-1,380% greater chance of receiving better legal results if they have access to legal assistance.[239] Similarly, a review of over 200 studies conducted in the United States concluded that "unrepresented parties lose significantly more often – and in a bigger way – than represented ones."[240] While there are factors at play in these statistics that may not be directly related to complexity, confusion around process and legal terminology[241] play a big role in the success, or lack thereof, of SRLs.[242]

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[236] *Justice Starts Here, supra* note 31 at 2.
[237] *Reaching Equal Justice, supra* note 3 at 28.
[238] See e.g. *Biley v Sherwood Ford Sales Limited*, 2019 ABQB 95 (including the fear of being found to be a vexatious litigant) [*Biley*]. See also Erin Chesney, Julie Macfarlane &Katrina Trask, *The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?* (University of Windsor, November 2015), online: https://representingyourselfcanada.com/wp-content/uploads/2016/12/NSRLP-The-Use-of-Summary-Judgment-Procedures-Against-SRLs.pdf at 10.
[239] Canadian Bar Association, Standing Committee on Access to Justice, *Toward National Standards for Publicly-Funded Legal Services* (Ottawa: Canadian Bar Association, April 2013) at 18, citing Russell Engler, "Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?" (2010) 9:1 Seattle J. for Soc. Just. 97 at 115, citing Rebecca Sandefur, "Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes" (26 March 2008) at 24. See also *Roadmap for Change, supra* note 3 at 4 citing Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall L.J. 71 at 87 ("those addressing refugee matters have a 275% higher chance of success than those who do not have representation").
[240] *Reaching Equal Justice, supra* note 3 at 45.
[241] Including application of jurisprudence and legislation.
[242] *Reaching Equal Justice, supra* note 3 at 28 ("[j]udges express concerns about whether SRLs experience fair outcomes, including that they tend to be "unable to articulate their case" or "fail to address the issues that are probative". In addition, judges commented that unrepresented litigants "are often overwhelmed by their emotions" and generally tend not to explore all possible scenarios. Both judges and lawyers expressed particular concerns about the inequalities experienced by SRLs who were victims of domestic violence"). See also *The National Self-Represented Litigants Project Final Report, supra* note 69 at 9 ("[w]hile on-line court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRL's often find they have made mistakes and omissions. The most common complaints include difficulty knowing which form(s) to use; apparently inconsistent information from court staff/ judges; difficulty with the language used on forms; and the consequences of mistakes including adjournments and more wasted time and stress. These widespread difficulties result in frustration for SRL's and additional burdens on court personnel, including registry staff and judges"), 60 ("[v]irtually every SRL in the sample complained that they found the language in the court forms confusing,

In addition to a higher likelihood of receiving a poorer outcome, SRLs are less likely to have their issues heard at the Supreme Court level. Statistics show that although SRLs account for 25% of annual applications to the Supreme Court of Canada, they have a 0.23% chance of being granted leave. This is in contrast with the approximately 11% of applications that are accepted overall. To put that further into context, within the 12 years between 2003 and 2015 1,748 applications were filed by unrepresented litigants and only 4 were granted.[243] Although these statistics do not point to the reason that SRLs are less likely to be heard, they do point to a trend that, without a legal interpreter, litigants appear to fare worse not only in legal outcome, but also in gaining the right to be heard before the Supreme Court of Canada.[244]

**Not enforcing legal rights / the stunting of positive law**

> *These difficulties and barriers to navigating the system are so frustrating, upsetting and discouraging that many community members said they would 'just give up' rather than tackle those challenges. When they described experiences where they did pursue their legal rights or protections, it was often framed as a fight against the odds.*[245]

According to the *Roadmap to Change* report, "over 20% of the population take no meaningful action with respect to their legal problems."[246] More specifically, according to the *Cost of Justice* report, 4.6% of Canadians who experience "at least one and up to seven serious civil or family justice problems during a given three-year period […] take no action to resolve their legal problem(s)".[247]

In its findings, the *Cost of Justice* report found that key reasons for not taking any action on legal matters included not thinking anything could be done (42.1%), considering the problem to not be that serious (35.2%), thinking it would cost too much (23.9%), thinking that it would be too stressful (22.8%) and being uncertain of legal rights (20.4%):

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complex and, and some cases, simply incomprehensible – referring to terms and concepts with which they were unfamiliar").

[243] Herman Wong, "Self-represented litigants struggle to be heard at the Supreme Court of Canada", *Ottawa Citizen* (13 February 2020), online: https://ottawacitizen.com/news/politics/self-represented-litigants-struggle-to-be-heard-at-the-supreme-court-of-canada/.

[244] Note that while these numbers provide one more example of the experience of SRLs, it is important to note that there are many factors that could influence these statistics that have not been accounted for. For example, it is not clear whether the 25% of SRL applications are from different parties, or whether they may include the same litigant applying multiple times.

[245] *Reaching Equal Justice, supra* note 3 at 22.

[246] *Roadmap for Change, supra* note 3 4.

[247] *Cost of Justice in Canada, supra* note 34 at 153.

**Table 4.1: Taking no Action – First Problem**[248]

Among people who do not try to resolve the first legal problem, the following are the reasons offered for not trying to resolve the problem. In some cases, there are multiple reasons for not taking any action to resolve the first problem.

| Reasons for Not Taking Action | Percentage of People | Population Estimate |
|---|---|---|
| Problem not that serious | 35.2% | 239,879 |
| Didn't think that anything could be done | 42.1% | 259,892 |
| Didn't know what to do or where to go to get help | 15.6% | 94,757 |
| Uncertain of legal rights | 20.4% | 123,649 |
| Think that it would take too much time | 18.8% | 113,834 |
| Think that it would cost too much | 23.9% | 144,782 |
| Too scared to do anything | 5.4% | 32,719 |
| Worried that it would just cause more trouble | 18.9% | 114,390 |
| Think the other party was right | 2.3% | 14,090 |
| Think that it would be too stressful | 22.8% | 138,002 |
| Help was too far away or hard to access | 9.7% | 58,750 |
| Had a previous problem and know there was no use in getting help | 9.4% | 57,060 |

As discussed above, where these legal issues are not pursued many can face a worsening[249] or compounding of their legal matters. Of those who did take action, many sought assistance from friends or relatives, support organizations or the engagement of a lawyer (15.6%).[250] The most helpful of these actions was the support of a lawyer with 33.4% saying this was somewhat helpful and 47% saying very helpful.[251]

In addition to the compounding impact of unresolved legal matters, where issues are not brought before the courts, the development of the law is stunted.[252] The Canadian legal system is

[248] *Ibid* at 155.
[249] See *Ibid* at 45, citing Ab Currie, "Legal Problems of Everyday Life" in Rebecca Sandefur, ed, *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, UK: Emerald Group Publishing, 2009) vol 12 at 89 ("[m]any people who do not resolve their problems feel that the situation is becoming worse").
[250] *Cost of Justice in Canada, supra* note 34 at 155 ("28.2% (or approximately 2,975,583 people) search the Internet for help 69.4% (or approximately 7,238,749 people) talk the problem over with the other party involved in the dispute 54.7% (or approximately 5,705,150 people) seek advice from friends or relatives 15.6% (or approximately 1,623,679 people) contact a lawyer for help 22.1% (or approximately 2,303,514 people) contact an organization such as a union or advocacy group for assistance").
[251] *Ibid* at 131 (note that 33.4% said somewhat helpful and 47% said very helpful).
[252] Suzy Flader, *Alleviating the Access to Justice Gap in Canada: Justice Factors, Influencers, and Agenda for Moving Forward* (2019) [unpublished, archived at University of Victoria] at 17, citing Kerri Froc, "Is the Rule of Law the Golden Rule? Accessing Justice for Canada's Poor" (2008) 87:2 Can Bar Rev 459 at 459 ("Kerri Froc

driven by case law, the content of which is ever changing based on the lived experiences of the litigants who bring their matters forward. If the complexity of the system prevents people from participating or fully presenting their cases, the justice system is stunted as its advancement does not include the perspectives of those who cannot understand it or cannot afford counsel. As a result, not only is the development of the law put at risk, but the laws that do develop will only reflect the issues of those who were able to access the courts. Jurisprudence will continue to develop without the voices of those who could not access it, thus further perpetuating their exclusion.[253]

Again, Ashley Murray's matter provides a clear example of what this can look like. Ms Murray appealed to the SSAB without legal counsel and, as such, was unaware of all of the legal arguments available to her. She later retained counsel and, upon appeal to the Court of Appeal, put forward a full legal case that specifically addressed matters of gender equity and the economic disadvantages experienced by women living in poverty.[254] However, because these issues had not been argued in her original appeal before the SSAB,[255] her matter was dismissed. As a result, an important legal question directly related to the safety and financial stability of women living in poverty did not receive judicial determination. The Court of Appeal did conclude by stating that "[t]he matters may well be raised before the administrative tribunals in the future and, if appropriate, can be the subject of a future appeal";[256] however, that would require a similarly positioned litigant to be able to either retain a lawyer or have the legal capacity to bring these complex issues before the SSAB which, as the factors in Ms Murray's

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argues that Canada's poor are unable to benefit from access to justice under the existing rule of law due to the normative evaluation of the content of laws that Charter rights like those expressed under ss. 7 and 15 support and inform. She notes the poor claimants have scarce chances of making successful claims against the government for systemic failures because they lack the financial means to pursue their legal rights. The poor have had some successful equality and fairness claims, concerning matters such as the government's systemic failures to provide funding for legal services in civil matters or its imposition of financial barriers to access to justice. However, these cases have arguably been won because the courts were able to generalize the issues away from poverty and towards seeing access to justice as an issue experienced by "ordinary," middle-class litigants" [footnotes omitted]).

[253] Access to Justice Committee, *Study on Access to the Justice System – Legal Aid*, (Ottawa: Canadian Bar Association, December 2016) at 3, citing *Hryniak*, *supra* note 2 at para 1 ("[w]ithout public adjudication of civil cases, the development of the common law is stunted").

[254] See *Murray Factum of the Appellant*, *supra* note 19 at para 52, citing *Manitoba Ombudsman Report*, *supra* note 23 at 92; para 51, citing *Falkiner*, *supra* note 24 at para 60.

[255] Note also because enough time had passed that her matter was considered moot.

[256] *Murray*, *supra* note 16 at para 20.

case demonstrate, is unlikely.

**Financial costs to both the litigants and the government**

*Access to Justice is an Economic Issue*[257]

The costs of a complex legal system flow in many directions: from citizens who do not recognize their legal rights and do not engage the system, to litigants who either represent themselves and risk a poorer result or who pay to access legal counsel, and to governments in the form of added legal services and social costs.

Persons who either do not know their legal rights or decide not to pursue them face not only the costs associated such as loss of potential compensation, unrealized benefits, punitive damages or loss of employment or housing, but they also risk compounding legal issues which could further increase their costs.

The complexity of the legal system can similarly impact persons who represent themselves. First of all, there are the day-to-day costs associated with addressing legal matters which include time off work to attend court, travel costs to and from court, and filing fees. Secondly, SRLs are more likely to be disadvantaged in the decision making process and could therefore lose out on compensation or incur additional punitive costs.[258] Finally, a lack of understanding of the process often leads to delays as a result of misunderstandings on process

[257] R Wagner, *supra* note 2.

[258] See *Reaching Equal Justice, supra* note 3 at 45 – 46. See also *Jonsson v Lymer*, 2020 ABCA 167 [*Jonsson*] (although the court here doesn't find the SRL to be vexatious, it does point to case law that would support such a finding). See also Julie Macfarlane, Megan Campbell, *Self-Represented Litigants Legal Doctrines of "Vexatiousness":An Interim Report from the National Self-Represented Litigants Project* (December 2019), online: <https://representingyourselfcanada.com/wp-content/uploads/2019/12/Vexatious-Litigant-Report-Final.pdf> at 13 [Macfarlane, *Legal Doctrines of "Vexatiousness"*] ("[t]hirteen (13) of these twenty-seven (27) cases where punitive or substantial costs were awarded against SRLs who were described in a vexatious lite manner also contain issues of procedural fairness, i.e. where SRLs made procedural errors that appear to stem from confusion or lack of knowledge"); National Self-Represented Litigants Project, "Self-Represented Litigants Legal Doctrines of 'Vexatiousness' (9 December 2019) *Case Law Database, Research Reports,* online: https://representingyourselfcanada.com/self-represented-litigants-legal-doctrines-of-vexatiousness/ ([h]owever we are already seeing a number of trends in the case law that we believe are important to highlight. These include an overlap between cases in the database which have been been flagged as raising "procedural fairness" issues (where an SRL has made mistakes which appear to be a direct consequence of their lack of knowledge and familiarity with the process, despite best efforts) and those in which they are formally designated as a vexatious litigant. As well, the relationship between CLD cases involving disabilities, substantial or punitive costs, and vexatiousness raise concerns about conflation between intentional process "abuse" and genuine confusion and mistakes, which we have drawn attention to before (for example in this earlier blog). This report provides more evidence pointing to this problem").

and failures to properly complete forms.[259] These delays mean that legal issues take longer to resolve and are therefore more likely to compound. While the obvious financial implication of the complex laws in Ashley Murray's case was the loss of EIA benefits, another clear example can be found in the matter of Jeremy Berke. Mr. Berke is an American man who spent 5 months at Rikers Island Prison because he was unaware that his bail was $2.[260] Aside from the basic justice issues at play, from a financial perspective this left the state to pay for the cost of housing him for 5 months (a cost of approximately $925 a day)[261] and meant that he lost out on any employment opportunities he might have had, but for his time in Rikers; all as a result of an unknown $2 bail fee.

From a government perspective, complex legal processes and materials can add to justice costs across the board, including the judiciary, Legal Aid and support staff. For example, following the simplification of court materials, staff in the British Columbia Small Claims Court were able to take on 40% more work, saving money while also creating greater efficiencies within the system.[262] Similarly, the Alberta Department of Agriculture saved $3,500,000 when it simplified its forms, demonstrating the great costs that fall to government when laws and materials are unnecessarily complex.[263]

The United States has seen significant fiscal savings as a result of various mandates requiring that legal materials be drafted in plain language.[264] For example, following the plain

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[259] *Plain Language in Washington State, supra* note 134 at 23 ("[o]f particular note are two studies on court forms. As a result of its forms revision of 1994, the Family Court of Australia found that *pro se* litigants accurately completed the new forms sixty-seven percent of the time, as compared to fifty-two percent for the old ones. Furthermore, for the same group, the number of applications rejected because of errors dropped from forty-two percent to eight percent"), citing Gordon Mills & Mark Duckworth, *The Gains From Clarity: A Research Report on the Effects of Plain-Language Documents* (Sydney: Law Foundation of New South Wales, 1996) online: <http://www.clarity-international.net/downloads/Gains%20from %20Clarity.pdf>.

[260] Shayna Jacobs, "Exclusive: Queens man unaware of $2 bail, spends nearly 5 months at Rikers Island", *New York Daily News* (1 June 2016), online: https://www.nydailynews.com/new-york/nyc-crime/queens-man-unaware-2-bail-spends-5-months-rikers-article-1.2656363.

[261] Dan Mannarino, "City Comptroller: It costs $337,000 per inmate at Rikers Island", *PIX 11* (6 December 2019), online: https://www.pix11.com/news/local-news/city-comptroller-it-costs-337-000-per-inmate-at-rikers-island.

[262] *Literacy and Access to Administrative Justice, supra* note 63 at 14, citing Joseph Kimble, "Writing for Dollars, Writing to Please", *Scribes Journal of Legal Writing* (1996) at 8.

[263] *Literacy and Access to Administrative Justice, supra* note 63 at 14, citing Christine Mowat, "Alberta Agriculture Saves Money with Plain Language", Clarity 38 (1997) at 6 ("[t]he Alberta Department of Agriculture—simplifying its forms saved easily $3.5 million").

[264] *Plain Language in Washington State, supra* note 134 at 1069, 1077 (the United States has Federal mandates requiring that many new or revised legal materials must be written in plain language. On a state level, 24 states have plain language court forms, 14 of which require the use of these plain language forms and 8 require that they are accepted by the court).

language re-drafting of their regulations, the Federal Communications Commission was able to remove five fulltime positions[265] and after Veteran Affairs revised its form letter they saw an 83% reduction in calls for assistance which saved $40,000 a year.[266]

In addition to finances directly related to the justice system, there are also costs to government arising from the daily legal issues experienced by Canadians. These expenses can be in the form of added social assistance, healthcare, loss of housing and loss of employment. It is estimated that these factors cost the government approximately $800,000,000 annually.[267] However, research shows that social spending costs can be reduced if persons have access to representation when navigating the system. This assistance can save money in a number of ways including "reducing domestic violence, helping children leave foster care more quickly, reducing evictions and alleviating homelessness, protecting patient health and helping low-income people participate in federal safety-net programs."[268]

While these examples point to costs that stem from an inaccessibly complex legal system, it is also important to point out that some barriers to the justice system also save money, at least in the short term. An example of this is the reduction in Legal Aid spending. While these budget cuts do reduce access to the justice system, they also reduce government spending on access.[269] Similarly, where marginalized litigants do not have the ability to enforce legal benefits, would-be responding parties do not bear those costs, either individually or, where precedent setting, for future claimants.[270] This was exactly the case with Ms Murray. Had she been aware of all of her legal rights before the SSAB, not only could she have potentially continued to receive income assistance, but future claimants could have relied on the decision in her case to enforce their own rights. But for the complex and inaccessible system, Ms Murray may have realized a legal benefit, saving her money but requiring government expenditures.

**Deterioration of physical and mental health**

*Access to justice is increasingly being recognized as a key factor that shapes the determinants of health and well-being, as several have a legal dimension. In many cases, health problems can*

[265] *Literacy and Access to Administrative Justice*, *supra* note 63 at 15, citing Kimble, *supra* note 262 at 9.
[266] *Literacy and Access to Administrative Justice*, *supra* note 63 at 15, citing Kimble, *supra* note 262 at 9.
[267] *Cost of Justice in Canada*, *supra* note 34 at 205-227.
[268] *Reaching Equal Justice*, *supra* note 3 at 55.
[269] E.g. legal aid costs and other legal support services.
[270] E.g. governments, employers, landlords etc.

*lead to legal problems, and legal problems can exacerbate health problems.*[271]

According to *Access to Justice Metrics* community consultations, the uncertainty and ambiguity of the legal system has a direct impact on the mental wellbeing of community members:

> Many community members reported that lack of information and direction exacted an emotional toll. Community members described how scary and intimidating it is not to know what is happening, what their options are, what possible outcomes might be, and so on. They mentioned the anxiety, fear, frustration, discouragement and stress involved in progressing through justice systems. They also talked about their need for emotional support. [272]

Similarly, the National Self Represented Litigants Project has reported that, when engaging with the legal system, SRLs feel anxious and excluded due to their lack of awareness and understanding of legal processes, customs and language.[273] According to the *Cost of Justice* report there is a clear connection between involvement with a legal matter and health. Although the data does not speak directly to the impact of complexity, it does outline the health impacts of experiencing a legal matter generally and provides a clear link on how the law is connected to health. Of the people surveyed, 41.2% identified their legal matter as having an impact on their mental health, reporting a subsequent increased use of medical or counseling services.[274] Similarly, 65.2% of people surveyed indicated that their legal issue affected their physical health and led to a rise in their use of the healthcare system.[275]

A more extreme example of both the possible emotional and physical effects of a complex system can be found in the case of Kimberly Rogers. A resident of Sudbury Ontario, Ms Rogers was registered for both welfare and student loans at a time when receiving both was

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[271] *Justice Starts Here, supra* note 31 at 31.
[272] *Access to Justice Metrics, supra* note 68 at 15 – 16.
[273] *The National Self-Represented Litigants Project Final Report, supra* note 69 at 97 ("…the lawyers and the judges speak the same language"; it "is like going into a gunfight armed only with a knife"). See also *Reaching Equal Justice, supra* note 3 at 46, citing *The National Self-Represented Litigants Project Final Report, supra* note 69 ("[a]s noted above, Macfarlane found serious implications of the SRL experience, including health issues, financial consequences, social isolation and declining faith in the justice system generally. Lack of representation or under-representation has a disproportionately negative effect on individuals living in marginalized conditions").
[274] *Cost of Justice in Canada, supra* note 34 at 215 ("[a]pproximately 5,309,024 people said that the first legal problem affected their mental health or caused extreme stress 41.2% (or approximately 2,188,143 people) visited doctors or used the counselling services more than normal as a result of experiencing a legal problem").
[275] *Ibid* at 212 ("[a]pproximately 2,002,304 people indicated that the first problem affected their physical health 65.2% (or approximately 1,306,024 people) visited doctors or used the health care system more than normal as a result of experiencing one legal problem").

legal. Soon after a change in government in 1995, new measures were put in place that banned individuals from receiving income from both services. Ms Rogers was not made aware of these changes and remained registered for both programs. As a result she was found guilty of welfare fraud, became ineligible for welfare services and was placed under house arrest. At the time Ms Rogers was pregnant. These conditions left her confined to her apartment during a record-breaking heat wave with no money to pay for rent, food or medication (including anti-depressants). On August 9th, 2001, Ms Rogers was found dead by suicide.[276]

Not only does the complexity of the system leave persons vulnerable to punitive measures following misunderstandings or unintentional errors, but the complexity of the system can also prevent people from accessing the emotional and physical benefits that they are entitled to under law. An example of this failure can be found in the case of Tina Fontaine, a 15-year-old girl from Manitoba, who was found murdered in 2014. Three years previously her father had been murdered and, according to relatives, following his death Ms Fontaine had become withdrawn. An investigation into her death found that following the loss of her father Victim Services were responsible for offering and providing her with supports; however, due in part to a "lack of clarity and consistency in the information and services provided to Tina's family" she did not receive the supports she both needed and to which she was entitled. The investigation into her death ultimately found that "[f]ollowing the death of Tina's father, victim services did not provide Tina the counselling to which she was entitled. Had the process been streamlined and the quality of services consistent, Tina might have been able to access timely compensation benefits, primarily in the form of counselling."[277] Had she known how to access the services available to her, her life may have turned out very differently.

Given that laws affect almost every aspect of daily living, it is no surprise that an inability to comprehend the law can have serious consequences. The more closely tied a legal matter is to one's basic needs, the more serious the health consequences when those matters are not understood.

**The impacts of a complex legal system vary by demographic**

*The current justice system, which is inaccessible to so many, disproportionately impacts members of immigrant, Aboriginal and rural and northern populations, and other vulnerable*

[276] See *Rogers, supra* note 22 and *Inquest into Rogers, supra* note 22.
[277] See e.g. *Tina Fontaine, supra* note 14 at 72.

*groups.*[278]

The impacts of an inaccessibly complex legal system are felt most by marginalized groups including rural/remote populations, persons living in poverty, Indigenous people, newcomers, persons with disabilities and women[279] and are further compounded when these factors intersect.[280] As will be explored, it is important to flag that the characteristics of many of these groups overlap with enumerated grounds under section 15 of the Charter, specifically, race, national or ethnic origin, colour, sex and mental or physical disability.[281] The fact that these groups are protected by the Charter does not necessarily affect a review of how they are disproportionately impacted by a complex legal system; however, when addressing available remedies later on in this thesis, the fact that equality protections may be triggered could amplify the need for corrective action.

Given the varying methods used by researchers in categorizing demographics it is difficult to provide exact numbers on impacted groups. However, when discussing complexity, the data reviewed makes clear that marginalized persons are more likely to experience the negative effects of an inaccessibly complex justice system.

Three reasons were provided for why the barrier of complexity has a greater impact on vulnerable groups:

1. Marginalized groups are less likely to be able to afford a lawyer. Without a legal translator the onus is on them to understand the law and its processes. This impact is doubly problematic as many of the services that assist in legal navigation are less effective or available to those groups.[282] For example, in order to benefit from online supports, one must have access to a computer and a reliable Internet connection,

[278] Public Affairs, *Report of the Treasurer's Advisory Group on Access to Justice Working Group* (Law Society of Upper Canada, February 2014) tab 2 at 3.
[279] *Justice Starts Here*, *supra* note 31 at 3.
[280] See *Reaching Equal Justice*, *supra* note 3 at 60 ("…experiencing more than one form of disadvantage, say disability and remoteness, has an "additive effect". Multiple disadvantage results in multiple problems…").
[281] See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1) ("[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on *race*, *national or ethnic origin*, *colour*, religion, *sex*, age or *mental or physical disability*" [emphasis added]) [*Charter*].
[282] *Justice Starts Here*, *supra* note 31 at 3, 18. See also *Global Insights on Access to Justice*, *supra* note 30 at 4; *Justice For All*, *supra* note 30 at 53; *The National Self-Represented Litigants Project Final Report*, *supra* note 69 at 10, 56.

technologies that may be prohibitively expensive to individuals with limited income.

2. Marginalized people are more likely to have low literacy skills, and so when faced with the challenge of comprehending the law, are less likely to be able to understand it:

> If members of the public have low literacy levels in general, they are doubly affected when faced with specialized legal language.[283]

3. Marginalized people have an increased likelihood of facing a higher number of and more complex legal issues, meaning that the issues that they are dealing with are more complex than what the population at large would face.[284] This is particularly problematic given that they are less likely to be able to afford a lawyer and the availability of Legal Aid representation is continually decreasing. In conducting a study on the legal needs of Ontarians making less than $20,000 annually, the CBA reported that "the poorest and most vulnerable Ontarians experience more frequent and more complex and interrelated civil legal problems."[285]

It should be noted that because no standardized categorization was followed by the various researchers considered in this review, it is difficult to synthesize all findings under clear categories. That said, from the various sources, the following groups within Canadian society can been seen to be disproportionately affected by the complexities of the legal system:

**Persons living in rural/remote communities**

*It is a well-documented and oft-lamented fact that the problem of limited access to justice is far worse in the rural and remote areas of Canada than in its cities and suburbs.*[286]

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[283] *Literacy and Access to Administrative Justice*, *supra* note 63 at 16.
[284]*Global Insights on Access to Justice*, *supra* note 30 at 4; *Justice For All*, *supra* note 30 at 53; see also *Reaching Equal Justice*, *supra* note 3 at 36 ("[n]ot only are people living in disadvantaged conditions or socially excluded groups more vulnerable to experiencing multiple legal problems, they are less likely to take action to resolve these problems, less capable of handling their problems alone and more likely to suffer a variety of adverse consequences that may well further entrench their social exclusion").
[285] *Reaching Equal Justice*, *supra* note 3 at 36, citing *Listening to Ontarians*, *supra* note 80 at 45.
[286] Jamie Maclaren, "Access to Justice in Rural and Remote Communities: Where to From Here?", *Slaw* (6 May 2011), online: < http://www.slaw.ca/2011/05/06/access-to-justice-in-rural-and-remote-communities-where-to-from-here/>.

In response to the complexity of the legal system, governments and service providers are working to create guides and educational materials to help explain legal content and legal processes. While these supports have helped alleviate some of the complexity of the system, these resources are most commonly made available through the Internet.[287] For those who live in rural or remote areas, this puts them at a disadvantage as Internet access is far more limited outside of urban environments:

> There is also a "digital gap" in Canada between rural communities or areas with relatively low population density and urban areas with respect to Internet services. People living in rural or remote areas often experience service interruptions because of poor service quality or they pay higher costs because of overage charges associated with lower-speed Internet service.[288]

In addition, even where services are available in person, face-to-face supports are often confined to cities and large communities and are therefore less accessible to rural populations. This is similarly the case with traditional legal representation as it is notoriously difficult to recruit lawyers to rural locations.[289] Because the number of supports are more limited in rural areas, when in-person supports are available there are often limited firms, services or practitioners available. Therefore, conflict of interest obligations may limit the options for supports; for example in a family matter where one party has retained local counsel, that lawyer and possibly even their entire firm may then be unavailable to other parties in the same matter.[290]

As a result, rural and remote populations are at a disadvantage when engaging with a complex legal system as they do not have access to the same benefit of online or in person legal

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[287] *Reaching Equal Justice, supra* note 3 at 47 ("[p]ublic legal education and information providers are leading the way, often relying on online resources as a gateway"); see also *The National Self-Represented Litigants Project Final Report, supra* note 69 at 10, 56; *Justice Starts Here, supra* note 31 at 18.

[288] *Justice Starts Here, supra* note 31 at 18.

[289] Tonya Lambert, "Promoting the Practice of Law in Rural, Regional & Remote Communities", *Law Now* 44:3 (7 January 2020), online: < https://www.lawnow.org/promoting-the-practice-of-law-in-rural-regional-remote-communities/>. See also Cabral et al, "Using Technology to Enhance Access to Justice" (2012 26:1 Harvard Journal of Law and Technology) 256 at 261, citing The California Commission on Access to Justice, *Improving Civil Justice in Rural California* (September 2010), online: <http://www.calbar.ca.gov/Portals/0/documents/accessJustice/CCAJ_2010__FINAL_2.pdf?ver=2017-05-19-133105-073>, at 9 ("[l]egal aid programs in rural areas face even greater challenges than those in urban areas as there are fewer traditional sources of pro bono legal work and fewer funding resources."), 12 ("Other challenges involve travel time and costs for the client to reach legal aid offices and the difficulty of recruiting staff to serve in rural areas") [*California Commission on Access to Justice*].

[290] See Law Society of Manitoba, *Code of Professional Conduct* (2011), online: https://lawsociety.mb.ca/regulation/act-rules-code/code-of-professional-conduct/, s 3.4-1 ("[a] lawyer must not act or continue to act for a client where there is a conflict") [*Code of Professional Conduct*].

supports.

**Indigenous people**[291]

*The information that we need should be provided. You are made dependent on the system because you don't know what to do.*[292]

Indigenous people are over-represented in the Canadian correctional system. According to *Justice Starts Here*:

> In July 2016... the federal correctional system reached a sad milestone — 25% of the inmate population in federal penitentiaries is now comprised of Indigenous people. That percentage rises to more than 35% for federally incarcerated women. To put these numbers in perspective, between 2005 and 2015 the federal inmate population grew by 10%. Over the same period of time, the Aboriginal inmate population increased by more than 50% while the number of Aboriginal women inmates almost doubled. Given that 4.3% of Canada's population is comprised of Indigenous Peoples, the Office estimates that, as a group, they are incarcerated at a rate that is several times higher than their national representation.[293]

In addition, and perhaps because of this over-representation, the complexity of the law disproportionately impacts Indigenous people. The legacy and on-going reality of colonialism has left Indigenous populations with high rates of poverty and low rates and quality of education,

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[291] Flader, *supra* note 252 at 18, citing Sarah Buhler, "Don't Want to Get Exposed: Law's Violence and Access to Justice" (2017) 26 J L & Soc Pol'y 68 at 75 ("Indigenous peoples face some of the most significant systemic discrimination in Canada. Though they are disproportionately impacted by a variety of pressing legal issues, they also face increased barriers to accessing adequate justice due to factors like the justice system's inherently colonial structure and Indigenous people feeling incapable or afraid of relying on a system that so often harms them"), citing Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015) at 164-182 ("[i]n its final report, the Truth and Reconciliation Commission specifically noted how the legacy of residential schools has disproportionately victimized Indigenous peoples to this day in both the criminal and civil justice systems"), and at 137-144 ("[t]he harms to Indigenous people presented by the child welfare system also factor into the general discussion of access to justice").

[292] *Access to Justice Metrics, supra* note 68 at 20, citing an Aboriginal woman from Saskatoon.

[293] Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015–16* (2015- 2016), online: http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/ annrpt20152016-eng.pdf [*Office of the Correctional Investigator*]. See also Alex Choby, Patti Laboucane Benson, *Indigenous Public Legal Education – PLE from an Interconnected Worldview* (Alberta: Centre for Public Legal Education Alberta, 2018), online: < https://www.lawnow.org/indigenous-public-legal-education-ple-from-an-interconnected-worldview/> ("[t]hey are: more likely to be arrested, more likely to be refused bail, less likely to have adequate council and more likely to have their matter proceed to trial in result, and once convicted, more likely to be given longer sentences. The Stanley Trial and the 2013 Iacobucci Report for the Government of Ontario are reminders that Indigenous people are unlikely to face a jury that includes other Indigenous people, or, for that matter, to see Indigenous people in influential positions within the legal system--as judges, court prosecutors or lawyers. As victims, Indigenous people are less likely to pursue matters in court").

compounding the impact of the complexity of the law.[294] In addition, the very languages that the law is written in (French and English) create language barriers as they are not the languages of the First People. While certain steps have been taken to translate or provide interpretation to Indigenous people,[295] the majority of legal writing, court forms and support services are not available in Indigenous languages. In a 2007 review of the needs of Indigenous persons in Alberta, the Native Counseling Services of Alberta found that Indigenous people had "difficulty navigating the justice system and understanding legal terminology and legislation, and general apprehension of, disconnection from, and apathy towards the system."[296]

Remote Indigenous communities also have poorer access to lawyers who could assist in navigating the system. In the *Justice Starts Here* focus groups, members from Nisichawayasihk Cree Nation complained that "there are no private bar lawyers in their communities and people represented by Legal Aid lawyers usually must wait until their court date before they can meet in person to get legal advice and/or representation."[297]

Similar to the barriers of rural populations, the "digital gap" also exacerbates accessibility barriers for persons in remote First Nation Communities:

> First Nations communities are among the most disadvantaged with respect to Internet and cell phone service. …the service is substandard due to slow speeds and a higher volume of traffic per connection.[298]

Finally, the relationship that some Indigenous People have with the law is, in and of itself, inherently conflicted. Wielded as both a destructive weapon of colonization and a

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[294] See Choby, *supra* note 293 ("Indigenous people have a complex relationship to Canadian law–which has been used both as an instrument of colonization, and more recently, as a way to pursue and clarify pre-existing and constitutional rights. For two decades, NCSA has undertaken research into the effects of colonial legislation and policy on Indigenous communities, life-chances, and experiences of the law in the present moment. Key findings highlight that some (but not all) Indigenous people live with historic trauma that shapes interactions with the legal system").

[295] Frank Iacobucci, *First Nation Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Fran Iacobucci* (Toronto: Office of the Attorney General, February 2013) at 41.

[296] Choby, *supra* note 293.

[297] *Justice Starts Here*, *supra* note 31 at 25.

[298] *Ibid* at 18. See also 18-19 ("[i]n Manitoba, northern First Nations do not have the same access to cell and phone service as compared to people living in the southern part of the province or in urban areas. Northern First Nations are in high cost of service areas and phone service is often unreliable in that calls cannot be made outside the community or the lines are frequently busy. As a result, people living in these communities must rely even more on the Internet as a means of communication, but the service is substandard due to slow speeds and a higher volume of traffic per connection. In many remote and isolated First Nations and other communities in Manitoba, people simply do not have the option of going to a physical location to access information or services. People living in these areas must use the Internet to access health information, government services, and do job searches…").

remedial tool for the realization of Indigenous rights, the very foundation of the Indigenous/Canadian legal relationship is complex.[299] This compounds the impact of additional complexities of language, representation and ineffective supports. As a result of these factors, Indigenous people – the population arguably most directly[300] affected by the legal system – are disproportionately impacted by its complexity.

**Low-income persons**

*One of the biggest factors in whether someone will have access to justice is that person's socioeconomic status.*[301]

The barriers of a complex justice system are strongly felt by low-income people who cannot afford a lawyer and whose access to Legal Aid is steadily decreasing.[302] We know that SRLs find the legal system confusing and difficult to navigate. Those difficulties are compounded for low-income persons who are more likely to experience lower levels of education and literacy.[303]

In addition to this, persons living in poverty often have basic survival needs that must be prioritized, making it even more difficult to address legal matters as they arise:

> The consequences of poverty, especially complex poverty, are significant. People living in poverty are simply trying to survive so they either cannot deal with their problems as they arise or they are dealing with problems that give rise to more than one legal issue. These issues are often compounded by other vulnerabilities including health or disability-related challenges.[304]

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[299] Choby, *supra* note 293 ("Indigenous people have a complex relationship to Canadian law-which has been used both as an instrument of colonization, and more recently, as a way to pursue and clarify pre-existing and constitutional rights").
[300] *Office of the Correctional Investigator, supra* note 293 (considering incarceration statistics).
[301] *Justice Starts Here, supra* note 31 at 2. See also *Access to Justice Index, supra* note 59 at 9 ("[a]ccess to justice issues are often intensified by other components and conditions, including socio-economic, health factors, and/or policy decisions taken in other areas of responsibility"); Farrow, "What is Access to Justice", *supra* note 39 at 972-972.
[302] See also *Reaching Equal Justice, supra* note 3 at 3.
[303] *Ibid* at 36 ("[g]enerally, people living in poverty have lower levels of education and literacy. They disproportionately experience physical and mental health and addiction issues, or have experienced significant trauma in their lives compared to people living at higher income levels. According to British Columbia's Legal Services Society report, Making Justice Work: Legal aid clients are among the most marginalized citizens. They lack the financial means to effectively access the justice system when their families, freedom, or security are at risk. Almost 70% have not graduated from high school, and many struggle with basic literacy. Others face linguistic or cultural barriers").
[304] *Justice Starts Here, supra* note 31 at 2.

Further, without a financial "safety net", the consequences of compounding and complex legal matters are often more severe for those in poverty as they are more likely to impact an ability to meet basic needs including food and shelter.[305]

**Persons with disabilities**[306]

*People with disabilities said that, even if they found the information, it was not necessarily accessible to them, e.g. in Braille.*[307]

According to survey data from Australia, persons with disabilities have the greatest justice needs of all marginalized demographics[308] and those with disabilities as well as single parents are 100% more likely to experience legal issues as compared to other demographics.[309] Although these are not Canadian numbers, they demonstrate the potential legal needs of this sector of the population, important to keep in mind as we consider specific barriers to the system.

Navigating a system inaccessible to the general population can be made even more inaccessible for persons with additional accessibility needs. Studies have found that when it comes to the use of online supports, in the United States 46% of adults with disabilities do not

[305] See e.g. *Murray Factum of the Appellant, supra* note 19 (the impacts of the legal matters faced by Ms Murray led to withdrawal of Social Assistance monies. This could have led to an inability to pay for housing and food). See also, Tania Burchardt, *Time and income poverty*, Centre for Analysis of Social Exclusion, London School of Economics (November 2008), online: < http://sticerd.lse.ac.uk/dps/case/cr/CASEreport57.pdf> ([t]his study considers the concept of time poverty, both on its own and when considered in conjunction or as compared to income poverty. Although not addressed within my thesis, this report brings up interesting points that might be further explored on the barriers to access to justice that are faced by those who experience both time and income poverty; leaving them without financial or personal resources to address legal matters and, possibly, then leading to a further compounding of issues).

[306] See also Nancy Hansen & Lorna Turnbull, "Disability and Care: Still Not 'Getting It'" (2013) 25:1 CJWL 111 ([c]onsidering a decision of the Federal Court of Appeal, this article discusses the concept of time poverty as it relates to those within the disability community, addressing the additional efforts required to function within non-disabled time and space. Again, this is not a topic pursued within this thesis, but important to flag as a topic for further exploration).

[307] *Access to Justice Metrics, supra* note 68 at 20.

[308] *Justice For All, supra* note 30 at 53, citing Law Council of Australia, *The Justice Project Final Report*, (Sydney: The Law Council of Australia, 2018) ("[p]eople with disabilities, who face discrimination in the workplace, at the hands of the authorities, in their communities, and in their homes. Surveys in Australia, for instance, have found that those with disabilities have the greatest justice needs compared to other disadvantaged groups"). See also *Reaching Equal Justice, supra* note 3 at 36 ("[n]ot only are people living in disadvantaged conditions or socially excluded groups more vulnerable to experiencing multiple legal problems, they are less likely to take action to resolve these problems, less capable of handling their problems alone and more likely to suffer a variety of adverse consequences that may well further entrench their social exclusion").

[309] *Reaching Equal Justice, supra* note 3 at 38, citing Christine Coumarelos, et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Sydney: Law and Justice Foundation of NSW, 2012) ("…people with disabilities and single parents were twice as likely as other respondents to experience legal problems").

use the Internet, as compared to only 19% of adults without a disability.[310] As such this population is similarly disadvantaged when it comes to accessing online materials as those who live remotely. In addition to this, even where the Internet is used, it is not always formatted in a way that is accessible (for electronic Internet readers, etc.) so persons with disabilities face additional barriers when using online supports.

Where in-person meetings are available and may alleviate some of these barriers, persons with limited mobility may still find them to be inaccessible as they may not be able to physically attend. Where written materials are provided they may also be problematic as they are not always available in accessible formats (large font, braille, etc.).[311]

**Women**[312]

> *Women survivors of violence face significant barriers to accessing justice. One is a lack of awareness about the law and their legal rights, particularly regarding family law issues.*[313]

Women who have survived trauma and violence are often unaware of their rights and, as a result, unsure of how to engage with the legal system in order to protect themselves and their family.[314] In addition, they are less likely to be able to afford a lawyer to assist them in navigating the system and are therefore more likely to have to represent themselves.[315] This

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[310] Cabral, *supra* note 289 at 2. See also *Reaching Equal Justice, supra* note 3 at 81 ("[t]houghtful web design can overcome many challenges, but it cannot change the fact that fewer adults living with a disability use the Internet, compared to adults without a disability"), citing Bonnie Hough, "Let's Not Make it Worse: Issues to Consider in Adopting New Technology" in Cabral, *supra* note 289 at 261-262.

[311] *Access to Justice Metrics, supra* note 68 at 20.

[312] See Flader, *supra* note 252 at 17-18, citing Mary Jane Mossman, "Shoulder to Shoulder: Gender and Access to Justice" (1990) 10 Windsor YB Access Just 351 at 351, 353, 356 ("[w]omen have experienced many issues accessing adequate justice due to factors like imbalanced employment opportunities and societal misunderstandings of gendered issues like the pervasiveness of sexual harassment and how to inclusively define equality"), citing Laura Track, Shahnaz Rahman & Kasari Govender, Putting justice back on the map: The route to equal and accessible family justice (Vancouver: West Coast Leaf, February 2014) at 12 ("[w]omen are particularly susceptible to facing access to justice issues in the realms of family and civil law. Due to their lack of adequate legal representation, women are losing custody of their children, giving up their valid legal rights to support and fair division of property, and being victimized by litigation harassment from opposing sides"), citing Lisa Gormley, "Traps, Dead-Ends And Obstacles to Justice: Solutions Proposed by Human Rights Law Frameworks" in Lisa Gormley Women's Access to Justice for Gender-Based Violence (Geneva: International Commission of Jurists, 2016) at 132-135 ("[f]emale survivors of violence (both sexual and non-sexual) also face a variety of legal traps, dead-ends, and obstacles when attempting to take action against a male perpetrator, which often ends up victimizing a woman more than if she had done nothing"). See also *Access to Justice Index, supra* note 59 at 9; *Reaching Equal Justice, supra* note 3 at 3.

[313] *Justice Starts Here, supra* note 31 at 35.

[314] *Ibid* at 35.

[315] *Reaching Equal Justice, supra* note 3 at 44 ("[a] significant number of lawyers and judges noted gender

predicament is not only difficult for the women involved, but is reportedly taken advantage of by abusive ex-partners who use this as an opportunity to make direct contact.[316]

According to the Manitoba Association of Newcomer Serving Organizations (MANSO), the complexity of the legal system is particularly difficult to navigate for women who are new to Canada. In describing how these barriers manifest, MANSO listed a number of concerns including "a lack of access to or knowledge of services and support, especially culturally appropriate services, … language and literacy barriers…"[317]

Finally, the compounding inequalities that women face such as a higher likelihood of experiencing poverty[318] increase both the difficulties in accessing appropriate supports and the chances that the system will be experienced as complex.

**Newcomers**

*Access to justice for newcomers is particularly complex where not only do newcomers need to understand and abide by immigration laws in a new province or a new country, but they may also have other legal problems unrelated to immigration that need a resolution.* [319]

Newcomers to Canada face a number of hurdles in accessing the legal system. These hurdles are amplified by the fact that, due to their legal status, newcomers are often required to immediately engage with the system with little to no legal preparation while, at times, dealing

differences for being unrepresented. The common perception is that women are more likely to be unrepresented because they cannot afford a lawyer, while men are more likely to want to deal directly with their former partner or are confident in their ability to represent themselves"). See also 45, citing Birnbaum, *supra* note 111 at 79 ("[m]en more often believe they don't need a lawyer. Women do not have the money").

[316] *Reaching Equal Justice, supra* note 3 at 45 ("[s]ometimes abusive men want to be able to have direct contact with their partner"). For further information see also Chambers et al, "Paternal filicide and coercive control: Reviewing the evidence in *Cotton v Berry*" (2008) 51 UBC L Rev 671.

[317] *Justice Starts Here, supra* note 31 at 35, citing Manitoba Association of Newcomer Serving Organizations, *MANSO Brief to House of Commons Standing Committee on the Status of Women, Violence against Young Women and Girls in Canada* (September 2016).

[318] Monica Townson, *Canadian women on their own are poorest of the poor* (Canadian Centre for Policy Alternatives 2009), online: <https://www.policyalternatives.ca/publications/commentary/canadian-women-their-own-are-poorest-poor> ("[w]omen on their own are the poorest of the poor, especially women raising children in lone-parent families, who are almost five times more likely to be poor than those in two-parent families. Yet their plight has been virtually ignored by the policy-makers. Older women on their own are also 13 times more likely to be poor than seniors living in families, with more than 14% of them having had low incomes in 2007. That these two groups of women had such high rates of poverty, at a time when poverty rates for others had dropped to relatively low levels, must surely be a cause for serious concern. Women are also among the poorest of the poor within Canada's most vulnerable populations: Aboriginal people, people from racialized communities, recent immigrants (many of whom are also from racialized communities), and persons with disabilities").

[319] *Justice Starts Here, supra* note 31 at 5.

with the trauma associated with leaving their home countries. This must often be done in the context of a different legal and political scheme, and so they are required to learn about their rights and responsibilities in an entirely new system.[320]

According to Statistics Canada, in 2016, 72.5% of immigrants did not speak either French or English as their first language,[321] making the process of understanding complicated legal terms that much more difficult.[322] Further, according to a report published by the Council of Canadian Administrative Tribunals, the difficulties faced by many Canadians in completing the detailed, and at times legal, demands of daily life (i.e., completing job applications, filling out insurance forms, following operational manuals),[323] are compounded for Canadians whose first language is not English or French.[324]

**Compounding characteristics**

*There is no limit to the number of intersectional barriers that increasingly prevent vulnerable Canadians from accessing the justice that they need to function.*[325]

Many people within marginalized populations experience overlapping forms of disadvantage which can compound the impacts of a complex legal system. For example, newcomers living in rural or remote areas will not only have to learn a complex and new legal system, but will have to do so with access to fewer support services. Similarly, lower education levels for those who live in rural areas, coupled with higher levels of poverty[326] mean that not only is access to legal representation more difficult, but so too is the ability to comprehend the

[320] *Ibid* at 29 ("[n]ewcomers to Canada also face the enormous task of learning about the Canadian legal and political system and their rights and responsibilities under Canadian laws and policies").
[321] Statistics Canada, *Census in Brief: Linguistic integration of immigrants and official language populations in Canada* (Ottawa: Statistics Canada 2017).
[322] *Justice Starts Here, supra* note 31 at 5 ("Manitoba is becoming an increasingly popular resettlement destination for newcomers. Recent immigrants to Canada, including refugees, face a particularly acute series of challenges as they arrive, settle, and integrate into their new homes. Many are learning English as an additional language, and face considerable barriers in terms of communication and understanding. Newcomers also may be accustomed to distinctly different social and cultural norms, political and legal traditions, ways of doing business, and ways of resolving disputes").
[323] *Literacy and Access to Administrative Justice, supra* note 63 at 1.
[324] See *Ibid* at 8 (when it comes to daily tasks, these impacts are compounded for Canadians whose first language is not English or French).
[325] Flader, *supra* note 252 at 19.
[326] See Cabral, *supra* note 289 at 261, citing *California Commission on Access to Justice, supra* note 289 ("[m]oreover, low wages and limited employment opportunities in rural areas contribute to higher poverty rates and lower education levels than in urban areas.") and at 38 ("In addition, rural areas have high levels of illiteracy, which limits the value of text-based information").

system when unrepresented.

*Justice Starts Here* provides a telling overview of some of the overlapping vulnerable characteristics experienced by Manitobans:[327]

> [W]omen have higher poverty rates across all ages and family types (except for single seniors)[328]
> The poverty rate for Indigenous people living off reserve is consistently higher than the poverty rate for the overall population…[329]
> Recent immigrants are more likely to experience poverty compared with the overall population of Manitoba…[330]

In its 1992 decision of *Moge v Moge*,[331] the Supreme Court of Canada addressed the gendered consequences of intersectionality through its recognition of the "feminization of poverty". In its decision the court pointed to the comparable speed with which poverty amongst women had grown over a 15-year period[332] as well as the disadvantages that that entailed.[333]

When a woman is Indigenous, or lives remotely, or lives with a disability, it is not

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[327] See also Flader, *supra* note 252 at 4 ("[t]he more vulnerable someone is prior to facing a legal issue, the more likely they are to face significant consequences when they cannot rely on the justice system"), at 3, citing *Roadmap for Change*, *supra* note 3 at 2 ("[f]or example, those who self-identify as disabled are more than four times more likely to experience social assistance problems and three times more likely to experience housing related problems. People who self-identify as aboriginal are nearly four times more likely to experience social assistance problems").
[328] *Justice Starts Here*, *supra* note 31 at 23, citing Kristen Bernas, *The View From Here 2015: Manitobans Call For a Renewed Poverty Reduction Plan* (January 2015) Winnipeg: Canadian Centre for Policy Alternatives, Manitoba and Canadian Community Economic Development Network at 14.
[329] *Justice Starts Here*, *supra* note 31 at 15.
[330] *Ibid* at 16.
[331] *Moge v Moge*, [1992] 3 SCR 813.
[332] *Ibid* at para 55("[i]n Canada, the feminization of poverty is an entrenched social phenomenon. Between 1971 and 1986 the percentage of poor women found among all women in this country more than doubled. During the same period the percentage of poor among all men climbed by 24 percent. The results were such that by 1986, 16 percent of all women in this country were considered poor: M. Gunderson, L. Muszynski and J. Keck, Women and Labour Market Poverty (1990), at p. 8" [emphasis added]).
[333] *Ibid* at para 56 ("[g]iven the multiplicity of economic barriers women face in society, decline into poverty cannot be attributed entirely to the financial burdens arising from the dissolution of marriage: J. D. Payne, "The Dichotomy between Family Law and Family Crises on Marriage Breakdown" (1989), 20 R.G.D. 109, at pp. 116-17. However, there is no doubt that divorce and its economic effects are playing a role. Several years ago, L. J. Weitzman released her landmark study on divorce, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985), and concluded at p. 323: 'For most women and children, divorce means precipitous downward mobility -- both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike. On a societal level, divorce increases female and child poverty and creates an ever-widening gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other'").

difficult to see how her barriers to access increase while the availability of supports lessen.[334] As we have seen with Ashley Murray, she was unable to retain legal counsel, failed to raise all relevant legal issues in her initial hearing at the SSAB, and was ultimately unsuccessful before the Court of Appeal.

Given her gender, family status and income level, the impact of this decision could easily have led to eviction and loss of custody or, out of economic reliance, a decision to remain in a harmful relationship.

## Conclusion

Almost every Canadian will experience a judiciable event in their lifetime; however, due to the complexity of the legal system they may not understand how to proceed in addressing their matter or may not even be aware that what they are experiencing is legal in nature. This Chapter has provided an overview of the impacts they experience and the populations most affected.

[334] See also Flader, *supra* note 252 at 19, citing Truth and Reconciliation Commission of Canada, Calls to Action (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015) 180-181 ("[t]he TRC has also highlighted how Indigenous women are particularly susceptible to justice issues, particularly in reference to the violence experienced by the unacceptably large number of murdered and missing Indigenous women and girls").

## Chapter 5: A Tale of Two Trilogies

*[W]e should do what we can to make the law clear and accessible to average Canadians. The law is, perhaps, the most important example of how words affect people's lives. There is truth in the proposition that if we cannot understand our rights, we have no rights.*[335]

### Introduction

The Canadian legal system is at a critical point with regard to the need to address access to justice.[336] The inaccessibility of Canada's legal system has been and continues to be a serious issue preventing Canadians from meaningfully engaging with the law.[337] In an effort to address and better understand this problem the past decade has seen a rise in the amount of research and reporting focused on legal access.[338] These reports have concluded that Canadians do not have adequate access to justice[339] and that the key barriers they face are cost,[340] delay[341] and complexity.[342] This chapter will outline how the judiciary has responded to barriers to access to justice, first by reviewing of the progression of the law in recognizing access to justice as a constitutionally protected right foundational to the rule of law.[343] It will then demonstrate how this right has been shaped by a trilogy of cases that have spanned three decades and how the right to understand the law falls squarely within the judicial tests emerging from this trilogy. Finally, it will review how the barriers of delay and cost have received judicial recognition as protected elements of the right to access to justice[344] and will argue that although not directly recognized as a component of the right to access to justice, matters of complexity should be acknowledged as a barrier giving rise to constitutional protections. While this complexity spans both process and language, for the purposes of this analysis I will focus on the language of the law[345] which

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[335] McLachlin, "Preserving Public Confidence", *supra* note 27.
[336] *Roadmap for Change*, *supra* note 3 at 1.
[337] See McLachlin, "The Challenges we face", *supra* note 2; *Hryniak*, *supra* note 2 at para 1.
[338] See e.g. *Roadmap for Change*, *supra* note 3; *Reaching Equal Justice*, *supra* note 3; *House of Commons*, *supra* note 10.
[339] See *Reaching Equal Justice*, *supra* note 3 at 15, 50; *Meaningful Change for Family Justice*, *supra* note 7 at 1.
[340] See *Court Challenges Program*, *supra* note 3 at 6; *Reaching Equal Justice*, *supra* note 3 at 15; *Roadmap for Change*, *supra* note 3 at 4, citing Balmer, *supra* note 4 at 31-36.
[341] See *Reaching Equal Justice*, *supra* note 3 at 18.
[342] See *Roadmap for Change*, *supra* note 3 at 4; *Reaching Equal Justice*, *supra* note 3 at 15.
[343] See *Trial Lawyers*, *supra* note 8 at para 39.
[344] See e.g. *ibid*; *BCGEU*, *supra note 9*; *Christie*, *supra* note 9.
[345] Note that a broader exploration of all aspects of complexity is beyond the scope of what can be addressed within this thesis.

both prevents citizens from understanding it and, therefore, accessing it.

**Rule of law**

Canadian citizens have a right to be governed by a law that they can access and understand. They have a right to its benefits and protections and inherent in that, they have a right to understand what those benefits are and how to enforce those protections. While, arguably, that extends beyond the written word of the law to its processes, its interpretations and its application, for the purposes of this analysis, the right to understand the law will be presented as the right to laws (both codified and common law) in plain language.

Somewhat ironically then, the starting point of our analysis begins with an unwritten principle upon which our legal system is based: The rule of law.[346] The concept, content and application of the rule of law has long been debated and is constantly shifting and changing in order to allow for the full realization of the Constitution and in order to appropriately reflect the needs of the legal system and those it serves. Today, the rule of law is understood to be "implicit in the very nature of a constitution",[347] to make up the "very foundation of the Charter",[348] and to consist of three main principles:

1. The law "is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power"[349]
2. There must be "the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"[350]
3. That "the relationship between the state and the individual . . . be regulated by law"[351]

In accordance with these principles, courts have relied on the rule of law when addressing provincial secession,[352] the territorial limits of provincial legislation,[353] Aboriginal and Crown

[346] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32, 54 [*Reference re Secession of Quebec*]. See also *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11, s 52(2).
[347] *Manitoba Language Rights Reference* (1985), 59 NR 321 (SCC) at para 64 [*Manitoba Language Rights Reference*].
[348] *BCGEU, supra* note 9 at para 26.
[349] *Christie, supra* note 9 at para 20, citing *Manitoba Language Rights Reference, supra* note 347 at para 59.
[350] *Christie, supra* note 9 at para 20, citing *Manitoba Language Rights Reference, supra* note 347 at para 60.
[351] *Christie, supra* note 9 at para 20, citing *Reference re Secession of Quebec, supra* note 346 at para 71.
[352] *Reference re Secession of Quebec, supra* note 346.
[353] *British Columbia v Imperial Tobacco Canada Ltd.*, [2005] 2 SCR 473, 2005 SCC 49 [*Imperial Tobacco*].

relationships[354] and, as of 1988, as a constitutional basis for the right to access to justice.[355]

**The access to justice trilogy**

Although concerns relating to access to justice have spanned the Canadian legal landscape since its inception, the right to access to justice as based in the rule of law was only acknowledged by the Supreme Court towards the end of the 1900s. Speaking to the graduating class of the University of Windsor Faculty of Law in 1988, Chief Justice Dickson made clear how urgent the matter of access was to the legal system at the time:

> Access to Justice … is one of the most pressing and significant issues confronting the legal system today.[356]

A year later Chief Justice Dickson delivered the Supreme Court decision of *BCGEU* which has since been treated as a leading authority on the constitutional right to access the courts as rooted within the rule of law.

The case, according to Chief Justice Dickson, was ultimately about "the fundamental right of every Canadian citizen to have unimpeded access to the courts and the authority of the courts to protect and defend that constitutional right."[357] The circumstances of the matter involved a province-wide strike organized by the British Columbia Government Employees' Union (the Union). In early November, 1983, union members had set up picket lines outside the entrances of courthouses across BC requesting that the public honour the strike and not cross without first obtaining a picket pass.[358] Notwithstanding the social or ethical pressures created by the picket line, the Union's presence did not create a physically impassable barrier and "picket-passes" were issued to persons needing to enter the courthouse. According to affidavit evidence read in by Chief Justice Dickson:

> …the British Columbia Government Employees' Union picket line was orderly and peaceful. Persons appearing to have business inside the Courthouse entered and left the building at will and at no time appeared to be impeded in any way by the picketers.[359]

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[354] *R v Powley* (2000), 47 O.R. (3d) 30, [2000] 1 CNLR 233 (affirmed at the Supreme Court in *R v Powley*, [2003] 2 SCR 207, 2003 SCC 43.
[355] *BCGEU, supra note 9* .
[356] Rt Hon Brian Dickson, PC, "Access to Justice (June 8, 1988 address)" (1989) 1:1 Windsor Review of Legal and Social Issues 1 at 1.
[357] *BCGEU, supra* note 9 at para 1.
[358] *Ibid* at para 2.
[359] *Ibid* at para 3.

Notwithstanding, upon arriving at the courthouse on the morning of the strike, Chief Justice McEachern (Chief Justice of the British Columbia Supreme Court) filed an ex parte motion ordering an injunction against the picketers[360] on the basis that the picket line interfered with the operations of the court and that he had a constitutional duty to keep the courts open.[361] The Union appealed to have the injunction set aside. Their appeal failed at the trial and appellate levels and ultimately before the Supreme Court of Canada where the court found that the picket lines infringed on the constitutional right to access the courts and, by extension, a constitutional right to access to justice.[362]

With regard to the injunction's impact on the right to picket, Chief Justice Dickson began by addressing the labour rights at stake, articulating the importance of picketing as "a crucial form of collective action" and "a highly important and now constitutionally recognized form of expression".[363] However, he explained that the picketing of a "commercial enterprise" versus the picketing of a courthouse are entirely different matters,[364] and where the latter bars access to courthouses it is within a judge's jurisdiction to intervene.[365]

With regard to his analysis on the right to access to justice, the Chief Justice began by first officially recognizing access to justice as a necessary component of the rule of law:

> For the moment I wish to highlight certain sections of the Charter which, it seems to me, *are a complete answer to anyone seeking to delay or deny or hinder access to the courts of justice in this country*. Let us look first at the preamble to the Charter. It reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". *So we see that the rule of law is the very foundation of the Charter.* Let us turn then to s. 52(1) of the Constitution Act, 1982 which states that the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Earlier sections

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[360] *Ibid* at para 4.
[361] *Ibid* at para 10.
[362] Note the requirements in *BCGEU* for establishing a party's standing. In other cases such as *Trial Lawyers* and *Christie* the issue of access to justice was ancillary to the central legal matter. *BCGEU* provides an example of addressing access to justice as a standalone issue before the courts. Rather than relying on an affected party to bring forward a claim, the Chief Justice in *BCGEU* acted *ex parte*, finding that he had the jurisdiction to do so as he had the authority to protect the court process and, at para 14, "maintain the proper administration of justice." At para 44 the Supreme Court supports this position, holding that it had been "urgent and imperative to act at once."
[363] *BCGEU, supra* note 9 at para 27.
[364] *Ibid* at para 31.
[365] *Ibid* at para 46 ("[b]ut that was not the situation confronting McEachern C.J.S.C. on the morning the picket lines were set up. As Chief Justice, he had the legal constitutional right and duty to ensure that the courts of the province would continue to function. His action went no further than that which was necessary to ensure respect for that most important principle").

> of the Charter assure, in clear and specific terms, certain fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights of utmost importance to each and every Canadian. And what happens if those rights or freedoms are infringed or denied? Section 24(1) provides the answer--anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The rights and freedoms are guaranteed by the Charter and the courts are directed to provide a remedy in the event of infringement. … Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? [emphasis added].[366]

In reviewing the function of the Charter, he concluded that "it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the Charter and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court."[367] He then went on to find that, where access to the courts is delayed, "hindered, impeded or denied" the "entire Charter [becomes] undermined."[368] In addressing the lower court decisions, he adopted the passage from the BC Court of Appeal where it was found that:

> We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case[369]

Speaking directly to the matter of picketing in front of a courthouse, the Chief Justice noted that although members of the public were being urged not to enter the court house, picket passes were being issued by the Union[370] and that those who entered the court house did not appear to be impeded by picketers.[371] Notwithstanding, the court found that the existence of picket lines in and of themselves may dissuade persons from either entering the courthouse or requesting a picket pass and that they therefore created a barrier which, although "intangible",[372]

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[366] *Ibid* at para 24.
[367] *Ibid* at para 24.
[368] *Ibid* at para 24.
[369] *Ibid* at para 26, citing the BC Court of Appeals decision in *BCGEU v BC (AG)*, (1985), 20 DLR (4th) 399 at p 406.
[370] *BCGEU, supra* note 9 at para 2 ("…including officers of the court, to pass through the picket lines").
[371] *Ibid* at para 3.
[372] *Ibid* at para 29, citing *Heather Hill Appliances Ltd v McCormack*, [1966] 1 OR 12 (Ont HC), at p 13 ("[t]he picket line has become the sign and symbol of trade union solidarity and gradually became a barrier--intangible but none the less real. It has now become a matter of faith and morals and an obligation of conscience not to breach the picket line and this commandment is obeyed not only by fellow employees of the picketers but by all true believers who belong to other trade unions which may have no quarrel at all with the employer who is picketed") [*Heather Hill*].

amounted to an unconstitutional impediment to access to the courts:

> At the very least, the picketing was bound to cause delays in the administration of justice and, as has been often and truly said, justice delayed is justice denied. […] An accused has the right to a public trial yet the members of the public not issued passes by the Union might have been deterred from entering the courthouse. Accused persons have a Charter right to a fair trial and a statutory right to make full answer and defence. Witnesses crucial to the defence could well have been deterred from even requesting a pass to enter the courthouse to give vital evidence. It is perhaps unnecessary to multiply the examples. The point is clear. Picketing a courthouse to urge the public not to enter except by permission of the picketers could only lead to a massive interference with the legal and constitutional rights of the citizens of British Columbia.[373]

Weighing the potential impacts of the picket lines, the Supreme Court ultimately dismissed the appeal, thus recognizing, for the first time, a constitutional right to access to justice.[374]

Almost two decades after *BCGEU* came the Supreme Court's decision in *Christie,* a case dealing with the constitutionality of taxes on legal services, particularly as they may limit access to counsel. Specifically, the Province of British Columbia had imposed a 7% tax on legal fees through amendments to its *Social Services Tax Act.*[375] Vancouver lawyer, Dugald Christie, applied to have the tax declared unconstitutional, arguing that the right to access to justice necessitated a right to legal services and that a provincial tax would limit access to those services, therefore infringing on the constitutional right to access to justice.[376]

In assessing the impact of the tax on Mr. Christie's legal practice and in reviewing the affidavits of Mr. Christie's low-income clients, the British Columbia Supreme Court found that the impact of the tax was to "deny access to justice in some cases of low income clients."[377] As a result, the chambers judge found that where the tax applied to legal services sought by low-

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[373] *BCGEU, supra* note 9 at para 31. See also para 29 ("[a] picket line ipso facto impedes public access to justice. It interferes with such access and is intended to do so. A picket line has great powers of influence as a form of coercion").

[374] Note that within the decision, Chief Justice Dickson uses the language of both 'access to justice' and 'access to courts', employing the latter more often than the former. While one might argue that these concepts are distinct and thus the decision in *BCGEU* is more narrow than put forward, Chief Justice Dickson uses the terms interchangeably and subsequent decisions have relied on *BCGEU* as standing for a charter right to access to justice; see *Christie, supra* note 9; *Trial Lawyers, supra* note 8.

[375] *Christie, supra* note 9 at para 1.

[376] *Ibid* at para 10 ("[t]he respondent's claim is for effective access to the courts which, he states, necessitates legal services. This is asserted not on a case-by-case basis, but as a general right").

[377] *Ibid* at para 5, citing the Supreme Court of British Columbia's decision in *Christie v BC (AG),* [2005] BCTC 122 (SC) at para 83 [*Christie SC*].

income persons, it was ultra vires the Province's authority.

The British Columbia Court of Appeal dismissed the appeal and extended the lower court's findings to encompass the tax as a whole,[378] introducing a broad working definition of "access to justice" which, according to the court, represented its core features:

> …reasonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals, that are related to the determination and interpretation of legal rights and obligations by courts of law or other independent tribunals.[379]

The Supreme Court of Canada, in affirming the appellate court decision, defined the legal matter before it as a question of whether the findings in *BCGEU* supported the proposition that "access to justice is a fundamental constitutional right that embraces the right to have a lawyer in relation to court and tribunal proceedings".[380] Acknowledging the important role that lawyers play in enabling access to justice,[381] the court considered the jurisprudence relating to a constitutional right to counsel and ultimately found that, while a right to counsel may arise in certain circumstances,[382] there is no right to counsel generally.[383]

In reaching this decision, the Supreme Court addressed the findings in *BCGEU*, and explained that notwithstanding those findings, not all limits on access to justice give rise to an unconstitutional infringement:[384]

> The right affirmed in *B.C.G.E.U.* is not absolute. The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least

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[378] *Christie v BC (AG)* (2005), 220 BCAC 165 (CA); 362 WAC 165, at para 76 ("I would set aside the order made below and grant Mr. Christie a declaration that to the extent that the Act purports to tax legal services related to the determination of rights and obligations by courts of law or independent administrative tribunals, it is unconstitutional as offending the principle of access to justice, one of the elements of the rule of law") [*Christie BCAC*].

[379] *Christie*, *supra* note 9 at para 7, citing *Christie BCAC*, *supra* note 378 at para 30.

[380] *Christie*, *supra* note 9 at para 16.

[381] *Ibid* at para 22.

[382] *Ibid* at paras 23, 24, 25.

[383] *Ibid* at para 14 ([n]ote that the court brought up the financial implications of a general right to counsel, using the fact that this would likely lead to many people being able to access counsel as a reason for not providing it. "This Court is not in a position to assess the cost to the public that the right would entail. No evidence was led as to how many people might require state-funded legal services, or what the cost of those services would be. However, we do know that many people presently represent themselves in court proceedings. We also may assume that guaranteed legal services would lead people to bring claims before courts and tribunals who would not otherwise do so. Many would applaud these results. However, the fiscal implications of the right sought cannot be denied. What is being sought is not a small, incremental change in the delivery of legal services. It is a huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers").

[384] *Ibid* at para 17.

> some conditions on how and when people have a right to access the courts. Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional.[385]

Because the court had made its determination with regard to a general right to counsel, it found that it was unnecessary to further assess the evidence on record. However, it did note that the record was not adequate to establish a direct link between "any increase in the cost of legal services and retaining a lawyer and obtaining access to justice."[386] Despite its arguably limited interpretation of access to justice, the court in *Christie* did conclude by noting that the rule of law could be expanded to include additional principles;[387] however, on the facts before it, this was not the case.[388]

Rounding out this trio of cases in 2014 was the Supreme Court decision in *Trial Lawyers,*[389] a family law case contesting the constitutionality of British Columbia's rules pertaining to hearing fees. The facts of the case involved a couple, Ms Vilardell and Mr. Dunham, who, upon their separation, sought the services of the court in determining matters of custody and asset division. Although neither party was represented by a lawyer, the hearing fees associated with the action amounted to almost a month's income for the family. Ms Vilardell asked to have the fees set aside. Provincial legislation in place at the time limited relief from hearing fees to circumstances where parties were either receiving employment or disability assistance, or were found to be "impoverished." Ms Vilardell did not qualify under these exceptions. Based on this, the Trial judge was unsure of the Act's constitutional compliance and so invited intervener submissions from the Attorney General and other interested parties in order to address the constitutionality of the hearing fee scheme.

Following intervener submissions, the trial judge ultimately found the hearing fees to be unconstitutional. The BC Court of Appeal agreed with the trial judge's finding of unconstitutionality, but added that the Act could be saved with the reading in of the words "or in

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[385] *Ibid* at para 17.
[386] *Ibid* at para 28. See also *Christie SC, supra* note 377 at para 83 (note that the lower court specifically found as fact that the additional tax resulted in a barrier to access to justice).
[387] *Christie, supra* note 9 at para 21 ("[i]t is clear from a review of these principles that general access to legal services is not a currently recognized aspect of the rule of law. However, in *Imperial Tobacco,* this Court left open the possibility that the rule of law may include additional principles. It is therefore necessary to determine whether general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law").
[388] *Ibid* at para 23.
[389] *Trial Lawyers, supra* note 8.

need", which would broaden the exemptions available to decision makers. The matter was further appealed to the Supreme Court of Canada.

In beginning its analysis, the Supreme Court first looked to past judicial interpretations of breaches of access to justice, providing a historical review of the instances that gave rise to constitutional infringements on that right:

> In *Residential Tenancies*, the law at issue unconstitutionally denied access to the superior courts by requiring that a certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the superior courts by imposing a privative clause excluding the supervisory jurisdiction of the superior courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the superior courts for a segment of society — young persons — by conferring an exclusive power on youth courts to try youths for contempt in the face of superior courts. This Court, perLamer C.J., relied on Crevier, concluding that "[it] establishes . . . that powers which are 'hallmarks of superior courts' cannot be removed from those courts" (MacMillan Bloedel, at para. 35).[390]

Applying these cases to the facts before it, the court found that because the imposition of hearing fees made it so that average citizens could not afford to access the courts, the fees "effectively denied" a segment of society from bringing their matters to court and therefore constituted a barrier to access to justice.[391] It further explained that although section 92(14) of the Constitution provides the province with powers to enact legislation, these powers do not extend to acts that would "[prevent] people from accessing the courts".[392]

Addressing the exceptions for those on social assistance or categorized as "impoverished", the court made clear that while exemptions for these groups are in line with constitutional principles, they cannot end there as even those who are not impoverished or

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[390] *Ibid* at para 34.

[391] *Ibid* at para 35, citing *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 ("[h]ere, the legislation at issue bars access to the superior courts in yet another way — by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction — the hallmark of what superior courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the superior court").

[392] *Trial Lawyers, supra* note 8 at para 35, citing *Imperial Tobacco, supra* note 353 ("[t]his is consistent with the approach adopted by Major J. in *Imperial Tobacco*. The legislation here at issue – the imposition of hearing fees – must conform not only to the express terms of the Constitution, but to the "requirements… that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the Constitution Act, 1867 as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts").

receiving government assistance may still be prevented from accessing the courts if the payment of hearing fees exceeds what would be considered "reasonable sacrifices":

> Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.[393]

Clarifying its previous decisions the Supreme Court explained that while its ruling in *Christie* may have narrowed *BCGEU*'s right to access the courts, the decision in *Christie* still stood for the principle that "access to the courts is fundamental to our constitutional arrangements".[394] The Supreme Court walked through the section 92 and 96 jurisdictions of the courts, and, analyzing its constitutional grounding, clearly placed the right to access to justice[395] within section 96 of the Constitution:

> The s. 96 judicial function and the rule of law are inextricably intertwined. … As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.[396]

Using the language of effectively denying or preventing access to justice,[397] Chief Justice Mclachlin further distinguished the decision in *Christie* on the basis of the evidentiary record before the court, establishing that the fees at issue could have the potential to bar access:

> This Court's decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in *Christie* — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not "every limit on access to the courts is automatically unconstitutional" (para. 17). *In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts. The tax at issue in Christie, on the evidence and arguments adduced, was not shown to have a similar impact* [emphasis Added].[398]

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[393] *Trial Lawyers, supra* note 8 at para 45.
[394] *Ibid* at para 41.
[395] Note that these cases use the terms "access to justice" and "access to courts" as synonymous.
[396] *Trial Lawyers, supra* note 8 at para 39.
[397] *Ibid* at paras 2, 31, 32.
[398] *Ibid* at para 41.

The resulting test delivered by the court outlined that, with regard to hearing fees, persons should be expected to make "reasonable sacrifices"[399] when accessing the courts. However, when those sacrifices have risen to the point of "undue hardship" [400] they will then be considered a breach of constitutional rights. The requirement of "undue hardship" will be met where persons are required to "forgo reasonable expenses in order to bring claims".[401]

Finally, although only referenced in passing, it is worth noting that in considering the barriers created by BC's original legislative exemptions, one component addressed by the courts was the impact on human dignity that could arise when requiring people to beg the courts to be categorized as impoverished. The court explained that this exercise could possibly create further hardship and further deter persons from accessing the courts:

> Other objections to the exemption provision can be raised. Litigants are required to come before the court, explain why they are indigent and beg the court to publicly acknowledge this status and excuse the payment of fees. This is arguably an affront to dignity and imposes a significant burden on the potential litigant of adducing proof of impoverishment - a burden she may be unable or unwilling to assume. This burden may further hamper access to the court. In clear cases of impoverishment, the task may be relatively straightforward. However, if "impoverished" were extended to the large group of additional people that the evidence indicates is prevented from going to court because of the current hearing fees, the task might be much more complex. In such circumstances, there is a practical concern the exemption application itself may contribute to hardship.[402]

While human dignity was not directly referenced in *BCGEU*, the acknowledgement of societal pressures in the context of picket lines parallels *Trial Lawyers'* discussion of human dignity. Although perhaps intangible, where overcoming obstructions to justice would lead to ostracism[403] or impair human dignity, the courts may find the burden too high and deem the

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[399] *Ibid* at para 19.
[400] *Ibid* at para 19.
[401] *Ibid* at para 46 ("[a] hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum - as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts"), para 48 ("[a] hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts - a tradition that goes back to the Statute of Henry VII, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees").
[402] *Ibid* at para 60.
[403] *BCGEU, supra* note 9 at para 29.

practice unconstitutional. The court in *Trial Lawyers* ultimately allowed the appeal and dismissed the cross-appeal,[404] stating that while provinces have the right to impose some conditions on access[405] those conditions are limited by the constitutional right to access to justice.[406]

To date, the literature has not referenced these cases as a "trilogy"; however, I would argue that based on the developments within the cases, this is exactly what they are. Just as the three decisions of the Supreme Court of the United States regarding tribal sovereignty in the early 19th century were referred to as the "Marshall Trilogy", so too might we consider these three decisions of the Supreme Court of Canada on access to justice to be a trilogy.[407] This sequence of cases not only addresses the same issue, but specifically references and builds off of one another, ultimately delivering a final checklist based on what courts have done to establish a constitutional right to access to justice. Combined, these decisions create the blueprint of a test for determining whether one's constitutional right to access to justice has been infringed; specifically:

1. Is there a barrier (either tangible or intangible)[408] that delays,[409] hinders,[410] impedes,[411] denies[412] or prevents[413] access to justice or has the potential to do so?[414]
    I. This must be established in either argument[415] or evidence.[416]

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[404] *Trial Lawyers, supra* note 8 at para 69
[405] *Christie, supra* note 9 at para 17 ("[t]he legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867* . This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts.
Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional").
[406] *Trial Lawyers, supra* note 8 at para 42 ("[t]he right of the province to impose hearing fees is limited by constitutional constraints").
[407] See Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution*, (Oxford: Oxford University Press, 2009) at 87 (note that there does not appear to be a legal definition for when and how to use the term "trilogy". However, the "Marshall Trilogy" which was comprised of *Johnson v McIntosh*, *Cherokee Nation v Georgia*, and *Worcester v Georgia*, were given the name the "Marshall Trilogy" due to the fact that the majority decision in each case was written by Chief Justice Joh Marshall. As the three cases referenced throughout this thesis work together to create a constitutional basis for access to justice, I would argue that they too can use the term "trilogy").
[408] *BCGEU, supra* note 9 at para 29.
[409] *Ibid* at para 24.
[410] *Ibid* at para 24.
[411] *Ibid* at para 24.
[412] *Ibid* at para 24.
[413] *Trial Lawyers, supra* note 8 at paras 32, 35, 37.
[414] *Ibid* at para 41.
[415] *BCGEU, supra* note 9.
[416] *Trial Lawyers, supra* note 8.

2. If yes, then assess whether the exercise of reasonable sacrifices would remove the barrier.[417]
    I. If reasonable sacrifices will allow access to the courts, then the constitutional right has not been infringed.
    II. If these sacrifices give rise to "undue hardship"[418] then the barrier at issue unconstitutionally infringes the right to access to justice.
        i. One factor to consider here is whether addressing the impediment at issue could create an affront to human dignity for the affected parties.[419]

**Applying the trilogy against a complex legal system**

***1) Is there a barrier (either tangible or intangible) that delays, hinders, impedes, denies or prevents access to justice or has the potential to do so?***

The simple answer to this question is yes. As the second and fourth chapters of this thesis have demonstrated, issues surrounding the complexity of the legal system have created a perfect storm whereby Canadians are increasingly required to understand the law at a time when access to that knowledge is becoming progressively less attainable.

Statistics show that almost every Canadian will experience a justiciable event in their lifetime. This comes at a period when we are seeing an increase in the complexity of the law while simultaneously experiencing a decrease in Legal Aid funding and eligibility coupled with significantly higher levels of SRLs.[420] According to the National Self Represented Litigants Project, SRLs find the system to be "complex, difficult to understand, and for many, its complexity and their lack of knowledge [make] it effectively inaccessible."[421] As a result, individual litigants are less likely to enforce their rights and are more likely to incur added

[417] *Ibid* at para 45.
[418] *Ibid* at paras 45, 46 (note that in *Trial Lawyers*, the hearing fees reached the point of undue hardship when they were so high that they would require the sacrifice of "reasonable expenses").
[419] *Ibid* at para 60; *BCGEU, supra* note 9 at para 29.
[420] *Reaching Equal Justice* at 44, citing Birnbaum, *supra* note 111 (up to 80% of litigants self-representing as compared to 5% just 20 years ago). See also *The National Self-Represented Litigants Project Final Report, supra* note 69 at 15 (in family courts there are consistently 60-65% of litigants self-representing at the time of filing).
[421] See also *The National Self-Represented Litigants Project Final Report, supra* note 69 at 60 ("[v]irtually every SRL in the sample complained that they found the language in the court forms confusing, complex and, and some cases, simply incomprehensible – referring to terms and concepts with which they were unfamiliar").

financial costs, experience increasing and compounding legal problems, face additional physical and mental issues and receive poorer outcomes.

For members of marginalized groups, these impacts are further exacerbated, as they are more likely to experience lower income levels and literacy skills while facing an increased likelihood of encountering complex and compounding legal issues:

> [T]he poorest and most vulnerable Ontarians experience more frequent and more complex and interrelated civil legal problems.[422]
> If members of the public have low literacy levels in general, they are doubly affected when faced with specialized legal language.[423]

In addition to the individual impacts of a complex legal system, this barrier has negative effects on the justice system as a whole. On top of the added costs incurred by government bodies, where litigants are unable to bring their matters forward or cannot fully articulate their legal issues[424] the development of positive laws becomes stunted and imbalanced. There is both the global impact to case law generally where, without considering and deciding new legal issues jurisprudence cannot advance,[425] as well as the inequitable progression of the law as the matters that are addressed in court do not reflect the experiences of marginalized communities but only those with means to access the courts. Consider, for example, the method in which a foundational constitutional matter was addressed in *Trial Lawyers*. Both parties at the trial level were self-represented and neither knew to bring up the issue of access to justice. It took the unconventional intervention of the trial judge to raise the question of a triggered constitutional right and then, in order to have the matter addressed, required the invitation of outside legal

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[422] *Reaching Equal Justice*, *supra* note 3 at 36, citing *Listening to Ontarians*, *supra* note 80 at 45.
[423] *Literacy and Access to Administrative Justice*, *supra* note 63 at 16.
[424] For example, they may not argue all aspects of the matter, properly identify the legal issue or appropriately organize their case.
[425] *Trial Lawyers*, *supra* note 8 at para 40 ("[i]f people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect"). See also *BCGEU*, *supra* note 9 at 15, citing the BC Superior Court's decision at (1983), 48 BCLR 1, 2 DLR (4th) 705, [1984] 1 WWR 399, 40 CPC 116, at p 713-714 (the trial judge made a point of listing a number of cases that would not have been heard had picket lines been able to prevent access to the courts, emphasizing the importance of access to justice as a method of furthering the common law "In New Westminster Toy J. was able to continue a most difficult case and McKenzie J. was able to commence and complete the tragic case of *R. v. Blackman* where a young man was found not guilty by reason of insanity on a charge of murdering six members of his family; Trainor J. continued a difficult murder trial in Cranbrook; Davies J. held a criminal assize at Prince Rupert; Callaghan J. held a civil assize at Nanaimo; Lander, Finch and Wood JJ. were able to commence or continue jury trials in Vancouver; and all the other busy work of this court at Vancouver was carried on. The County Court of Vancouver was able to carry on its usual work as well as complete jury selections in criminal cases involving the attendance of upwards of 460 jurors; and, so far as I know, most of the work of all courts in most locations of the province was carried on").

parties. This was similarly the case in *BCGEU* where the very development of the constitutional right to access to justice arose as a result of the non-traditional intervention of a member of the court. In *Christie* it was the social justice leanings of a public interest lawyer that resulted in the matter receiving judicial consideration. The key point here is that, without a legal interpreter, the barriers in these three cases could not have been addressed. Those who cannot access legal decision making cannot provide input on legal decision making. They are then left out of legal decision making and continue to lack access to legal decision making.

Just as fees and picketing have been found to interfere with access to the courts, so too does complex language. While one may technically be able to enter a courtroom, if the language required to participate is incomprehensible, it can hardly be said that the right to access to justice has been realized. This barrier exists from the very triggering of a legal issue through to the court room and the enforcement of orders. Surely one can see how legislation that fails to inform the public on the process for accessing the courts effectively denies that access. Where legislation and policy is not fully understood, or worse even, misunderstood, persons are unable to access the courts and the remedies and rights to which they are entitled.[426]

Consider, for example, the ultimate remedy provided in *Trial Lawyers* which required expanded exemptions to provincial hearing fee legislation. This remedy, although well intentioned, did not require that these provisions be drafted in plain language. For a litigant seeking to apply the act, its constitutional re-alignment would make little difference if these amendments could not be understood. Canadian law can provide all the benefits and protections one should want of it, but if Canadians cannot understand them, to what end are these changes made?

In addition to barriers due to a lack of understanding of the law, evidence demonstrates that, just as one might have been deterred from entering the court house due to the social pressures of picket lines,[427] the language of the law effectively bars legal access as persons may

[426] See e.g. *Tina Fontaine, supra* note 14.
[427] *BCGEU, supra* note 9 at para 29, citing *Heather Hill, supra* note 372 at p 13. See also at para 30, citing Paul Weiler, *Reconcilable Differences* (Toronto: Carwells, 1980) at p 79 ("…a concern for the social pressures and ostracism of other workers if they do not conform to the trade union ethic; the likelihood that they will face serious discipline from their own trade union. It might even cost them their jobs, if they defy that ethic and cross a picket line approved by the trade union movement. In the final analysis, the legal treatment of picketing must rest upon a realistic appraisal of its industrial relations role").

be[428] afraid of making mistakes, being ridiculed or even facing repercussions such as being found to be vexatious,[429] in contempt or as bringing forward matters that the court considers frivolous. Where persons fear humiliation, failure, or even criminal charges[430] they are less likely to attempt to access the courts, even where they believe that their rights have been infringed or that they are entitled benefits under the law. This is particularly the case for persons who experience marginalization or oppression, as daily feelings of powerlessness can make it even more difficult to put oneself at the mercy of an unknown and potentially repressive authority figure.[431]

The combined effect of all of these factors is that legislation that is drafted in a language that is not understood by a large segment of the population creates a barrier to accessing the courts. The complex legalese employed in the drafting of both federal and provincial legislation makes the law incomprehensible to a significant portion of the Canadian population, hindering and impairing their access to the courts.

***2) Can this barrier be avoided with the exercise of reasonable sacrifices up to the point of undue hardship?***

Unlike the requirement of proving impoverishment, there is no specific requirement that SRLs prove a lack of knowledge, rather, the entire judicial process stands as an exercise of establishing ignorance and misunderstandings. The impact of the embarrassment felt by litigants who want to enforce their rights but do not fully understand them could arguably amount to an affront to human dignity that further prevents their access and creates an undue hardship.[432]

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[428] *Access to Justice Metrics, supra* note 68 at 15 – 16 ("[m]any community members reported that lack of information and direction exacted an emotional toll. Community members described how scary and intimidating it is not to know what is happening, what their options are, what possible outcomes might be, and so on. They mentioned the anxiety, fear, frustration, discouragement and stress involved in progressing through justice systems. They also talked about their need for emotional support").

[429] Note that this is not an unfounded fear, see Macfarlane, *Legal Doctrines of "Vexatiousness"*, *supra* note 258.

[430] See e.g. contempt of court.

[431] See e.g. Choby, *supra* note 293.

[432] See e.g. *The National Self-Represented Litigants Project Final Report, supra* note 69 at 108 ("SRL respondents described a wide range of impacts and consequences for them arising out of their decision to self-represent. Many if not most of these were unanticipated, a least to the degree that they became a problem. The experience of speaking with so many SRL's over the 13 months of data collection left the Principal Investigator with a very real sense of the impact experienced by many. At the same time, few SRL respondents saw any other choice. Where there were negative consequences for their lives they therefore saw these inevitable. This did not mean however that they did not carry a sense of grievance – and in some cases, embarrassment and astonishment – over the extent of these consequences"), 96 quoting a participant ("[t]he experience of asking for an adjournment 'was the worst experience of my whole life…it was embarrassing and humiliating. The judge blasted me as an incompetent father – I was

"Undue hardship" is typically considered in the context of employment and human rights cases, specifically in assessing whether appropriate accommodations have been made. In that setting the courts have found that, while some hardship is acceptable, where that hardship rises to a level of being "undue", further accommodation may not be necessary. This assessment is conducted on a case-by-case basis. Previous jurisprudence has considered the following factors as relevant in conducting this analysis:

> ... financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.[433]

While the guidance from these cases is not directly relevant to addressing an undue hardship assessment in the context of access to justice, it does provide a framework within which this analysis can be considered. In *Trial Lawyers*, the Court equated undue hardship with the forgoing of reasonable expenses. This was found in the context of a litigant whose hearing fees would have amounted to a month's income for her household. While the court did find that one should be expected to make reasonable sacrifices in accessing the courts, these fees were deemed to have passed that threshold. The payment of these fees would not have been impossible, but would have required sacrifices on the part of the litigant that would have been unreasonable.

In the context of complex language, litigants seeking the translation services of legal counsel would face similar hardship. A number of Canadians may be able to organize their finances so that the sacrifices made are reasonable or so that potential cost awards are shared with counsel. However, it can easily be seen how the costs for many others would escalate to

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shaking. I had never been treated like that in my whole life. He sent me out of the court and told me not to come back until I had a lawyer'"), 98 quoting a participant ("[t]he anticipation that they would not be able to properly manage their court appearance created further anxiety among SRL's, and sometimes resentment. 'When I tell myself my story, it makes sense. So I think that when I stand up in front of a judge and tell my story, I can explain myself. But I am so worried that when I stand up, I shall be cut down and not be able to make myself clear and stand up for myself'"), 104 quoting a participant ("[t]he judge I appear before keeps telling me that I need a lawyer. I keep saying that I cannot afford one. The judge asked me about my assets in court in front of other people, which was embarrassing – and then said that she does not understand why I don't qualify for Legal Aid").

[433] *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 (note that this case was recently referenced in *Stewart v Elk Valley Coal Corp*, 2017 SCC 30, [2017] 1 SCR 591 in the joint concurring reasons by Muldaver and Wagner JJ).

much more than a month's income. Where that occurs the findings in *Trial Lawyers* would support that these costs are unreasonable and give rise to undue hardship.[434]

As demonstrated in chapters two and four, many Canadians not only face challenges in interpreting legal terminology, but experience limited literacy with regard to day to day communications. On top of that, the impacts of low literacy are often compounded by additional aspects of marginalization such as gender, income and race. Deciphering the language currently used in legislative drafting requires years of specialized training. Given the situation of many Canadians coupled with the complexity of the system it is unreasonable to expect that persons will not only be intellectually capable of completing that training, but also that they will have the time, money and resources to do so independently. Without that knowledge, however, the law as it is currently structured can often not be understood and access to justice is hindered.

In addition, as addressed in *Trial Lawyers*, the very process of having to establish your marginalization is an affront to human dignity which creates further barriers to access to justice:

> [Requiring people to] explain why they are indigent and beg the court to publicly acknowledge this status and excuse payment of fees […]is arguably an affront to dignity [and may] further hamper access to the court.[435]

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[434] One might point out that the parties in *Trial Lawyers* were self-represented and that it was the imposition of compulsory hearing fees, not lawyer fees, that led to a constitutional infringement. While this may be the case, it is important to recognize that the central issue ultimately addressed was done so through the intervention of both legal counsel and the judiciary It should be noted that the court's jurisdiction over hearing fees versus legal fees is vastly different. Where the first is discrete and introduced through statute, the latter is generally set by the lawyers themselves and is not governed by legislation. However, there exist a number of examples where courts have and can intervene to reduce the barrier of lawyer fees; see e.g. *R v Brydges*, [1990] 1 SCR 190 (a case which found that detained persons have a right to advice from counsel reglardless of their financial state. This case led to a broadening of Legal Aid services to individuals upon detention)[*Brydges*]; *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 (a case which found that in child protection proceedings, where a parent is unable to afford a lawyer, state-funded counsel may be appointed), see also at para 123 ("I agree with the Chief Justice that: 'In proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case' (para. 80)") [*G (J)*].

[435] *Trial Lawyers, supra* note 8 at 60 ("[o]ther objections to the exemption provision can be raised. Litigants are required to come before the court, explain why they are indigent and beg the court to publicly acknowledge this status and excuse the payment of fees. This is arguably an affront to dignity and imposes a significant burden on the potential litigant of adducing proof of impoverishment — a burden she may be unable or unwilling to assume. This burden may further hamper access to the court. In clear cases of impoverishment, the task may be relatively straightforward. However, if "impoverished" were extended to the large group of additional people that the evidence indicates is prevented from going to court because of the current hearing fees, the task might be much more complex. In such circumstances, there is a practical concern the exemption application itself may contribute to hardship").

Those same impacts arise where litigants are required to prove that they do not know the law.[436]

In sum, just as one who is indigent may technically "access" the court room by simply entering, without the funds to file the appropriate documents, retain counsel and compile evidence, their access is not true access. Similarly, while one may be able to enter the courtroom, if the language required to bring forward a case is incomprehensible one can hardly be said to have received access to justice.

In its concluding remarks, the court in *Christie* cited the findings in *Imperial Tobacco*, leaving "open the possibility that the rule of law may include additional principles."[437] Canadians are facing a situation where funding cuts are requiring that they self-represent within an increasingly complex legal system. The barrier this creates prevents access to the courts and requires the expansion of the rule of law to include either plain language or legal translation as a component of the constitutionally protected right to access to justice.

**Cost, delay and complexity: a trilogy of barriers**

As will be discussed below, to date the judiciary has interpreted access to justice as including physical access to the courts,[438] financial access to the courts,[439] fees covering access to counsel[440] and access to trials in a timely manner.[441] These characterizations largely coincide with the barriers identified within access to justice research and reporting throughout the past few decades.[442] Relying on court data, national and province-wide statistics, surveys, interviews and personal testimonials,[443] Canadian reporting on the issue of access to justice has identified

[436] See e.g. *Reaching Equal Justice, supra* note 3 at 19 ("Eugene's Story: His income assistance worker told him legal aid doesn't help with landlord-tenant disputes, but gave him a toll-free number for legal help. He called the number, but was embarrassed when he didn't really understand what the person told him, and hung up"). See also *The National Self-Represented Litigants Project Final Report, supra* note 69 at 108, 96, 104.
[437] *Christie, supra* note 9 at para 21.
[438] *BCGEU, supra* note 9 (picketing of courthouses).
[439] *Trial Lawyers, supra* note 8 (hearing fees).
[440] *R v Rowbotham*, [1988] OJ No 271 (QL) [*Rowbotham*]; *G (J), supra* note 434.
[441] *R v Jordan*, [2016] 1 SCR 631 [*Jordan*].
[442] See *Roadmap for Change, supra* note 3; *Court Challenges Program, supra* note 3; *Reaching Equal Justice, supra* note 3.
[443] *Roadmap for Change, supra* note 3; *Court Challenges Program, supra* note 3; *Reaching Equal Justice, supra* note 3.

key barriers to the legal system as including cost,[444] delay[445] and complexity:[446]

> There is a serious access to justice problem in Canada. The civil and family justice system is too complex, too slow and too expensive.[447]

Finding that access has been impaired,[448] the jurisprudence has responded to these barriers by interpreting the constitutional right to access to justice as including access in a timely manner as well as financial access to both counsel and hearing fees, remedying breaches with fee exemptions,[449] pro bono legal services[450] and even stays of proceedings.[451] However, clear constitutional protection against the impediments created by complexity has not yet received judicial acknowledgment.

**Cost**

*Trial Lawyers* outlined that where hearing fees deny or prevent[452] access to the courts, they are in breach of the rule of law.[453] As the court succinctly put it:

> The right of the province to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that

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[444] *Reaching Equal Justice*, *supra* note 3 at 38 ("[s]urveys on private-market legal services conducted by several Canadian law societies have come to consistent results. The main problem people identify in accessing legal assistance is perceived or actual cost. At the same time, studies show that having legal assistance generally results in better outcomes for the people involved").

[445] *Ibid* at 18 ("[e]xcessive and harmful delay was often cited as a frustration. … Delay is a frustrating barrier to enforcing legal rights and attaining some measure of justice").

[446] See *Ibid* at 49 ("[t]he growing complexity of law and legal process, including vocabulary, protocols, procedures and institutions, contributes to an inaccessible justice system. This is perhaps the most evident contributor to barriers to equal justice. This complexity can be traced to various sources, including "the current state of rules of procedure, a multiplicity of practice directions, and the substantive law, which is often obscure and uncertain." The volume of legal materials continues to expand at an exponential rate. Court decisions are longer, legislation runs to hundreds of pages and regulations can be even thousands of pages long. This growing complexity is in large measure a reflection of modern society"); *Court Challenges Program*, *supra* note 3 (generally); *Roadmap for Change*, *supra* note 3 at i ("[b]ut as Canadians celebrated the new millennium, it became clear that we were increasingly failing in our responsibility to provide a justice system that was accessible, responsive and citizen-focused. Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights").

[447] *Roadmap for Change*, *supra* note 3 at iii.

[448] See *BCGEU*, *supra* note 9.

[449] *Trial Lawyers*, *supra* note 8.

[450] *Rowbotham*, *supra* note 440; *G (J)*, *supra* note 434.

[451] *Jordan*, *supra* note 441 at para 135.

[452] See *Trial Lawyers*, *supra* note 8 at paras 2, 31, 32, 46.

[453] See also *Pleau v Nova Scotia (Prothonotary, Supreme Court)*, [1998] NSJ No 526, at para 66 (with regard to the issue of hearing fees the court found that "[a]ccess to justice is neither a service nor a commodity. It is a constitutional right of all citizens; any impediments must be strictly scrutinized. Regardless of whether the impediment takes the form of a tax, a fee, an allowance, or some other form, it will, and must fail if its effect is to unduly 'impede, impair or delay access to the courts'") [*Pleau*].

> is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected.[454]

In *Rowbotham*,[455] the leading case on the constitutional right to funded counsel in criminal proceedings, the court found a right to funded counsel where, without counsel, the accused's right to a fair trial would be impaired:

> To sum up: where the trial judge finds that representation of an accused by counsel is essential to a fair trial, the accused, as previously indicated, has a constitutional right to be provided with counsel at the expense of the state if he or she lacks the means to employ one.[456]

Factors that the court considered in ordering state funded counsel included the means of the accused and the length and complexity of the proceedings.

Building on *Rowbotham*, the Supreme Court in the child welfare case of *G (J)*[457] found that where government proceedings engage section 7 rights, the government is required to ensure a fair hearing. In certain circumstances based "on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the [litigants]…" this may require the provision of state funded counsel. In this case the government was required to provide funded counsel in a custody proceeding involving an extended order of apprehension by the Minister where the mother stood to lose her children.

These decisions provide a constitutional grounding for a right to state funded counsel where the matter is serious, complex, and the party does not have the means to retain counsel.[458] Addressing the limitations of this right, the Supreme Court in *Christie* found that, although in certain circumstances access to the courts through funded counsel will be supported by the rule of law, the rule of law does not provide for general access to funded counsel in all circumstances:

> We conclude that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not

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[454] *Trial Lawyers, supra* note 8 at paras 41 – 43.
[455] *Rowbotham, supra* note 440.
[456] *Rowbotham, supra* note 440 at para 170.
[457] *G (J), supra* note 434.
[458] Note that this is in circumstances where legal aid will not cover cost. See *Rowbotham, supra* note 440 at para 151 ("[a]s a matter of common sense, an accused who is able to pay the costs of his or her defence is not entitled to take the position that he or she will not use personal funds, but still to require Legal Aid to bear the cost of his or her defence. A person who has the means to pay the costs of his or her defence but refuses to retain counsel may properly be considered to have chosen to defend himself or herself").

> support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.[459]

Overall, the above-cited cases demonstrate that the right to access to justice has been interpreted by the courts to include hearing fees where the costs would effectively prevent access to the courts, and legal fees in circumstances where both an individual does not have the means to afford a lawyer[460] and counsel is required in order to ensure a fair trial because of complexity.

**Delay**

With regard to the matter of delay, the very language in *BCGEU* makes clear that delays in justice are a breach of the rule of law:

> Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them?[461]

In applying the language of *BCGEU*, the court in *Pleau*[462] considered the matter of hearing fees which were creating delays in bringing matters before the court. Finding the fees to be a breach of the constitutional right to access to justice, Justice MacAdam explained that:

> Access to justice is neither a service nor a commodity. It is a constitutional right of all citizens; any impediments must be strictly scrutinized. Regardless of whether the impediment takes the form of a tax, a fee, an allowance, or some other form, it will, and must fail if its effect is to unduly "impede, impair or delay access to the courts."[463]

In the Ontario decision of *Figueroa*,[464] the practices of government officials resulted in delays in getting the accused to court in a timely manner. The court, again applying *BCGEU*, extended Dickson's comments to include not only justice delayed by picketing, but also justice delayed by court actors.[465] Citing *BCGEU*, the court found that:

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[459] *Christie, supra* note 9 at para 27 (note that although *Christie* was distinguished in *Trial Lawyers*, it was not on the point of a general right to funded counsel).
[460] And Legal Aid has been denied.
[461] *BCGEU, supra* note 9 at para 24.
[462] *Pleau, supra* note 453.
[463] *Ibid* at para 66.
[464] *R v Figueroa*, [2002] OJ No 3140 [*Figueroa*], upheld on this point in *R v Figueroa (N)*, (2003) 171 OAC 139 (CA).
[465] In this matter the issue was multiple delays by government officials when transporting the accused from the detention centre to the court house.

> Although said in the context of union picketing of courthouses during a legal strike against a provincial government, I find these comments apposite to the circumstances prevailing before me. … These delays are an assault on the rule of law.[466]

Addressing the matter of delay in child welfare proceedings, the Manitoba Court of Appeal in *HH & GC,*[467] found that delays in warrantless apprehension matters are contrary to the principles of fundamental justice and in breach of section 7 of the Charter:

> The motion judge in the Court below (the motion judge) correctly determined that the failure to conduct a prompt hearing violated the parents' section 7 Charter rights, specifically the right to "life, liberty and security of the person", and was contrary to the principles of fundamental justice (see the Canadian Charter of Rights and Freedoms). [468]

Setting the standard for delay in criminal matters, *R v Morin*[469] considered whether a delay of 14 and a half months for bringing a charge of impaired driving to trial was in breach of the s. 11(b) right to be heard within a reasonable time. Introducing a framework for determining delay, the court ultimately found that, because of an "absence of significant prejudice",[470] the delay in *Morin* was not unreasonable.[471]

24 years later, due to difficulties in applying the "unduly complex" Morin factors,[472] the Supreme Court revisited the issue of delay in *R v Jordan.*[473] Basing their decision on the importance of timely justice, the Supreme Court replaced the Morin factors with a presumptive ceiling of 18 months for matters going to trial at provincial court and 30 months at superior

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[466] *Figueroa, supra* note 464 at para 9.
[467] *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33 (this case dealt with delay in a warrantless apprehension hearing and the appropriate remedies flowing from a failure to conduct a prompt hearing. The court here upheld the judge's finding of delay).
[468] *Ibid* at para 3. See also para 84 ("[t]here is no evidence on the record of insufficient resources dedicated to child protection matters to ensure their timely adjudication. As explained in *Hryniak*, the conventional trial no longer reflects the modern reality and needs to be re-adjusted. New practices and procedures are required. Changes in court culture take time, but it is in the interests of children, parents and society generally that all participants in the justice system critically evaluate old practices and antiquated approaches that occasion unnecessary delay and complexity to child protection proceedings").
[469] *R v Morin*, [1992] 1 SCR 771. Note that the treatment of delay in criminal matters is separate and distinct from delay in other legal contexts such as administrative law. This is particularly because delay in criminal matters may trigger charter obligations. See *Charter, supra* note 281, s 11(b) ("[a]ny person charged with an offence as the right … to be tried within a reasonable time").
[470] *Ibid* at p 808.
[471] *Ibid* at p 787 – 788.
[472] *Jordan, supra* note 441 at para 37 ("the Morin framework is unduly complex").
[473] *Ibid.*

court. In outlining their reasoning the court explained that every instance of delay is an impediment to timely access to the courts:

> Each procedural step or motion that is improperly taken, or takes longer than it should, along with each charge that should not have been laid or pursued, deprives other worthy litigants of timely access to the courts.[474]

Within the context of the case, the court ultimately found that the accused's right to a timely trial had been breached and ordered that the convictions be set aside. The direction of the court in *Jordan* as well as the seriousness of the remedy has led to sweeping reform within Canada's justice system with all levels of court scrambling to prevent further stays of proceedings.[475]

These cases reflect the judicial acknowledgment of the right to timely access to justice and the importance of constitutional protections against delay.

**Complexity**

The decisions reviewed above outline the progression of the law to date with regard to access to justice in the form of physical, financial and timely access. What has yet to receive clear judicial acknowledgment within Canada's constitutional framework, however, is the right to access in terms of complexity and a right to understand.[476] Just as research has identified delay and cost as creating barriers to justice, so too have they demonstrated that complexity is a key barrier to access to justice within Canada:[477]

> Most people, literate or not, don't understand even the simplest legal expressions … They do not understand the concepts contained in the words, even if they understand the words

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[474] *Ibid* at para 43.

[475] See e.g. Alison Crawford, "Criminal courts scramble to meet Supreme Court's new trial timelines", *CBC News* (11 February, 2017) online: <http://www.cbc.ca/news/politics/jordan-decision-courts-justice-delays-1.3973981>.

[476] It should be noted, however, that there has been judicial acknowledgment of the barrier of complexity; see e.g. *Souveraine, supra* note 10 (in this decision the Supreme Court notes its concerns with the rigidity of the rule that ignorance of the law is no excuse at a time when laws are becoming increasingly complex. The court's remarks suggest that regulating bodies should work to be more accessible and clear.); *R v Arcand*, 2010 ABCA 363 at para 85, footnote 131 (the Court explores the principle of legality, explaining that "In the context of the criminal law, the legality principle requires that the law must be (1) accessible, that is understandable; (2) foreseeable in its consequences; and (3) non-arbitrary in its application."); *R v Armitage*, 2015 ONCJ 64 at para 2 (Justice Nakasturu both emphasizes the importance of accessibility in decision making and provides a direct example of plain language judgments) [*Armitage*].

[477] See *The National Self-Represented Litigants Project Final Report, supra* note 69 at 51 ("[e]ven the few SRL's who remained 'on top' of their case had many critiques of the complexity of the process and the elusiveness of 'access to justice'"); McLachlin, "Preserving Public Confidence", *supra* note 27 ("[t]here is truth in the proposition that if we cannot understand our rights, we have no rights").

> themselves. Therefore, they cannot understand what is expected of them and often the implications of what is being said.[478]

Knowledge of the law requires both knowledge of the language of the law and its substance; one without the other does not allow true participation in legal processes.[479] For the purposes of this review, both complex language and substance will be addressed as "complexity", as both feed into the other.

The complexity faced by people attempting to access the legal system is particularly troubling given the fact that Canadian citizens are responsible for both knowing the law and conforming to it.[480] As a result, the barrier of complexity both prevents persons from taking action to enforce their rights while also increasing their chances of having punitive action brought against them.[481] These two legal realities (barriers to access to justice and a legal responsibility to know and, effectively, access the law) give rise to a concerning dichotomy within our legal system where citizens are legally obligated to conform to a law which they cannot understand.

Although not based in a rule of law analysis, the message from the judiciary regarding complexity largely echoes the findings within national research and data: that the complexity of the law prevents the public from accessing the court system. For example, in *Jorgenson,*[482] Chief Justice Lamer, in considering the question of whether the accused had knowingly sold obscene materials, expressed his concern that the law had grown so complex that it was now unreasonable to expect it to be understood by "responsible citizen[s]":

> [T]he complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable.[483]

In the Supreme Court case of *Souveraine*, the court considered the question of whether the level of regulatory complexity faced by litigants in insurance licensing matters gave rise to a defense against penal sanctions. Although on the facts of the case the court was ultimately unwilling to allow the defense, the court made no secret of the difficulties it had in imposing

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[478] *Literacy and Access to Administrative Justice*, *supra* note 63 at 11.
[479] Note that this is unless you have a lawyer who does have knowledge of the law.
[480] See e.g. *Criminal Code*, *supra* note 12 s 19.
[481] See e.g. *ibid* s 19. See also *Rogers*, *supra* note 15; *Inquest into Rogers*, *supra* note 15.
[482] *R v Jorgensen*, [1995] 4 SCR 55.
[483] *Ibid* at para 25.

regulatory discipline where the law had grown so complex that no ordinary citizen should be expected to understand it on their own:

> It should nonetheless be noted that if the rule that ignorantia juris non excusat - ignorance of the law excuses no one - were absolute, this could seriously hinder the application of another cardinal rule of our criminal justice system: there can be no punishment without fault. The overlap between these rules is all the more significant given the current simultaneous proliferation of regulatory measures and penal statutes…[484]
>
> At the same time, the rise in the number of statutes coupled with their growing complexity increases the risk that a citizen will be punished in circumstances in which ignorance of the law might nevertheless be understandable.[485]

Beyond their recognition of legislative and regulatory complexity, the courts have also acknowledged the difficulty posed in attempting to understand the language and application of the common law. This can be seen, again, in the Supreme Court decision of *Souveraine* where the court relied on the language of Côté-Harper, Rainville and Turgeon, in illustrating the barriers faced by litigants:

> [Translation] The presumption of knowledge of laws was acceptable and defensible in the past because those laws concerned only serious offences and crimes against morality. The situation is very different today, and the criminal or penal law must be interpreted by consulting an abundant case law. [486]

Addressing the matter head on, Justice Nakasturu attempted to alleviate the consequences of complex legal terminology in the decision of *Armitage*.[487] Emphasizing the importance of accessibility in decision making, Justice Nakasturu drafted his decision using plain language,[488] sending a message to the judiciary that proper decision making requires that decisions can be understood by those they meant to serve.

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[484] *Souveraine, supra* note 10 at para 71.
[485] *Ibid* at para 75.
[486] *Ibid* at para 69, citing Gisèle Côté-Harper, Pierre Rainville & Jean Turgeon, *Traité de droit pénal canadien*, 4th ed (Montreal: Éditions Y Blais, 1998), at 1098.
[487] *Armitage, supra* note 476.
[488] *Ibid* at para 2 ("[b]efore I get to this, I would like to make two short comments. First of all, I want to say something about the style of this decision. For those who have read some of my past judgments, the reader may notice a change. For Jesse Armitage, I have tried to say what I wanted to say in very plain language. I believe that this is very important for judges to do in every decision. However, judges often do not do a good job of this. I would describe myself as one of the worst sinners. As lawyers first and then judges, we get used to using words that are long and complicated. This only muddies the message we are trying to say. That message is very important when it comes to passing a sentence on an offender. That the message is clear is even more important in the Gladue courtroom").

> …when judges write their decisions, they are writing for different readers, different audiences. Judges write not only for the parties before them. Judges write to other readers of the law. Lawyers. Other judges. The community. [489]

With regard to access specifically directed at SRLs, a recent decision of the Supreme Court of Canada has also, potentially, opened the gates for allowing more equitable participation in the trial process. In *Pintea v Johns*,[490] the Supreme Court dispensed a brief decision dealing with whether an order of contempt should be upheld against an appellant where it had not been established whether they had "actual knowledge" of court directives.[491] Finding for the appellant, the court concluded by endorsing the Canadian Judicial Council's 2006 *Statement of Principles on Self-represented Litigants and Accused Persons*,[492] which states, among other things, that "[j]udges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation."[493]

Although initially lauded as a strong step forward for SRLs, the case has received mixed application in subsequent decisions.[494] Used originally to promote leniency and patience by

[489] *Ibid* at para 4.
[490] *Pintea v Johns*, 2017 SCC 23, [2017] 1 SCR 47.
[491] *Ibid* at para 1.
[492] *Ibid* at para 4 ("[w]e would add that we endorse the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council").
[493] Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons* (Canadian Judicial Council, September 2006), online: https://cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf at 2 ("[w]hereas the system of criminal and civil justice in Canada is predicated on the expectation of equal access to justice, including procedural justice, and equal treatment under the law for all persons; Whereas the achievement of these expectations depends on awareness and understanding of both procedural and substantive law; Whereas access to justice is facilitated by the availability of representation to all parties, and it is therefore desirable that each person seeking access to the court should be represented by counsel; Whereas those persons who do remain unrepresented by counsel both face and present special challenges with respect to the court system; Therefore, judges, court administrators, members of the Bar, legal aid organizations, and government funding agencies each have responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court; and Therefore, it is desirable to provide a statement of principles for the guidance of such persons in the administration of justice in relation to self-represented persons") [*Statement of Principles on Self-Represented Litigants*].
[494] See Macfarlane, *Legal Doctrines of "Vexatiousness"*, *supra* note 258.

judges,[495] the case has also been relied on for its reference to litigant responsibilities,[496] justifying court-imposed limitations on court access,[497] cost awards,[498] and classifications of "vexatious":[499]

> However, this is not a one-way street. The Statement of Principles recognizes that there are also corollary duties incumbent upon self-represented litigants. In particular, Para 4 of the Commentary to statement B provides:
>
> > […]In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it.[500]

Finally, with regard to matters of administrative law specifically, the concurring reasons of Abella and Karakatsanis in the 2019 Supreme Court Decision of *Vavilov* emphasized that "access to justice is at the heart of the legislative choice to establish a robust system of administrative law."[501] They went on to cite Morissette JA who observed that:

> . . . the aims of administrative law . . . generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.[502]

With hundreds of administrative tribunals across Canada,[503] their presence can provide for a more accessible legal system; however, even within the parallel administrative process, given the complexity of the regulatory arenas that tribunals serve, they too can be quite

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[495] See *Snively v Gaudette*, 2020 ONSC 2895; *Mayfield Television Productions Ltd v Stange*, 2018 ABQB 294; *Moore v Apollo Health & Beauty Care* (Ont CA, 2017) at 44 ("[w]hile self-represented persons vary in their degree of education and sophistication, I think it safe to say that most find court procedures "complex, confusing and intimidating." That state of affairs gives rise to the responsibility of judges to meet the need of self-represented persons for "simplicity" and to provide "non-prejudicial and engaged case and courtroom management" to protect the equal rights of self-represented persons to be heard: Statement, pp. 4 and 6").

[496] *Statement of Principles on Self-Represented Litigants*, *supra* note 493 at 9 ("1. Self-represented persons are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case. 2. Self-represented persons are expected to prepare their own case. 3. Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process").

[497] *IntelliView technologies Inc v Badawy*, 2019 ABCA 66.

[498] *Kirby v Kirby*, 2017 ONSC 6695 (Ont SCJ) [*Kirby*]; *DD and FD v HG*, 2020 ONSC 1919.

[499] *Biley*, *supra* note 238; *Jonsson*, *supra* note 258. See Macfarlane, *Legal Doctrines of "Vexatiousness"*, *supra* note 258 at 11.

[500] *Kirby*, *supra* note 498 at para 8.

[501] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (joint concurring reasons of Abella and Karakatsanis JJ) [*Vavilov*].

[502] *Ibid* at para 242 (joint concurring reasons of Abella and Karakatsanis JJ), citing Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 *CJALP* 225 at p 236.

[503] *Literacy and Access to Administrative Justice*, *supra* note 63 at 4.

complex.[504] Consider again, the circumstances of Ms Murray. According to the Court of Appeal, in order to have her issues heard, Ms Murray was expected to have fully articulated them before the SSAB. These are legal arguments that involve complex statutory interpretation, an understanding of ancillary legislation and hundreds of pages of case law. Compounding this challenge is the fact that government-funded legal counsel is rarely available for SSAB matters and so obtaining meaningful advice or counsel can be impossible for appellants who, by the very nature of the tribunal, are living in poverty and unable to retain private counsel. Therefore, although perhaps designed for broader access, it can hardly be said that in Ms Murray's experience the use of an administrative tribunal improved her access to justice.

These decisions demonstrate that, at the very least, the judiciary is aware of the issue of complexity and the difficulties it creates in preventing ordinary citizens from understanding and accessing the law.

***Protections against complexity***

Although the courts have not yet responded to this barrier by extending constitutional protections as they have with delay and cost, the jurisprudence has acknowledged protections in limited cases. These include 1) a right to have laws that are consistent and certain,[505] 2) a right to understand the law through a conduit,[506] 3) a right to understand rights in criminal matters where parties have mental deficiencies,[507] 4) a right to understand family law orders,[508] 5) a right to understand sentencing decisions,[509] 6) protections with regard to unconscionable contracts,[510] 7) judicial obligations in jury charges, [511] and, 8) a right to understand and be understood within

[504] *Vavilov*, *supra* note 501 at para 88 ("[i]n any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice").
[505] See *R v J (KR)*, [2016] 1 SCR 906 [*J (KR)*]; *Fraser v Ontario (Attorney General)*, [2011] 2 SCR 3 [*Fraser* 2011].
[506] See *Blackpool Corp v Locker*, [1948] 1 All ER 85 (Eng CA) at [*Blackpool*].
[507] See *R v Evans*, [1991] 1 SCR 869 [*Evans*].
[508] See *RA v WA*, 2017 BCCA 126 [*RA*].
[509] See *Armitage*, *supra* note 476 at paras 3 – 4.
[510] See *Bomek v Bomek* (1983), 20 Man R (2d) 150 (CA) [*Bomek*].
[511] See *R v MacKay (KD)* (2005), 343 NR 398 (SCC) [*Mackay*].

a court of law as required by procedural fairness.[512]

With regard to general principles surrounding access to the law, the Supreme Court has directed that the rule of law requires that laws should be able to be known at the time of action. In the Supreme Court decision of *J (KR),*[513] Justice Karakatsanis considered the validity of the retroactive application of sections of the Criminal Code expanding the powers of judges when sentencing sexual offenders. Relying on the words of Lord Diplock in *Black-Clawson,* the court found that retrospective application of criminal provisions gave rise to a breach of the accused's charter rights:

> [A]cceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.[514]

Applying the same principle that laws should be able to be known in advance, the 2011 Supreme Court judgment of *Fraser*[515] considered whether a decision surrounding the issue of collective bargaining should be made outside the direction of legal precedent. The Court found that there was not sufficient evidence to overturn their past decisions, emphasizing that the maintenance of precedent where possible is critical to keeping with the predictability of the law:

> The values of certainty and consistency, which are served by adherence to precedent, are important to the orderly administration of justice in a system based upon the rule of law.[516]

In *Blackpool,*[517] a matter involving the interpretation of Ministerial directives, Justice Scott explained that the right to know the law is a central component to the continuance of the rule of law.[518] Applying the right to the facts of the case, Justice Scott found that at the very least, the rule of law required that legal advisors to the public must have access to the law:

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[512] See *R v Beaulac (JV)* (1999), 238 NR 131 (SCC) [*Beaulac*].
[513] *J (KR), supra* note 505.
[514] *Ibid* at para 23, citing *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG,* [1975] AC 591 (HL), at p 638.
[515] *Fraser* 2011, *supra* note 505.
[516] *Ibid* at para 132.
[517] *Blackpool, supra* note 506.
[518] *Ibid* at p 87 ("[t]here is one quite general question affecting all sub-delegated legislation and of supreme importance to the continuance of the rule of law under the British Constitution, namely, the right of the public affected to know what the law is").

> [B]ut the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public - *in the sense, of course, that, at any rate, its legal advisers have access to it at any moment as of right* [emphasis added].[519]

The court says two important things here; first that, based on the rule of law, the public has a right to know the law and, secondly, that right can be fulfilled where one's legal advisor has physical access to the law. The court did not go on to further explain the right to knowledge or whether the right to an advisor to interpret the law requires access to government funded counsel but it did provide that, to some extent, the rule of law includes a right of the public to know the law.

With regard to complexity in criminal matters, the Supreme Court in the 1991 decision of *R v Evans*[520] found that where an accused has a mental deficiency the police are obligated to explain their right to counsel to the extent that it could reasonably be expected that they understand:

> A person who does not understand his or her right cannot be expected to assert it.[521]

Based on the facts before the court, it was found that the police had not done enough to explain to the accused his rights and, as a result his confession was deemed inadmissible. While the decision in *Evans* was limited to persons with known mental deficiencies, the case marked a shift in criminal law matters where the justice system acknowledged the importance of understanding one's rights and the possible individual factors that might have an effect on understanding. As a result an emphasis was placed on ensuring that the rights of the accused are properly explained.[522]

Addressing the issue of complexity in the family law context the BC court of appeal in *RA v WA*[523] considered the matter of an applicant who had been found in breach of an unclear court order. In allowing the appeal, the court found that, especially in serious family matters,

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[519] *Ibid* at p 87.
[520] *Evans, supra* note 507.
[521] *Ibid* at p 891.
[522] Gérald Lafrenière, *Police Powers and Drug-Related Offences: Prepared for The Senate Special Committee on Illegal Drugs* (6 March 2001), online: <https://sencanada.ca/content/sen/committee/371/ille/library/powers-e.htm> ("[a]s a result of this case, police may have to make extra efforts to ensure that suspects understand their rights, particularly in cases involving children, people who do not speak the language used by the police, and those with diminished mental capacity. This would probably also apply to people who may have trouble comprehending their rights because they are intoxicated or under the influence of drugs").
[523] *RA, supra* note 508.

orders must be clear enough that they can be understood by those who are expected to follow them.[524] Similarly, in the context of sentencing decisions, in the 2015 case of *Armitage*, Justice Nakasturu indicated his belief that accessible language should be used in all decision making. With regard to sentencing before Gladue Courts, he went so far as to assert a right to be heard and to understand, stating that the first people of Canada "not only have a right to be heard, but they also have a right to fully understand."[525] Justice Nakasturu went on to say that this should apply to all accused, regardless of ancestry. [526] While the language applied by Justice Nakasturu has not been generally adopted by decision makers, it signals an acceptance of the court that parties have a right, at the very least in sentencing decisions, to understand the decisions in their own legal proceedings.

Although not necessarily falling within the category of a "right to understand", the jurisdiction of courts to intervene in unconscionable transactions demonstrates an acknowledgement of the judicial role of protecting citizens where they do not understand the law. The case of *Bomek v Bomek*[527] outlines circumstances where courts will step in to protect uninformed parties. Here the plaintiffs, a couple with little education, agreed to mortgage their home believing they were providing a loan to their son. In reality, the mortgage was sent directly to a Credit Union to reduce their son's overdraft. The Credit Union prepared misleading documents, which the son had his parents sign. Soon after the Credit Union sought repayment of the mortgage and the plaintiffs brought the matter to court where the Queen's Bench found in their favor and had the mortgage set aside.

Upholding the trial judge's decision, the Manitoba Court of Appeal found that the facts of the case engaged "the equitable jurisdiction of the court to relieve against unconscionable transaction."[528] The court applied the works of Professor Bradley E. Crawford where he explained that courts may demand a "peculiarly exacting duty of fairness" where persons "transact business with others dealing with them on a less than equal footing", an inequality which may arise "through a disparity of commercial experience or native intelligence or

[524] *Ibid* at para 10 ("I make the obvious observation that, particularly in high-conflict family cases, it is essential that obligations under court orders are easily ascertainable").
[525] *Armitage, supra* note 476 at paras 3 – 4.
[526] *Ibid* at paras 3 – 4.
[527] *Bomek, supra* note 510.
[528] *Bomek, supra* note 510 at para 24.

otherwise".[529] The Court of Appeal pointed to the actions of the Credit Union which further legitimized this finding, of particular import, noting that the Credit Union "made no effort to ensure that the mortgagors understood the implications of what they were doing."[530]

Similar to unconscionable transactions, the case law surrounding jury charges does not create a general right to understand the law, but rather, creates a responsibility on judges to ensure they use "plain and understandable" language when directing jury members on the law so as to ensure a fair trial.[531] As directed by the Supreme Court of Canada, a trial judge:

> **…**must set out in *plain and understandable* terms the law the jury must apply when assessing the facts. This is what is meant when it is said that the trial judge has an obligation to instruct on the relevant legal issues [emphasis added] [532]

The ultimate purpose of the jury charge is to make sure that, as decision makers, the jury can make an "informed decision".[533] Again, these findings do not necessarily point to a right to understand the law; however, the breadth of caselaw[534] that exists clarifying the jury charge does demonstrate the lengths to which the courts will go to ensure that a jury understands the law. When considered against the minimal scrutiny applied to the language used by the courts when speaking, not to a jury, but to the parties appearing before it, it does leave one wondering whether similar safeguards are needed for all participants appearing before the court.

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[529] *Ibid* at para 25, citing Bradley Crawford, "Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties" (1966), 44 Canadian Bar Review 142.

[530] *Bomek, supra* note 510 at para 28. Note that this case was applied more recently in *Quick Auto Lease Inc v Nordin* (2014), 303 Man R (2d) 262 (CA), para 14 ([h]ere they clarified the test: "t]he debtor must demonstrate both the inequality of the parties and the improvidence of the bargain, before the creditor is obligated to show that a contract freely entered into by the parties was fair, just and reasonable in the circumstances").

[531] *Mackay, supra* note 511 at para 3 ("[h]owever, in this case we are satisfied the length of the charge did not mislead or confuse the jury or otherwise have an adverse impact on the fairness of the trial. Despite the inordinate length of the judge's instructions, the jury was ultimately left with a clear understanding of its duty and adequate guidance as to how it was to be discharged"). See also *R v Avetysan (A)* (2000), 262 NR 96 (SCC) at 25, applying *R v Lifchus,* [1997] 3 SCR 320 ("[t]he case law is clear that a new trial will be necessary when the jury may have been under a misapprehension as to the correct standard of proof and the correct approach to conflicting evidence. The rationale has its source in the principle of trial fairness. See Lifchus per Cory, J., at para. 13:
'The Marshall , Morin and Milgaard cases serve as a constant reminder that our system, with all its protections for the accused, can still make tragic errors. A fair trial must be the goal of criminal justice. There cannot be a fair trial if jurors do not clearly understand the basic and fundamentally important concept of the standard of proof that the Crown must meet in order to obtain a conviction'").

[532] *R v WJD* (2007), 369 N.R. 225 (SCC), at para 32.

[533] *R v Bradey*, 2015 ONCA 738 at para 184.

[534] See e.g. *R v Daley,* 2007 SCC 53, [2007] 3 SCR 523; *R v Jacquard,* [1997] 1 SCR 314; *R v Huard,* 2013 ONCA 650, 302 CCC (3d) 469; *R v Largie*, 2010 ONCA 548, 101 OR (3d) 561; *R v Baltovich* 9 (2004), 73 OR (3d) 481 CA.

Finally, the commentary from the Supreme Court in its dealings with language rights cases[535] endorses a right to both understand and be understood in a court of law as a basic principle of procedural fairness. In *MacDonald v City of Montreal,*[536] a case dealing with whether a summons for speeding drafted in French alone violated section 133 of the Constitution Act of 1867, the Supreme Court affirmed the right, when in a court of law, to both understand and be understood:

> It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. […] It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system.[537]

These principles were later upheld in the 1999 case of *R v Beaulac,*[538] where the court reiterated that the principles of fundamental justice require that parties have a right to understand and be understood in a court of law.[539]

## Conclusion

While these cases do not necessarily give rise to the constitutional protections afforded to those faced with unreasonable costs or delays when engaging the justice system, they do demonstrate a willingness amongst the judiciary to not only acknowledge the barriers created by complexity, but also, at times, to accommodate those barriers. Taken together, these decisions form a platform against which a more targeted constitutional analysis can emerge, clarifying the

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[535] See e.g. *Mercure v Sask* (1988), 83 NR 81 (SCC) at para 56 ("…[t]he right to be understood is not a language rights but one arising out of the requirements of due process"); *Soc des Acadiens v Minority Language* (1986), 69 NBR (2d) 271 (SCC) at para 60 ("[t]he common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language. It belongs to the category of rights which in the Charter are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss 7 and 14 of the Charter").
[536] *MacDonald v City of Montreal, supra* note 175.
[537] *Ibid* at paras 114 – 115 (note that that same year, the Supreme Court reiterated its findings in *MacDonald v City of Montreal*, applying it in *Society des Acadiens* where it reiterated that parties have a right to understand and be understood in a court of law).
[538] *Beaulac, supra* note 512.
[539] *Ibid* at paras 25 and 41. See also *Mazraani v Industrial Alliance Insurance and Financial Services Inc*., 2018 SCC 50, [2018] 3 SCR 261 (note that the findings of *Beaulac* were recently applied in this Supreme Court case in the context of the language rights of witness in an employment insurance matter).

judicial position on treatment of complex legalese and process as well as access through comprehension.

## Chapter 6: Next steps - Reimagining a Complex Legal System

*To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.* [540]

### Introduction

Both Canadian jurisprudence and the Constitution itself are clear that where a constitutional right has been infringed, parties have the right to an appropriate remedy.[541] In the previous chapters it has been demonstrated that the complexity of legal language gives rise to such an infringement, creating a barrier to accessing justice that can prevent Canadians from understanding how or to whom a law applies, the reasons for judicial decision making or even the very existence of their legal rights and responsibilities. As has been the case with matters of cost and delay, the existence of this barrier triggers the need for a remedy. Amplifying that need is the fact that the impact of a complex legal system disproportionately falls upon marginalized groups, including those protected by section 15 of the Charter.

This chapter will articulate the need for intervention from the legal community in pursuing these remedies. Drawing on section 15 principles of equality, it will consider the matter of complex language through the application of a charter analysis, demonstrating how cases such as *Eldridge v British Columbia*[542] and *Jodhan v Canada*[543] provide a roadmap for possible remedial action. Finally, it will conclude by reviewing the remedies available to the courts including plain language drafting, increased access to legal counsel and public legal education and information.

### The legal community's role in seeking a remedy

Before delving into potential "next steps" for addressing the issue of complexity it is important to remind ourselves of the contradiction at play: that the pursuit of a legal remedy addressing lack of access to the courts actually requires access to the courts. This irony is further complicated by the fact that the demographics most impacted by a complex legal system are marginalized groups, including Indigenous peoples, women, and those who have disabilities.

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[540] *Nelles v Ontario et al*, [1989] 2 SCR 170; 60 DLR (4th) 609 at p 196.
[541] *BCGEU, supra* note 9 at para 24.
[542] *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624 [*Eldridge*].
[543] *Canada (Attorney General) v Jodhan*, 2012 FCA 161 [*Jodhan* FCA].

These groups often face additional compounding obstacles when attempting to access the legal system, including financial and educational hurdles as well as encountering more complex legal issues.[544]

This reality means that we cannot rely on those most impacted to bring forward legal challenges aimed at Canada's complex system. Rather, it will require the actions of a more proactive and interventionist judiciary, legislatures and legal community in order to ensure that the necessary remedies are fully explored and realized. In fact, it was exactly that which brought about recognition of the constitutional right to access to justice in the first place.

In *BCGEU* the Chief Justice of the superior court acted ex parte in imposing an injunction against picketing that would have prevented access to the courts, reasoning that it was his duty as a judge to prevent "any attempt to interfere with the administration of justice."[545] His actions were supported by the Supreme Court of Canada which found that "[a]s Chief Justice, he had the legal constitutional right and duty to ensure that the courts of the province would continue to function."[546] In *Christie*, when challenging the provincial tax on legal fees, the access to justice matter was not brought forward by those directly impacted, but rather, was argued by a member of the bar who witnessed the impact of these fees on his low-income clients. Similarly, in *Trial Lawyers*, Ms Vilardell's request to the court for a waiver of fees triggered a constitutional question of access to justice; however, both parties were self-represented and neither knew to argue issues of access. It took the intervention of the presiding judge to not only raise the issue, but also to invite outside counsel to address the matter, where it was argued all the way to the Supreme Court of Canada. Without the unorthodox intervention of the trial judge, the common law principles surrounding access to justice would not have progressed, leaving both the initial litigant as well as those to follow in vulnerable situations with unrealized constitutional rights and remedies.

The intervention demonstrated in these cases is closely tied to the standards expected of legal practitioners. The Law Society of Manitoba's Code of Professional Conduct, for example,

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[544] Note also that, as discussed in this thesis, this also means that methods of access that could alleviate complexity, such as counsel or other supports, are less available to these groups as well.

[545] *BCGEU, supra* note 9 at para 10, citing the BC Superior Court decision in *BCGEU v BC Attorney General*, (1983), 48 BCLR 1, 2 DLR (4th) 705, citing *Re Johnson* (1887), 20 QBD 68 (C.A.). See also para 46 ("[a]s Chief Justice, he had the legal constitutional right and duty to ensure that the courts of the province would continue to function. His actions went no further than that which was necessary to ensure respect for that most important principle").

[546] *BCGEU, supra* note 9 at para 46.

mandates that its members demonstrate a commitment to the development of the justice system and equal access to the law. At section 5.6, the Code requires that lawyers "encourage public respect for and try to improve the administration of justice."[547] The Code's commentary on this provision advises that the very practice of law implies "a basic commitment to the concept of equal justice for all within an open, ordered and impartial system."[548]

The point need not be laboured any further, only to say that as we discuss potential next steps we must keep in mind the roles and responsibilities of the legal community in furthering access to justice. It would be both unreasonable and unjust to leave it to the marginalized groups most impacted by barriers of access to justice to bring about remedial solutions within a system that obstructs their participation.

**A right to a remedy**

Sections 52(1) and 24(1) of the Constitution provide for remedial action where one's constitutional rights have been infringed. These sections and their importance were emphasized in the analysis in *BCGEU,* where Chief Justice Dickson outlined that an integral component of the fundamental connection between access to justice and the rule of law is the ability to turn to a court of competent jurisdiction for a remedy when ones rights have been infringed.[549]

As previous chapters have outlined, the complex language of both legislation and legal decision making in Canada have created a barrier to justice which infringes on the right to access of Canadians. Amplifying the significance of this barrier, at least from a legal standpoint, is the fact that those disproportionately impacted by complexity are members of marginalized groups, including those protected by section 15 of the Charter. As such, in assessing appropriate

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[547] *Code of Professional Conduct, supra* note 290 at s 5.6-1.
[548] *Ibid* at s 5.6-1, commentary 2.
[549] *BCGEU, supra* note 9 at para 24 ("[w]hereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". So we see that the rule of law is the very foundation of the Charter. Let us turn then to s. 52(1) of the Constitution Act, 1982 which states that the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Earlier sections of the Charter assure, in clear and specific terms, certain fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights of utmost importance to each and every Canadian. And what happens if those rights or freedoms are infringed or denied? Section 24(1) provides the answer--anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The rights and freedoms are guaranteed by the Charter and the courts are directed to provide a remedy in the event of infringement"). Note also *Eldridge, supra* note 542 at paras 19, 20, 21(the Charter extends beyond that which is governed by legislation, including government policies and government actors)

remedies one must not only contemplate the findings within the trilogy analysis, but must also consider the equality provisions of the section 15. Should this disproportionate impact give rise to a further breach of constitutional principles, appropriate remedial action will be all the more important.

In order to consider the Charter impact, it is worth first reviewing the equality cases of *Eldridge* and *Jodhan* which provide a framework against which the impacts of inaccessible legal language can be explored.

**Eldridge**

The matter at issue in *Eldridge*[550] was whether British Columbia's Medical Services Plan violated section 15(1) of the Charter on the basis that it failed to provide sign language interpreters to persons with impaired hearing. The argument put forward was that without sign language interpretation, those who could not hear did not receive the same benefits under the legislation as those who could. The complainants were denied at both the trial and appellate level, appealing then to the Supreme Court of Canada.

The Supreme Court allowed the appeal, finding that section 15 requires both formal and substantive equality and that,[551] although the legislation on its own was not discriminatory, its implementation by service providers had an adverse effect on persons with hearing loss. The court went on to explain that while discrimination can arise from both intended and unintended actions, it can also "accrue from a failure to take positive steps."[552] Finding that the government had an obligation to provide sign language interpretation the court re-affirmed that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner"[553] and that "[i]n many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons."[554]

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[550] *Eldridge, supra* note 542. Recently relied on in *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser* 2020].
[551] *Eldridge, supra* note 542 at para 61 ("[t]his Court has consistently held that s 15(1) of the Charter protects against this type of discrimination. In Andrews, supra, McIntyre J. found that facially neutral laws may be discriminatory. "It must be recognized at once", he commented, at p. 164, ". . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality"; see also Big M Drug Mart Ltd., supra, at p. 347. Section 15(1), the Court held, was intended to ensure a measure of substantive, and not merely formal equality.").
[552] *Ibid* at para 78.
[553] *Ibid* at para 73.
[554] *Ibid* at para 73.

With regard to the specific "positive steps" required by the government the court highlighted the key service being denied as "effective communication". They explained that, just as hearing persons can communicate effectively with their health care providers, the government must take steps to ensure that those who cannot hear can also communicate effectively. According to the Supreme Court, the standard to be met required that those with hearing loss "'actually understood' the content of the communication".[555]

**Jodhan**

The Federal Court of Appeal's May 30, 2012 decision in *Jodhan v Canada*[556] addressed equal access to government information in the context of web access. The case involved Donna Jodhan, a woman with visual impairment who sued the Federal Government based on the restrictions she encountered when trying to access their websites. The Federal Court found in favor of Ms Jodhan, holding that she had been denied substantive equality.[557] The government appealed.

The Federal Court of Appeal varied the lower court's decision, again finding in favor of Ms Jodhan.[558] The court held that while "effective access to government information and services, not online access, is the true benefit of the law" in this day and age, the Internet is one of the most important tools for accessing information and services.[559] The court therefore held that effective access requires access by way of the Internet.[560] The Federal Court of Appeal further explained that although there may be a multitude of avenues by which access may be derived, if one person is prevented from using a faster, more secure method than another, they

[555] *Ibid* at para 81, citing *Bonner v Lewis*, 857 F 2d 559 (9th Cir 1988), at p 563 ("[w]hile the term "effective communication" is not defined in the legislation, it has been held to mean that a deaf individual "actually understood" the content of the communication").
[556] *Jodhan* FCA, *supra* note 543; Michelle McQuigge, "Advocate says government has improved websites accessibility for the blind" *Global News* (5 September 20120), online <https://globalnews.ca/news/283231/advocate-says-government-has-improved-websites-accessibility-for-the-blind-2/> (note that similar to *BCGEU*, *Christie*, and *Trial Lawyers*, in bringing forward this case the litigant did not pay for counsel, but was able to obtain representation through the Court Challenges Program).
[557] Jodhan v Canada (Attorney General), 2010 FC 1197 [*Jodhan* FC].
[558] *Jodhan* FCA, *supra* note 543 at para 157 ("[t]he end result of this denial, in my view, is that Ms. Jodhan and the visually impaired are not afforded substantive equality, because they are being denied the ability to interact with government institutions on a basis equal to that of those who can see.").
[559] *Jodhan FC*, *supra* note 557 at para 129.
[560] See *Ibid* at para 131 ("I am therefore of the view that the benefit of the law is access to government information and services. However, access thereto necessarily includes the benefit of online access, which is not just an ancillary component of the multi channel delivery mechanism, but an integral part thereof. In other words, one cannot speak of access to government information and services without including access thereto by way of the Internet").

have not received equal benefit of the law:

> In other words, if one person can access information online within a matter of minutes and another person can access the same information by traveling to a government office, waiting for his or her turn and then meeting with a government employee to obtain the same information, there has been effective access in both cases and thus both persons have received the same benefit of the law. I cannot agree with the Attorney General's position. In my view, one of the above two persons has not received the same benefit. They have not been treated equally. [561]

Finally, in applying the principles from *Eldridge*, the Federal Court of Appeal found that the government was required to take positive steps in order to make its websites Charter compliant:

> In my view, that cannot be right. In Eldridge, at paragraph 73, the Supreme Court held that every benefit offered by the government had to be offered in a non-discriminatory manner and that in achieving that goal, the government might be required to take positive action. Substantially for the reasons given by the judge, I must conclude that the consequence of the Treasury Board's failure to issue adequate standards and to ensure departmental compliance with its accessibility standards is that Ms. Jodhan and the visually impaired are denied equal access to the benefit of government information and services. An easy remedy to that situation is for the Treasury Board to correct the inadequacy of its standards and to use its best efforts to ensure that the standards are implemented by the various departments under its supervision.[562]

These cases demonstrate that Canadians are entitled to equal benefit of the law and that this right encompasses benefits in both form and effect. Put another way, the benefit of the law consists of both the formal and technical benefit as well as the integral components that allow access to that benefit. This may include access to additional services such as sign language interpretation or accessible web design. Where equal access to the benefit of the law does not exist, the government may be required to take positive steps in order to remedy the disparity.

**A section 15 analysis**

The benefit of the law that is being considered in this research is, quite simply, the ability to engage with the Canadian legal system. In order to have fully realized that benefit, Canadians must have equal and effective access to it. Where complex language creates a barrier to that access, the government must take positive steps to remove that barrier.

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[561] *Ibid* at para 130.
[562] *Ibid* at para 150.

In considering this question in the context of section 15 it should first be noted that the Charter clearly applies to matters relating to legislation and legal decision making. Section 32(1)(b) explicitly states that it applies to **"**the legislature and government of each province in respect of all matters within the authority of the legislature of each province" and jurisprudence has upheld that it similarly applies to the actions of judges and therefore, judicial decision-making.[563]

The next step in the analysis is to then ascertain whether section 15 has been violated. Section 15(1) of the Charter states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the recent Supreme Court decision of *Kahkewistahaw First Nation v Taypotat*,[564] the court explained that this right must be interpreted in a manner that recognizes that "persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages."[565] The court then articulated the applicable test for determining a breach of section 15:

> The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground.[566]
>
> The second part of the analysis focuses on arbitrary - or discriminatory – disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:
>
> > The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [Quebec v. A, at para. 332][567]

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[563] See *R v Swain*, [1991] 1 SCR 933. See also *Eldridge, supra* note 542 at para 21 ("[t]he s. 32 jurisprudence of this Court has for the most part focused on the first type of Charter violation. There is no doubt, however, that the Charter also applies to action taken under statutory authority"). Note that notwithstanding these sources, the applicability of the Charter can at times be complex and unclear and arguably, at times, inappropriate. See e.g. Hon Peter Lauwers, "What Could Go Wrong with Charter Values?" (2019), 91 SCLR (2d) 1 - 84.
[564] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548.
[565] *Ibid* at para 17.
[566] *Ibid* at para 19.
[567] *Ibid* at para 20, citing *Quebec (Attorney General) v. A*, [2013] 1 SCR 61 at para 332.

With regard to distinctions based on enumerated grounds, the fourth chapter of this thesis provided an outline of some of the marginalized groups most impacted by the complexity of the law. For the purpose of a section 15 analysis, we will consider the disproportionate impacts on Indigenous persons, women and persons with disabilities, groups that all fall within the enumerated grounds of:

1. Race
2. National or ethnic origin
3. Colour
4. Sex
5. Mental or Physical disability[568]

The inaccessible language of laws disproportionately disadvantages Indigenous people, women and those with disabilities. As outlined in Chapter Four, the impact of complex legal drafting is disproportionately felt by, amongst others, the enumerated groups listed above.[569] Although not express, the adverse[570] impact of complex laws is that these enumerated groups do not have equal access to the law as they are more likely to face educational gaps that limit comprehension and do not have equal access to legal interpreters who could bridge the divide.[571] This inequality is further perpetuated by the government's failure to take positive steps[572] to ensure equal benefit of the law, both in form and effect.

While we know that section 15 does not always require positive action from government,[573] where the government has created a benefit (in this case, the law itself), the implementation of that benefit must allow for equal access. Where it does not, the government

[568] *Charter*, *supra* note 281.
[569] See Chapter 4.
[570] See *Eldridge*, *supra* note 542 at para 77 ("[t]his Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme").
[571] See *Fraser* 2020, *supra* note 550 at 55 (further discussion on disproportionate impact, finding that there can be "no doubt that disproportionate impact can be established if members of protected groups are denied benefits or forced to take on burdens more frequently than others").
[572] See *ibid* at para 78.
[573] See *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657, 2004 SCC 78.

will be required to take steps to ensure equality.[574] Put another way, where complexity prevents equal access to the law for protected groups the government must then take steps to address that inequality and ensure equal access.

**Possible remedies**

Both the access to justice analysis as well as the section 15 analysis demonstrate that the complex drafting of legislation and legal decision making is not consistent with constitutional values and that remedial action is required in order to remove the barrier of complexity and ensure equal access to the law.

Consider, again, the matter of Ms Murray who, with the assistance of counsel on appeal, was able to articulate a legal case asserting that the Department's approach to determining common law relationships both triggered section 15 equality rights[575] and had the potential effect of forcing women into unhealthy and economically dependent relationships.[576] The appeal in her matter was dismissed partially on the ground that she had failed to bring these arguments before the SSAB. Had Ms Murray either been able to identify these legal arguments on her own or had access to counsel before the SSAB, these issues could have been addressed by the SSAB and, potentially, the Court of Appeal. The inability to have these matters assessed and clarified by decision makers had the effect of not only denying Ms Murry her potential remedies, but also allowing the Department to continue a practice that has the potential to cause harm to others in the future.

As this case assists in demonstrating, there are many ways in which the barrier of complexity may arise and a precise plan for either reducing complexity or bridging the complexity gap would require direct consultation with those most impacted, including those within the legal community, government, marginalized groups, and Canadians at large. These in-depth consultations are beyond the scope of this thesis; however, research and judicial decision making to date do provide a number of recommendations on the types of actions that may be implemented in order to address the complexity gap. These include plain language drafting,

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[574] *Eldridge, supra* note 542 at para 73.
[575] *Murray Factum of the Appellant, supra* note 19 at para 51, citing *Falkiner, supra* note 24. Also citing, at para 52, *Manitoba Ombudsman Report, supra* note 23 at 92.
[576] *Murray Factum of the Appellant, supra* note 19 at para 52, citing *Manitoba Ombudsman Report, supra* note 23 at 92.

increased access to legal counsel and public legal education and information.

**Plain language drafting**[577]

*[Plain language is] the single most helpful technique...for ensuring that everyone understands court proceedings.*[578]

With regard to the impact of plain language, to date, the plain language services that are currently provided by Canadian governments[579] and the legal community have made the government and the law more accessible to the public, have created efficiencies for staff and have saved government money.[580] The movement towards plain language in the United States has led to the mandating of plain language legal drafting on both Federal and State-specific levels[581] and has shown results of increased reader comprehension and significant financial savings.[582] In addition, the data shows that translation of plain language forms is 43% cheaper than translating standard legal forms,[583] thus diminishing the additional barriers of persons for

[577] Note that there is debate over whether plain language drafting actually results in laws that can be more easily understood by the general public, or whether plain language reducesses the necessary precision of the law and fails to address proponents of legal interpretation that go beyond the written word such as precedent. An exploration of this debate is beyond the scope of this thesis, however, this question is addressed through the following sources: Sullivan, "Some Implications of Plain Language Drafting", *supra* note 124; Assy, *supra* note 140.
[578] *Literacy and Access to Administrative Justice, supra* note 63 at 14, citing *Reading the Legal World, supra* note 133 at 34.
[579] *Access to Justice Committee, supra* note 33 at 4 ("[t]he Law Society is also taking a more active role in ensuring that a continuum of services are available to Ontarians, including accurate, accessible legal information").
[580] *Literacy and Access to Administrative Justice, supra* note 63 at 14, citing Kimble, *supra* note 262 at 8 ("[t]he Small Claims Court in British Columbia—the same staff can handle 40 per cent more work after its Acts, forms, and brochures were re-written in plain language"); at 14, citing Mowat, *supra* note 263; *Plain Language in Washington State, supra* note 134 at 1093, citing American Bar Associations Standing Committee on Legal Aid & Indigent Defendants, *Standards For Language Access in Courts* (2012), online: <http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf> at 84-85 ("[i]n addition, plain language documents are quicker to understand, and readers make fewer errors when they fill out forms, resulting in quicker and more accurate compliance to requirements").
[581] *Plain Language in Washington State, supra* note 134 at 1077.
[582] *Literacy and Access to Administrative Justice, supra* note 63 at 15, citing Kimble, *supra* note 262 at 9 ("[t]he Federal Communications Commission in the United States—re-writing its regulations in plain language made them more accessible. This saved five full-time positions … Veterans Affairs in the United States—it wanted to make its materials more understandable. After revising a form letter, staff received 83 per cent fewer calls asking for clarification. Savings from this one revised form? $40,000 a year"); *Plain Language in Washington State, supra* note 134 at 1085, citing Maria Mindlin, *Is Plain Language Better? A Comparative Readability Study of Court Forms*, 10 Scribes J Legal Writing 55, 61 (2005–06) ("[a] California study conducted in 2005 found that the new plain language proof of service showed a reader comprehension of eighty-one percent accuracy, as compared to sixty-one percent for the earlier version, and the new plain language subpoena scored a ninety- five percent accuracy rate in comprehension as compared to sixty-five percent for the original").
[583] *Plain Language in Washington State, supra* note 134 at 1077, citing Transcend Translations, Inc, *Readability: How to Write and Design Documents That are Easy to Read* (2012) at 60.

whom English or French are an additional language.

In considering the rewriting of legislation and jurisprudence in plain language, it is worth looking to Canadian language rights cases which provide a roadmap for instituting linguistic direction in legal drafting.

A clear example of this can be found in *Manitoba Language Rights Reference*,[584] a case that dealt with section 23 of the *Manitoba Act, 1870*,[585] and which required that legislation be printed and published in both English and French. The Supreme Court in this case found that by failing to provide its laws in both official languages, Manitoba had breached its constitutional obligations and its unilingual laws were "invalid and of no force or effect."[586] By way of remedy, the court directed that the Manitoba Legislature "comply with its constitutional duty"[587] and re-enact all of its laws in both official languages. In order to prevent a legal vacuum where Manitoba was without any valid provincial legislation, the court set out a timeline within which bilingual laws had to be redrafted. Another example lies in the family law decision of *RA v WA*[588] where the court observed that when drafting orders, courts must ensure that obligations flowing from the orders be "easily ascertainable."[589] Based on the vagueness of the lower court's directive, the BC Court of Appeal granted the applicant's application for appeal. Arguably, it would be similarly open to courts to allow appeals on the basis that the complexity of the lower court decision is in breach of the constitutional rights to access to justice.

With regard to the matter of inaccessibly complex laws, the remedial opportunities could be said to be analogous. If we accept that complex legal drafting gives rise to a breach of the constitutionally protected right to access to justice, then those laws are inconsistent with the Constitution and are of no force and effect. Similarly, where courts draft legal decisions in an inaccessible manner, they are effectively infringing on constitutional rights and freedoms and

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[584] *Manitoba Language Rights Reference, supra* note 347.
[585] *Manitoba Act, supra* note 202.
[586] *Manitoba Language Rights Reference, supra* note 347 at para 54. See also at para 46 ("[s]ection 23 of the Manitoba Act, 1870 is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineat the rights and duties they hold in respect of one another, and thus to live in society").
[587] *Ibid* at para 83.
[588] *RA, supra* note 508.
[589] *Ibid* at para 10.

section 24(1) of the Charter provides for just and appropriate remedies.[590] Just as in *Manitoba Reference*, these breaches could be remedied through the redrafting of legislation in plain language with an accompanying order requiring the use of plain language in legal decision-making.[591]

With regard to "how" these changes could be made, a number of toolkits exist which provide direction on how to redraft legislation to be plain and clear. One prime example can be found in the *Results of Usability Testing Research on Plain Language Draft Sections of the Employment Insurance Act*[592] which was commissioned by the Department of Justice and Human Resources Development Canada. The purpose of the testing was to "provide a solid foundation for wise decision-making to guide plain language drafting"[593] and deliver a strong Canada-specific guideline on how to draft legislation to be more clear. In addition, the Department of Justice has also created the *Guide to Fostering Readability of Legislative Texts*[594] which provides a roadmap for fostering the "intelligibility of legislative texts".[595] These guides could act as either a reference for amendments or could be used as a starting point for developing a national framework for plain language drafting.

With regard to judicial decision making, court actors have already taken steps to improve the accessibility of their decisions. For example, the plain language decision making by Justice Nakasturu in *Armitage* demonstrates that courts are both aware of the inaccessibility of the language they use and that, when committed, are able to provide accessible decisions. There are similarly resources online that could either be referenced or adopted by the judiciary in their writing process.[596]

Another example of accessibility in action is the recent initiative at the Supreme Court of

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[590] *BCGEU, supra* note 9 at para 24.
[591] *Jordan, supra* note 441 at para 134, citing Michael Code, *Trial Within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States*, (Scarborough, Ont: Carswell, 1992) at pp 133-134 ("[t]he right to a trial within a reasonable time has aptly been described as 'discipline for the jus- tice system', in that it may cause '*discomfort in the short term but [it will bring] achievement in the long term*'"[emphasis added]).
[592] Schmolka, *Usability Testing, supra* note 220.
[593] *Ibid* at 1. See also Schmolka, *Consumer Fireworks Regulations, supra* note 220. See generally *A Movement to Simplify Legal Language, supra* note 220.
[594] Department of Justice, "Guide to fostering the readability of legislative texts" (2018), online: <https://www.justice.gc.ca/eng/trans/ar-lr/rg-gl/p1.html>.
[595] *Ibid* citing the Red Tape Reduction Commission.
[596] See e.g., *Literacy and Access to Administrative Justice, supra* note 63; *Content Style Guide, supra* note 214; *Plain language, clear and simple, supra* note 211.

Canada which provides plain language summaries of their rulings. This new process was developed in order that the court remain transparent and accessible to the Canadian public:

> Starting tomorrow, the Supreme Court of Canada will issue plain-language "Case in Brief" summaries of its reasons for judgment.
>
> > "The Court has always aimed to be transparent and accessible to the Canadian public, and that's what this new initiative is about," said the Rt. Hon. Richard Wagner, Chief Justice of Canada. "Cases in Brief are short summaries drafted in reader-friendly language, so that anyone interested can learn about the decisions that affect their lives."
>
> Cases in Brief will be published on the Court's website and shared on social media. Members of the public can follow the Court on Facebook and Twitter. Cases in Brief will appear around noon Eastern time on the day a judgment is released.[597]

These examples demonstrate that there is precedent to follow in reimagining legal language and accessibility. Although the actual enforcement of plain language legislative drafting and decision making may seem difficult, jurisprudence mandating statutory translation already exists and can be relied on in bringing Canada's legal system in line with its constitutional obligations.[598]

**Increased access to legal counsel**

*There is a major gap between what legal services cost and what the vast majority of Canadians can afford.*[599]

Although legal representation does not directly resolve the issue of legal complexity, the provision of legal support can be used in order to provide legal translation and bridge the 'comprehension gap' between litigants and the law.

*Christie* has established that although there may be a right to funded counsel in specific circumstances, there is not a general constitutional right to state funded counsel.[600] Commenting on the "financial implications"[601] of such a scheme, the Supreme Court in *Christie* noted that this

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[597] Supreme Court of Canada, News Release, "Starting tomorrow, the Supreme Court of Canada will issue plain-language "Case in Brief" summaries of its reasons for judgment" (22 March, 2018), online: <https://scc-csc.lexum.com/scc-csc/news/en/item/5774/index.do>.
[598] *RA*, *supra* note 508 at para 10. As noted at footnote 577 of this thesis, there is debate around the benefits and drawbacks of plain language legal drafting. See Sullivan, "Some Implications of Plain Language Drafting", *supra* note 124; Assy, *supra* note 140.
[599] *Roadmap for Change*, *supra* note 3 at 3.
[600] *Christie*, *supra* note 9 at para 27.
[601] *Ibid* at para 14 (note, however, that this is not a determinative factor in the court's ultimate decision making).

change could impose considerable costs on taxpayers.[602] While this restriction may be fiscally responsible and in keeping with the power of provinces to impose conditions on how the court is accessed,[603] the reality is that without funded counsel many do not have access to counsel at all. This limitation is at odds with the right to access to justice. As the Supreme Court in *Trial Lawyers* made clear, although reasonable limits may be placed on the right to access to justice, the right itself extends to all legal matters within Canada.[604] The fiscal questions here will have to be balanced with the rights and responsibilities of Canadians.

How then should the legal system respond to this constitutional breach? As a rule, the roles of the judiciary and legislature are separate and,[605] therefore, the courts do not like to tell the government what to do with its money.[606] However, as has been seen in both *Rowbotham* and *G (J)*, where constitutional rights are at stake, the court has stepped in. In these cases the Supreme Court specifically extended a right to state funded counsel in order to remedy a constitutional breach.[607] Given the argument that complex laws are contrary to the constitution it

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[602] *Ibid* at para 14.

[603] *Ibid* at para 17 ("[t]he legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the Constitution Act, 1867. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts").

[604] *Trial Lawyers, supra* note 8 at para 40 ("[i]f people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect").

[605] See *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 381, 2004 SCC 66 at paras 104 ("[n]o one doubts that the courts and the legislatures have different roles to play, and that our system works best when constitutional actors respect the role and mandate of other constitutional actors, including an "appreciation by the judiciary of its own position in the constitutional scheme" (*Auditor General*, *supra*, at p. 91, *per* Dickson C.J.). While the separation of powers is a defining feature of our constitutional order (*PEI Provincial Court Judges Reference*, *supra*), the separation of powers cannot be invoked to undermine the operation of a specific written provision of the Constitution like s. 1 of the Charter . Section 1 itself expresses an important aspect of the separation of powers by defining, within its terms, limits on legislative sovereignty"), 105 ("[j]udicial review of governmental action long predates the adoption of the Charter . Since Confederation, courts have been required by the Constitution to ensure that state action complies with the Constitution. The Charter has placed new limits on government power in the area of human rights, but judicial review of those limits involves the courts in the same *role* in relation to the separation of powers as they have occupied from the beginning, that of the constitutionally mandated referee. As the Court affirmed in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 56, '. . . it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies.'").

[606] Andrea Wong, "The Yellow Brick Road? Establishing a Constitutional Right to State-Funded Counsel for Matters of Civil Law in Canada" (2011) 2:1 Journal of Public Policy, Administration and Law 42 at 44 ("…the courts have hesitated to establish a general constitutional right to state-funded counsel that would interfere with the roles of the legislatures and executive branch in making laws and allocating public funds").

[607] Note *G (J), supra* note 434 at para 102 (in granting the remedy of state funded counsel, the Supreme Court of Canada balanced the relief provided against the direction from Sopinka, J in "*Osborne, Millar and Barnhart et al v Canada (Treasury Board) et al*, [1991] 2 SCR 69; 125 NR 241; 82 DLR (4th) 321, at p 1-4, to 'refrain from intruding into the legislative sphere beyond what is necessary' in fashioning remedies for Charter violations." The court then went on to outline what steps could be taken by the government should it wish to extend the court's remedy: "[t]hat having been said, there is nothing preventing the government from amending the policy -- for

would be open to the courts to respond similarly and remedy this breach of the constitutional right to access to justice with an extension of the provision of state funded counsel.

In the alternative, it may be for the government to respond by expanding both the Legal Aid mandate and its services. This expansion could follow a process similar to what was implemented following the Supreme Court decision of *Brydges,*[608] a decision which found that under Section 10(b) of the Charter, detained persons have the right to "immediate, but temporary, advice from duty counsel irrespective of financial status."[609] In response to this decision the Minister of Justice expanded the services offered by Legal Aid to include duty counsel for anyone immediately upon arrest.[610] Just as the government responded to the breach of constitutional rights in *Brydges* by extending the role of Legal Aid, so too might they consider further extending Legal Aid's services as a response to the breach of the constitutional right to access to justice.

Again, this does not solve the matter of complex laws, but would provide an interpretive service, akin to *Eldridge,* ensuring equal benefit of the law.

**Public legal education and information**

*Perhaps a little more of an effort can be spent in education campaigns [in] ... public school ... to prevent maybe heading off to jail or heading off to court or heading off to probation. ... Prevent it before it starts*[611]

Although perhaps a more radical and systemic legal remedy, another option for bridging the comprehension gap may be to not make the laws less complex, but to provide early legal education allowing more equitable access to complex laws.[612] Public Legal Education and Information (PLEI) is "an activity that seeks in a systematic way to provide people with the opportunity to obtain information about the law and the justice system in a form that is timely

example reading in a discretion -- or providing respondents to custody applications with state-funded counsel through means other than the Domestic Legal Aid program").

[608] *Brydges, supra* note 434.

[609] *Ibid* at p 209, citing James Wilkins, *Legal Aid in the Criminal Courts* (1975), at p 12.

[610] Department of Justice, *Maximizing the Federal Investment in Criminal Legal Aid*, by Prairie Research Associates (Ottawa: 2014) at footnote 10.

[611] Farrow, "What is Access to Justice", *supra* note 39 at 979.

[612] It should be noted that this type of implementation should consider marginalized communities and groups who do not have the same access to the education system. A hybrid of legal education and reduced complexity may be more appropriate.

and appropriate to their needs."[613] It is a movement that is growing in North America as a method of equipping persons with the necessary knowledge to both understand and navigate the legal system.

The goal of PLEI is to prepare people with the information they need to identify when they are dealing with a legal issue, to know their options (including early resolution) and to be more able to understand the formal law and processes if needed. This knowledge is intended to not only assist in addressing the barrier of a complex legal system, but could also act as a preventative measure:

> At present, most people seek out legal information when they are in a legal bind, during a time of crisis. The goal is to change this so that everyone develops basic legal capabilities as part of public education curriculum and has a continuing opportunity to build on this base of knowledge and understanding throughout their lives.[614]

As PLEI is just starting to gain momentum as a method of addressing justice barriers,[615] it is occurring in a more piece-meal manner as opposed to a coordinated effort[616] and there are not strong statistics to demonstrate its effectiveness. However, it provides another option for closing the knowledge gap between Canadian citizens and the law; essentially, if the law will not reach Canadians where they are at, then perhaps Canadians must be equipped to reach the law.

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[613] Department of Justice, "Access to Justice Service Agreements", online: < https://www.justice.gc.ca/eng/fund-fina/gov-gouv/access.html>.

[614] *Reaching Equal Justice, supra* note 3 at 67.

[614] See also: *Access to Justice Metrics, supra* note 68 at 19 ("[c]ommunity members stated that people first needed to know their rights before they could enforce them. Some people said they believed they had rights, but just did not know what their rights were. Lack of information was a repeated complaint; thus the provision of legal information was a repeated recommendation. Many believed that public legal education is necessary, both generally and in schools").

[615] See *Reaching Equal Justice, supra* note 3 at 67 ("[l]egal capability training is a new approach that builds on a rich foundation of public legal education and information (PLEI) resources and curriculum").

[616] See *Roadmap for Change, supra* note 3 at 13 ("[p]roviding access to legal information is an important aspect of the ERSS. The good news is that there is an enormous amount of publicly available legal information in Canada and that there are active and creative information providers. But there are significant challenges. It is not always clear to the user what information is authoritative, current or reliable. There is work to be done to improve the accessibility and in some cases the quality of these resources. The biggest challenge, however, is the lack of integration and coordination among information providers. A much greater degree of coordination and integration is required to avoid duplication of effort and to provide clear paths for the public to reliable information"). Note that *Roadmap for Change* directs readers to the programs as an example that there are many service providers in Canada: Community Legal Education Ontario, online: <http://www.cleo.on.ca/en>; Justice Education Society, online: <http://www.justiceeducation.ca/>; Ontario Justice Education Network, online: <http://www.ojen. ca/welcome>.

## Conclusion

Both the trilogy as well as the equality cases discussed demonstrate an understanding that fundamental to the rule of law is the principle that the public can access and understand it.[617] Due to the law's complexity this has been understood to mean that ordinary citizens should have access to counsel who can explain the law to them.[618] However, should the courts and the legislators not provide this access, it then stands to reason that the public should be able to access and understand the law on their own without a lawyer; that the complexity of the system itself must be remedied.

Just as the remedies for delay and cost do not mean that all legal matters will be immediate and free, neither can it be expected that remedies with regard to complexity will ensure that all members of the public will understand all laws in Canada.[619] However, this review does demonstrate that the divide between the current state of the law and what the ordinary person can reasonably be expected to understand is unconstitutionally wide. The legislature and the judiciary will have to step in and take remedial action if they wish to preserve the constitutional right to access to justice.

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[617] *Blackpool, supra* note 506 at p 87 ("[t]here is one quite general question affecting all sub-delegated legislation and of supreme importance to the continuance of the rule of law under the British Constitution, namely, the right of the public affected to know what the law is").

[618] *Ibid* at p 87 ("… but the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public - in the sense, of course, that, at any rate, its legal advisers have access to it at any moment as of right").

[619] Note that some laws may be considered important to understand than others. For example, those required for daily living such as traffic laws and property laws that may be encountered most frequently.

## Chapter 7: Conclusion

The need for accessibility within the Canadian legal system has become undeniable.[620] Barriers such as delay, cost and complexity are standing in the way of meaningfully accessing justice. This is particularly problematic as the lives of Canadians are governed by statute and case law, with laws touching almost every aspect of life from conception to death, and beyond. At the center of this all-encompassing system is the principle that people know the laws under which they are governed. It is against this central requirement that a fundamental legal contradiction emerges: that Canadians are obligated to adhere to a law that they do not have a right to understand, and which, according to statistics, many do not in fact understand.

It is my hope that this thesis has succeeded in demonstrating how critical this dichotomy is, particularly in our current circumstances where we are seeing increased numbers of SRLs and decreased funding for Legal Aid, thereby further requiring the navigation of the legal system without a legal interpreter. The gaps that emerge when persons are unable to understand the law can have serious consequences including fines, loss of housing, imprisonment, and even death.

Over the past few decades the Supreme Court of Canada has responded to the access to justice crisis with a trilogy of cases that recognize a constitutional right to access to justice. Based in the rule of law[621] this right has been extended to include protections against the barriers of cost and delay.[622]

Both the courts and research related to access to justice have acknowledged that the complexity of the law results in barriers to the legal system. Notwithstanding, the courts have yet to recognize complexity as an infringement on the constitutional right to access to justice. This thesis has demonstrated, however, that based on the principles emerging from the Supreme Court trilogy, as well as section 15 charter rights, the right to access to justice must include a right to understand the law, whether on a stand-alone basis or through a legal conduit. While assessing the appropriate remedies for responding to this barrier will require consultations with appropriate stakeholders, there is a case to be made for the provision of plain language drafting, education and access to interpretation through legal counsel. However, as is clear from the very trilogy of

[620] See *Roadmap for Change, supra* note 3; *Reaching Equal Justice, supra* note 3; *Court Challenges Program, supra* note 3.
[621] See *Trial Lawyers, supra* note 8.
[622] See e.g. *ibid*; *Christie, supra* note 9; *BCGEU, supra* note 9.

cases that established the right to access to justice, it cannot be left to those without access to bring forward this claim.

Intervention from the legal community[623] will likely be required in order for the realization of a full right to access to justice including the right to understand. If legal actors have made the system so complex that Canadians are barred from effective participation, then it is only fitting that those same actors take responsibility for removing that very barrier.

[623] *Code of Professional Conduct*, *supra* note 290 at s 5.6-1 (in line with obligations within the Code).

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