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INTO THE “VORTEX OF LEGAL PRECISION”:  
ACCESS TO JUSTICE, COMPLEXITY, AND THE CANADIAN TAX SYSTEM

by

Colin Jackson

Submitted in partial fulfilment of the requirements  
for the degree of Doctor of Philosophy

at

Dalhousie University  
Halifax, Nova Scotia  
August 2019

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## ABSTRACT

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This thesis is an exploration of access to justice issues in the Canadian tax system. Drawing on the work of Roderick Macdonald, it argues for a broad conception of access to justice based on the empowerment of individuals in all of the sites, processes, institutions where law is made, administered, and applied. It argues that tax law shows the usefulness of this comprehensive approach to access to justice.

Using the comprehensive approach to access to justice, the thesis goes on to argue that legal complexity should be seen as an important access to justice issue in tax law. It lays out a pragmatic, access to justice-oriented framework for talking about complexity in tax law. Applying this framework, it examines the sources of complexity in Canadian tax law and suggests a path toward simplification.

The final chapters of the thesis contain examples of the type of access to justice-oriented research and advocacy that these frameworks facilitate.

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# CHAPTER I: INTRODUCTION

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## I. OVERVIEW AND IMPETUS

Access to justice is not an easily defined term.<sup>1</sup> Nor should it be, given the diversity of human affairs and the variety of venues and processes in which justice is worked out. Still, access to justice in Canada is sometimes said to be in a state of crisis,<sup>2</sup> and there is wide agreement that the issue is important and demands attention, as “there is no justice without access to justice.”<sup>3</sup>

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<sup>1</sup> For accounts of the history of thinking about access to justice, see: David M Trubek, “Critical Moments in Access to Justice Theory: The Quest for the Empowered Self” in Allan C Hutchinson, ed, *Access to Civil Justice* (Toronto: Carswell, 1990) 107; Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 20–23 [Macdonald, “Scope, Scale and Ambitions”]. For a discussion of theoretical problems with defining access to justice, see William E Conklin, “Whither Justice?: The Common Problematic of Five Models of Access to Justice” (2001) 19 Windsor YB Access Just 297. For the development of a “public centred” understanding of access to justice, see: Trevor CW Farrow, “What Is Access to Justice?” (2013) 51 Osgoode Hall LJ 957.

<sup>2</sup> Farrow, *supra* note 1 at 963, 965, 972; Amy Salyzyn, “Canada: Foreclosures, Freeman, Foreign Law Schools and the Continuing Search for Meaningful Access to Justice” (2013) 16:1 Leg Ethics 223 at 224; Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* (2013) at 43, 61, 150, online: <[www.cba.org/CBAMediaLibrary/cba\\_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf)> [perma.cc/39V]-BWD8]; Alice Woolley & Trevor Farrow, “Addressing Access to Justice through New Legal Service Providers: Opportunities and Challenges” (2015) 3 Tex A&M L Rev 549 at 549; Thomas Cromwell, “Access to Justice: How It’s Looking on the Ground”, *The Lawyer’s Daily* (13 August 2018), online: <[www.thelawyersdaily.ca/articles/7107/access-to-justice-how-it-s-looking-on-the-ground-thomas-cromwell](http://www.thelawyersdaily.ca/articles/7107/access-to-justice-how-it-s-looking-on-the-ground-thomas-cromwell)> [perma.cc/9QHK-6372].

<sup>3</sup> Lucianna Ciccocioppo, “There is No Justice without Access to Justice: Chief Justice Beverley McLachlin”, (11 November 2011), online: <[www.law.utoronto.ca/news/there-no-justice-without-access-justice-chief-justice-beverley-mclachlin](http://www.law.utoronto.ca/news/there-no-justice-without-access-justice-chief-justice-beverley-mclachlin)> [perma.cc/Y7PM-7SPG].

Tax law is ubiquitous and pervasive, and is thus is a key site of justice in contemporary Canadian society. The Canada Revenue Agency (CRA) processes about 28 million tax returns for individuals annually.<sup>4</sup> Each of these represents a direct interaction with Canada's tax law system. Canadian taxpayers initiate roughly 85,000 tax disputes per year.<sup>5</sup>

Perhaps more significant than these times when individuals turn their attention to the tax system are the everyday ways in which tax law shapes our economy and society. From large corporate mergers to residential tenancy agreements to grocery shopping, every transaction is influenced by tax law. Tax law influences where Canadians live, how we receive health care, and how we plan for the future. Where law is implicated, concerns around justice, and concerns around access to justice, are also implicated.

Despite tax law's importance for social and economic justice, little is known about access to justice in the tax system. While much work has been done to study access to justice issues broadly, most of this research has ignored tax law.<sup>6</sup> The

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<sup>4</sup> In the 2015-16 year, the CRA reported 28.7 million: Canada Revenue Agency, Departmental Performance Report 2015-16 at 44, online: <[www.canada.ca/content/dam/cra-arc/migration/cra-arc/gncy/prfrmnc\\_rprts/2015-2016/dpr-2015-16-eng.pdf](http://www.canada.ca/content/dam/cra-arc/migration/cra-arc/gncy/prfrmnc_rprts/2015-2016/dpr-2015-16-eng.pdf)> [perma.cc/24GQ-CVB2].

<sup>5</sup> Canada Revenue Agency, Departmental Results Report 2016-17 at 71, online: <[www.canada.ca/content/dam/cra-arc/corp-info/aboutcra/dprtmntl-prfrmnc-rprts/2016-2017/drr17cra-en.pdf](http://www.canada.ca/content/dam/cra-arc/corp-info/aboutcra/dprtmntl-prfrmnc-rprts/2016-2017/drr17cra-en.pdf)> [perma.cc/MB82-2PNQ].

<sup>6</sup> Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice, 2009) [Currie, *Legal Problems of Everyday Life*]; Ab Currie, *Nudging the Paradigm Shift, Everyday Legal Problems in Canada* (Canadian Forum on Civil Justice, 2016), online: <[cfcj-fcjc.org/sites/default/files//publications/reports/Nudging%20the%20Paradigm%20Shift%2C%20Everyday%20Legal%20Problems%20in%20Canada%20-%20Ab%20Currie.pdf](http://cfcj-fcjc.org/sites/default/files//publications/reports/Nudging%20the%20Paradigm%20Shift%2C%20Everyday%20Legal%20Problems%20in%20Canada%20-%20Ab%20Currie.pdf)> [perma.cc/3Q3P-PFUS] [Currie, *Paradigm Shift*]; Trevor CW Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada:*

literature contains examples of research looking specifically at access to justice in the context of criminal law,<sup>7</sup> family law,<sup>8</sup> environmental law,<sup>9</sup> health law,<sup>10</sup> and civil dispute resolution.<sup>11</sup> Research has been done evaluating specific access to justice-oriented interventions, such as legal aid programs and small claims courts.<sup>12</sup> While some work has been done examining particular facets of the Tax Court of Canada's

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Overview Report (Toronto: Canadian Forum on Civil Justice, 2016), online: <[www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf)> [perma.cc/S8NV-2XA9].

<sup>7</sup> Albert Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework* (Department of Justice), online: <[www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rro3\\_5/rro3\\_5.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rro3_5/rro3_5.pdf)> [perma.cc/W8S5-SEXU] [Currie, *Criminal Legal Aid within an Access to Justice Framework*].

<sup>8</sup> Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Canadian Forum on Civil Justice, 2013), online: <[www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> [perma.cc/H9XE-SLHD].

<sup>9</sup> Nicholas A Robinson, "Ensuring Access to Justice through Environmental Courts" (2011) 29 *Pace Envtl L Rev* 363; Sven Deimann & Bernard Dyssli, eds, *Environmental Rights: Law, Litigation & Access to Justice* (London: Cameron May, 1995); Mark A Schofield & David S Thompson, "Access to Justice and the Right to a Healthful Environment in Canada: Public Participation in Environmental Decision Making" (1994) 3 *RECIEL* 231.

<sup>10</sup> Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: the Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

<sup>11</sup> Action Committee on Access to Justice in Civil and Family Matters, *supra* note 8; Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Needs Project* (Toronto: Ontario Civil Needs Project Steering Committee, 2010), online:

<[lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110\\_oclnreport\\_final.pdf](http://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110_oclnreport_final.pdf)> [perma.cc/9TE8-MPSG] [Ontario Civil Legal Needs Project, *Listening to Ontarians*]; Roderick A Macdonald, *Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995); Allan C Hutchinson, ed, *Access to Civil Justice* (Toronto: Carswell, 1990).

<sup>12</sup> Marc W Patry, "How Small Are Contemporary Small Claims? An Evaluation of the Nova Scotia Small Claims Court" (2012) 5 *Web JCLI*; Currie, *Criminal Legal Aid within an Access to Justice Framework*, *supra* note 7; Albert Currie, "Legal Aid Delivery Models in Canada: Past Experience and Future Developments" (1999) 33 *UBC L Rev* 285 [Currie, "Legal Aid Delivery Models"]; Seana C McGuire & Roderick A Macdonald, "Small Claims Courts Cant" (1996) 34 *Osgoode Hall LJ* 509; Peter Finkle & David Cohen, "Consumer Redress through Alternative Dispute Resolution and Small Claims Court: Theory and Practice" (1993) 13 *Windsor YB Access Just* 81; Christopher S Axworthy, "Controlling the Abuse of Small Claims Courts" (1976) 22 *McGill LJ* 480.

informal procedure,<sup>13</sup> there is a paucity of access to justice research examining Canada's tax system. This thesis aims to begin filling this gap and to lay out trajectories for future research on access to justice in the Canadian tax system.

In their classic work, Cappelletti and Garth trace the evolution of access to justice theories. They begin in the liberal philosophy of the eighteenth and nineteenth centuries with access to justice meaning the "individual's *formal* right to litigate or defend a claim."<sup>14</sup> The fact that many did not have the means to make effective use of legal institutions was largely ignored in the scholarship. The movement toward recognizing social rights and duties in this framework and making them truly accessible to all was increasingly recognized as important following World War II.<sup>15</sup>

Cappelletti and Garth describe efforts in Western countries to improve access to justice in three waves. The first consisted of legal aid for the poor.<sup>16</sup> The second wave addressed the problem of representing collective interests. Innovations in this wave included public agencies or officials with the role of enforcing certain group rights, and test case, public interest, and class action litigation.<sup>17</sup> The third wave they describe as representing a broader conception of access to justice. It "includes, but goes *beyond advocacy*, whether inside or outside of the courts."<sup>18</sup> Rather than focusing

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<sup>13</sup> Colin Campbell, "Access to Justice in Income Tax Appeals" (2012) 63 UNBLJ 445; André Gallant, "The Tax Court's Informal Procedure and Self-Represented Litigants Problems and Solutions" (2005) 53:2 Can Tax J 333.

<sup>14</sup> Mauro Cappelletti & Bryant Garth, *Access to Justice* (Milan: Giuffrè, 1978) at 6-7 [emphasis in original].

<sup>15</sup> *Ibid* at 8-9.

<sup>16</sup> *Ibid* at 22-35.

<sup>17</sup> *Ibid* at 35-48.

<sup>18</sup> *Ibid* at 49 [emphasis in original].



exclusively on legal representation in courts, “[i]ts focus is on the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies.”<sup>19</sup> This third wave encouraged more innovation regarding civil procedure, alternative dispute resolution models, encouraging settlement of disputes, small claims courts, specialized fora for particular types of common disputes, such as consumer disputes, landlord-tenant disputes, and labour disputes.<sup>20</sup>

In this thesis, I adopt a conception of access to justice that goes beyond even these third wave approaches. This approach has elsewhere been described as a “holistic” approach, a “democratic” approach, and a “comprehensive” approach.<sup>21</sup> This view of access to justice has as its aim the empowerment of those who are often thought of as legal subjects. It also expands its gaze beyond dispute resolution to include all of the sites, processes, and institutions where law is made, administered, and applied. While this conception of access to justice is not new, rarely have research agendas or reform proposals engaged with the full breadth of access to justice. This thesis represents one attempt to envision an agenda for research and reform that

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid* at 54–120.

<sup>21</sup> On the “holistic” approach, see: Currie, *Criminal Legal Aid within an Access to Justice Framework*, *supra* note 7. Currie described the holistic approach as a “third wave” approach; however, I see his proposals as a step beyond third wave approaches, and a step toward Macdonald’s comprehensive approach. On the “democratic” approach (or “democratic thesis”, contrasted with the “practical thesis”), see: Jennifer Ann Leitch, *Having a Say: Democracy, Access to Justice and Self-Represented Litigants* (PhD Dissertation, York University, 2016), online: <[digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1023&context=phd](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1023&context=phd)> [perma.cc/9HJU-JSJP] at 6–7, 40–45, 78–94. On the “comprehensive” approach, see: Macdonald, “Scope, Scale and Ambitions”, *supra* note 1.

moves beyond an exclusive focus on legal disputes as defined by courts. Canada's tax system presents an excellent opportunity to demonstrate the usefulness of the comprehensive approach to access to justice.

This thesis proceeds in three main parts. The first part, chapters 2 through 4, advocates for a broad view of access to justice. I claim that looking at tax law from an access to justice perspective demonstrates the need for researchers and advocates not to be limited to a framework that views access to justice as being wholly, or even primarily, about dispute resolution. The second part, consisting of chapters 5 and 6, aims to give an example of a topic that the broad view of access to justice illuminates in ways that a dispute resolution-focus vision of access to justice could not. In this part, I claim that complexity is an important access to justice issue in tax law and lay out a framework for thinking about this complexity and attempting simplification. In the third part, chapters 7 and 8, I aim to illustrate the type of work that might be done under the rubric of access to justice research if complexity were taken seriously as an access to justice problem in tax law.

## **II. SKETCH OF THE THESIS**

### **A. PART I—ACCESS TO JUSTICE IN TAX LAW: CURRENT ISSUES AND FUTURE DIRECTIONS**

Part I of the thesis reviews access to justice issues and research in tax law. It begins with a supply-side/demand-side (or top-down/bottom-up) model of access to justice research to structure the review. Chapter 2 examines supply-side access to justice issues and research in Canadian tax law. There has been relatively little

research in this space; however, it seems that the Canadian tax system has incorporated many of the innovations of Cappelletti and Garth's third wave of access to justice. While it is apparent that the Tax Court of Canada and the CRA have endeavoured to mitigate barriers to access, I suggest that the innovations incorporated in the tax system would be a fruitful field for future research.

In chapter 3, I explore demand-side access to justice issues and research in the tax system. Canada, like other parts of the world, has seen a recent growth of legal needs research. In Canada, however, this research has largely ignored tax law as a potential source of legal needs. I suggest that there is reason to think Canadian tax law would be worth examining in future demand-side access to justice research.

In chapter 4, I argue that tax law helps illustrate the need for a comprehensive access to justice approach that goes beyond the supply-side/demand-side dichotomy. Tax law is not exceptional or unique in this way, but does provide an excellent illustration of the reasons that access to justice cannot be reduced to the resolution of discrete justiciable disputes. This comprehensive approach to access to justice is drawn from the work of Roderick Macdonald, and so chapter 4 also briefly sketches Macdonald's legal theory to put this conception of access to justice in context.

## B. PART II—COMPLEXITY AS AN ACCESS TO JUSTICE ISSUE

One of the access to justice issues that is highlighted when the tax system is looked at through the comprehensive access to justice lens is the system's complexity.

While complexity has sometimes entered into the access to justice conversation,<sup>22</sup> the discussion rarely goes very far. However, if the goal of access to justice is not merely to ensure that individuals are able to enforce their legal rights or successfully resolve their disputes, but to empower them in their daily interactions with the legal system and in all of the sites in which law is made, administered, and applied, then legal complexity takes on an increased importance. To the extent that it makes the law harder to understand and engage with, legal complexity undermines access to justice. Part II of the thesis makes this argument with the overall goal of illustrating the need for the comprehensive conception of access to justice.

More specifically, chapter 5 engages with the research on legal complexity and argues that legal complexity is an access to justice problem—a particularly important problem in the Canadian tax system. Tax scholarship has long had a preoccupation with the complexity of the tax system, but these concerns also take on a heightened importance as they are viewed through the access to justice lens. While tax researchers have generally been concerned about tax compliance and the effects that legal complexity may have on taxpayers' abilities to comply with their legal obligations, the goal of access to justice calls for us to aim at the higher goal of engagement and empowerment of taxpayers rather than mere compliance. Chapter 5 also offers a typology of tax complexity that I suggest can be useful for access to justice research and advocacy.

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<sup>22</sup> See, for example, Cappelletti & Garth, *supra* note 14 at 118; Deborah L Rhode, *Access to Justice* (New York: Oxford University Press, 2004) at 20; Action Committee on Access to Justice in Civil and Family Matters, *supra* note 8 at 8.

Chapter 6 then takes on arguments sometimes made that simplification of the tax system is impossible or, if it is possible, would significantly undermine the goals of the system. I argue that tax simplification is possible and identify three causes or drivers of complexity in the tax system. Access to justice researchers and advocates can usefully target two of these three for study and reform.

### C. PART III—ILLUSTRATIVE EXAMPLES

Part III of the thesis goes further to illustrate the usefulness of the comprehensive approach to access to justice in framing an agenda for research and advocacy, particularly in the area of tax complexity. Chapter 7 looks at the issue of readability of various materials in the tax system as part of tax complexity. It fills a void in the literature by measuring the readability of the *Income Tax Act* as well as various CRA publications.<sup>23</sup> While the CRA's publications are relatively readable, the results of the study indicate that Canada's *Income Tax Act* is significantly less readable than other Canadian statutes and than the taxation statutes of comparable jurisdictions.

Chapter 8 puts forward an idea for simplification of Canada's tax system with access to justice in mind. It examines what is sometimes called the "realization rule" or "realization principle" in the context of capital gains taxation. Deferring the taxation of capital gains until the gains are realized both undermines the general goals of the tax system and creates significant complexity, thereby reducing access to

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<sup>23</sup> *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].

justice. There were sound reasons for making this choice in the design of the tax system in the past. However, I argue that, in light of current conditions and the access to justice concerns associated with it, the time is ripe to reconsider the deferral of capital gains tax until realization of the gains.

Chapters 7 and 8 are only two of a multitude of possible research and reform projects that might fall within the ambit of an access to justice research agenda focused on tax complexity. They contribute to the literature in their own right, but also function in the thesis to demonstrate the power of both the comprehensive conception of access to justice discussed in part I and the discussion of complexity in part II.

### III. CONTRIBUTIONS

While Macdonald's comprehensive access to justice approach has been widely read and often cited,<sup>24</sup> rarely has a robust access to justice research agenda escaped the framing of legal disputes provided by courts.<sup>25</sup> This thesis shows how such a research

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<sup>24</sup> See, for example: Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial Legislative and Grassroots Dimensions" (2007) 33 Queen's LJ 139; Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About" (2008) 46:4 Osgoode Hall LJ 773; Patry, *supra* note 12; Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012); Alana Klein, "Of Justice and Its Scales: Looking Back on (Almost) Forty Years of Rod MacDonald's Scholarship on Access to Justice" (2013) 59 McGill L J 761; Patricia Hughes, "Advancing Access to Justice through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31 Windsor YB Access Just 1 [Hughes, "Advancing Access to Justice through Generic Solutions"]; Anthony Niblett & Albert H Yoon, "Unintended Consequences: The Regressive Effects of Increased Access to Courts" (2017) 14:1 J Empirical Leg Stud 5; Leitch, *supra* note 21.

<sup>25</sup> Some examples of access to justice research that escape this framing are available. See, for example: Natalina Nheu & Hugh McDonald, *By the People, for the People?: Community Participation in Law Reform* (Law and Justice Foundation of New South Wales, 2010), online:

agenda can be put forward in a particular area of law. It outlines fruitful avenues for future research and provides examples of the some of the types of research that a comprehensive approach to access to justice can facilitate.

This thesis also contributes to the rich, deep, and growing literature on tax complexity. An approach to this topic that focuses on access to justice, rather than the administrative cost or compliance burden, highlights some of the elements and effects of complexity and marginalizes others. In addition to putting forward a new way to see tax complexity and its effects, the thesis suggests a way forward for researchers and reformers concerned about tax complexity.

In Part III, this thesis adds a Canadian voice to the literature on readability in tax law that had previously been lacking. The literature contains results from the U.S., U.K, New Zealand, and Australia about the readability of various elements of their tax systems, but no such analysis had been done in Canada. Finally, using the access to justice lens, this thesis contributes a fresh look at the realization rule in Canada. While the deferral of capital gains taxation until realization has been the subject of considerable scholarship in Canada and the United States, current conditions in Canada make this a good time to reconsider the issue, and the access to justice lens on the topic adds new insights.

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<[www.lawfoundation.net.au/ljf/site/articleIDs/CC42E4B3179ECC48CA2577EB000460AF/\\$file/ByThePeopleForThePeople\\_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/CC42E4B3179ECC48CA2577EB000460AF/$file/ByThePeopleForThePeople_web.pdf)> [perma.cc/UST3-XUA7].

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## CHAPTER 2: SUPPLY-SIDE ACCESS TO JUSTICE

### RESEARCH IN TAX LAW

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#### I. ACCESS TO COURTS AND ACCESS TO LAWYERS

Much of the history of access to justice research focused on what has come to be known as “supply-side”<sup>1</sup> or “top-down”<sup>2</sup> access to justice issues. In the paradigmatic case, this research looks at discrete disputes with obvious legal character and significant stakes—criminal charges, for example, or divorce and custody disputes. The research then looks at the supply of legal services necessary to resolve the dispute. In particular, it asks questions around whether the participants have adequate access to dispute resolution fora (courts, or, where appropriate, alternative dispute resolution mechanisms), and whether they have adequate access to legal representation. Thus, supply-side research became preoccupied with issues around difficult or lengthy court procedures and delays and the cost of lawyers. The advocacy that came out of supply-side access to justice research has often called for expanded pro bono and legal aid programs, easier access to courts through the reduction of

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<sup>1</sup> For more on the “supply-side” and “demand-side” terminology, see: Catherine R Albiston & Rebecca L Sandefur, “Expanding the Empirical Study of Access to Justice” (2013) 2013 Wis L Rev 101; Deborah L Rhode, “Access to Justice: An Agenda for Legal Education and Research” (2012) 62 J Leg Educ 531; Jamie Baxter, Michael Trebilcock & Albert Yoon, “The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 55 at 55–56.

<sup>2</sup> Rebecca L Sandefur, “Access to Civil Justice and Race, Class, and Gender Inequality” (2008) 34:1 Annual Rev Sociology 339 at 343.



procedural and jurisdictional hurdles and the advent of small claims courts, and increased access to mediation and arbitration in place of the purportedly less accessible official state courts.

This chapter reviews the supply-side access to justice research that has been done in Canadian tax law and how supply-side access to justice advocacy has been reflected in Canada's tax dispute resolution structures. From this review, three things are notable. First, Canada's tax dispute resolution system has been admirably responsive to the concerns of access to justice advocates, and now incorporates many of the features that supply-side access to justice advocates have recommended. Second, the effectiveness of these access to justice interventions has not been confirmed in the literature. While access to justice researchers have studied many of these features in other contexts, the tax system has not received the same scrutiny. Third, dispute resolution in the tax system has a number of unique features that make it worthy of its own investigation. Some of these might alleviate the concerns that have been raised in other areas, while others raise new questions to be explored.

In this chapter, I begin with a brief description of the process of resolving disputes in the Canadian tax system. Then, in part III, I review a number of access to justice issues in the Canadian tax system. I look at issues of geography, jurisdiction, the cost of tax lawyers, then turn to discuss the unique features of two streams of cases in the Tax Court of Canada, and then finally look at the recent trend of encouraging the out-of-court settlement of disputes. The chapter concludes with a

review of the questions that have been left open and could profitably been the subject of future supply-side access to justice research.

## II. DISPUTE RESOLUTION IN CANADIAN TAX LAW

Tax is an area of Canadian law that affects all Canadian residents and everyone who earns income in Canada. Because much of this chapter discusses the details of the Canadian tax system and the unique features of tax dispute resolution, a brief overview of the system will be helpful. This section sets the stage by briefly explaining the steps involved in tax dispute resolution in Canada.

All residents of Canada are required to turn their minds to the income tax system at least once per year. The *Income Tax Act* requires every individual resident in Canada who owes tax to file a tax return annually.<sup>3</sup> While those who do not owe tax are free from the obligation to file a tax return, one cannot be confident that they do not have the obligation to file without first turning one's mind to the tax system. Moreover, those who have little or no tax liability because of their low income often must file a tax return to take advantage of government programs intended to help them, such as the Canada Child Benefit and the GST/HST credit. In other words, Canada's income tax system requires the attention and interaction of every adult in the country every year.<sup>4</sup>

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<sup>3</sup> *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss 150(1), 248(1) [ITA].

<sup>4</sup> Of course, not every adult in Canada *does* interact with the tax system every year, but the design of both the technical tax system and many of Canada's social programs administered through the tax system assume that they will.

The *Income Tax Act* charges the Minister of National Revenue (the Minister) with assessing tax liability, and the Minister delegates this duty to the Canada Revenue Agency (the CRA). To discharge that duty, the CRA receives and analyzes taxpayer's filings, and, in some cases, requests additional information or performs an audit. When the CRA issues an assessment of a taxpayer's liability—even an “as filed” assessment that simply adopts the taxpayer's own calculation of tax liability—the taxpayer has the opportunity to appeal.

A dispute over an income tax assessment proceeds in several stages. A taxpayer who disagrees with the CRA's assessment (or reassessment) of her tax liability has 90 days in which to file a Notice of Objection.<sup>5</sup> The CRA Appeals Branch will then perform an administrative review of the file, taking into account the facts and reasons set out in the Notice of Objection, and may confirm, vary, or vacate the assessment, or issue a new reassessment. Following this administrative appeal, the taxpayer may file an appeal to the Tax Court of Canada.<sup>6</sup>

Appeals to the Tax Court fall into one of two streams. Where the amount in dispute is relatively low—or where she is willing to limit the amount that can be recovered—the taxpayer may elect to use the Tax Court's informal procedure. The informal procedure typically provides for a quicker resolution of the dispute and is less constricted by the rules of evidence and procedure, akin to a small claims court.

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<sup>5</sup> *ITA*, *supra* note 3, s 165.

<sup>6</sup> *Ibid*, s 169.

Larger cases fall into the general procedure stream, and will more closely resemble a trial in a superior court.

In an appeal to the Tax Court of Canada, the taxpayer is the appellant and so has the burden of proving that the Minister's assessment is incorrect. The Crown's pleadings—the Reply to the Notice of Appeal—set out the factual assumptions on which the Minister based her assessment as well as the statutory provisions and the reasons that the Crown relies on in defending the assessment.<sup>7</sup> The assumptions pleaded by the Minister are taken to be true unless they are “demolished” by the taxpayer.<sup>8</sup> This requirement that the taxpayer bring evidence to rebut the Minister's factual assumptions is justified on the basis that the subject of the dispute “is the taxpayer's business.” That is, the taxpayer is assumed to be the one in the best position to know the relevant facts of the case and have access to and control of the best available evidence.<sup>9</sup>

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<sup>7</sup> *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, s 49 [*General Procedure Rules*]; *Tax Court of Canada Rules (Informal Procedure)*, SOR/90-688b, s 6.

<sup>8</sup> *Johnson v MNR*, [1948] SCR 486; *Hickman Motors Ltd v Canada*, [1997] 2 SCR 336 at para 92.

<sup>9</sup> *Orly Automobiles Inc v Canada*, 2005 FCA 425 at para 20:

It is the taxpayer's business. He knows how and why it is run in a particular fashion rather than in some other ways. He knows and possesses information that the Minister does not. He has information within his reach and under his control. The taxation system is a self-reporting system. Any shifting of the taxpayer's burden to provide and to report information that he knows or controls can compromise the integrity, enforceability and, therefore, the credibility of the system.

Appeals from the Tax Court of Canada go to the Federal Court of Appeal (as of right),<sup>10</sup> and then to the Supreme Court of Canada (with leave).<sup>11</sup>

### III. SUPPLY-SIDE ACCESS TO JUSTICE RESEARCH IN THE CANADIAN TAX SYSTEM

Canada's tax system already includes many of the supply-side interventions that access to justice proponents have called for over the years. However, very little can be said with confidence about the effectiveness of these measures or the accessibility of the tax system as a whole. In this section, I provide an overview of some of the features of Canada's tax system that are particularly notable from an access to justice perspective and review the research that has been done touching on access to justice in the Canadian tax system.

#### A. ACCESS TO THE TAX COURT AND GEOGRAPHY

Canada's geography poses particular access to justice problems. For its part, the Tax Court of Canada and its predecessors have long been proud of their efforts to reduce barriers that might be raised for taxpayers living in rural or remote locations. The Court and its judges are based in Ottawa,<sup>12</sup> but make a point of being geographically accessible to anyone who wants to contest a tax assessment. Former Chief Justice Alban Garon put the importance of the Court's flexibility and itinerant nature this way:

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<sup>10</sup> *Federal Courts Act*, RSC 1985, c F-7, s 27.

<sup>11</sup> *Supreme Court of Canada Act*, RSC 1985, c S-26, s 40.

<sup>12</sup> *Tax Court of Canada Act*, RSC 1985, c T-2, s 6(1) [*TCC Act*].

Whether a case is heard under the general procedure or the informal procedure, one of the priorities for the Tax Court of Canada is that it be accessible to all Canadians. As evidence in support of this statement, the court currently sits in 68 Canadian cities. The court sits in all kinds of places: courthouses (of course), hotels, conference rooms, rectories, etc. The court has even sat in a taxpayer's kitchen when the taxpayer could not otherwise attend the hearing.<sup>13</sup>

The *Tax Court of Canada Act* gives the Court the power to sit at any time and place,<sup>14</sup> and, as the anecdotes like the one about the Court sitting in a taxpayer's kitchen indicate, the Court has both the resources and dedication to mitigate geographic barriers to the Court's processes.

Still, the barriers created by geography in tax, like issues of geography in Canadian access to justice generally, are understudied.<sup>15</sup> A handful of questions along these lines might be pursued. Can we empirically confirm the effectiveness of the Tax Court's efforts to mitigate geographic barriers to tax dispute resolution? We might reasonably expect that the time between filing a Notice of Appeal and having a hearing is smaller in places like Toronto (where the Court sits most weeks) and

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<sup>13</sup> "Tax Court of Canada 20th Anniversary Symposium" (2005) 53:1 Can Tax J 135 at 138 (transcript of Garon CJ speaking as part of a panel discussion).

<sup>14</sup> *TCC Act*, *supra* note 12, s 14(1).

<sup>15</sup> For a recent review of (the relatively limited) research on and the (more plentiful) policy responses to concerns about the effect of geography on access to justice, see Jamie Baxter & Albert Yoon, "No Lawyer for a Hundred Miles?: Mapping the New Geography of Access of Justice in Canada" (2014) 52 Osgoode Hall LJ 9.

Ottawa (where the Court is headquartered), slightly larger in small centres like Halifax (where the Court sits several days per month), and larger again in Baie-Comeau (which is listed as a hearing location, but where there are no hearings currently scheduled).<sup>16</sup> While the Tax Court seems reasonably accessible to those in remote communities, we might also ask about the availability of effective legal representation, given the specialized nature of tax litigation practice.<sup>17</sup>

Concerns about dispute resolution aside, how accessible are lawyers who can give specialized advice in tax and estate planning? Recent research in Ontario has indicated that offering family law and trusts and estates services are statistically significant predictors of a smaller geographic scope of practice for lawyers.<sup>18</sup> Tax, however, was not found to be a statistically significant predictor of either a larger or smaller geographic scope for the lawyers surveyed.<sup>19</sup> We might expect that much of tax practice can occur at considerable distance, and there is at least anecdotal evidence that this happens,<sup>20</sup> but it is difficult to be sure with the data available how large a barrier geography poses to the accessibility of tax lawyers.

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<sup>16</sup> Courts Administration Service, “Tax Court of Canada Hearings Schedule”, online: <[apps.tcc-cci.gc.ca/cf/hearings/hearings\\_schedule\\_e.php](https://apps.tcc-cci.gc.ca/cf/hearings/hearings_schedule_e.php)> [perma.cc/M6SM-85]C]. As of 26 June 2019, no hearings were listed as being scheduled for, among others, Prince Rupert, Brandon, Baie-Comeau, Edmundston, Charlottetown, Iqaluit, Goose Bay, or Îles-de-la-Madeleine. This is not to say that the Tax Court ignores smaller centres; on the contrary, as of 26 June 2019, hearings had been scheduled in Kamloops, Grande Prairie, North Bay, Yarmouth, Sydney, and Corner Brook.

<sup>17</sup> Victor Thuronyi, Kim Brooks & Borbala Kolsozs, *Comparative Tax Law*, 2nd ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016) at xiii, write, “Because tax law has become so complex, many tax professionals have specialized—even subspecialized”.

<sup>18</sup> Baxter & Yoon, *supra* note 15 at 44–45.

<sup>19</sup> *Ibid.*

<sup>20</sup> For example, the interim reasons in *Richard A Kanan Corp v Canada*, 2011 TCC 211 discuss a dental practice in Invermere, British Columbia that received tax and business advice from a law firm in

## B. ACCESS TO THE TAX COURT AND JURISDICTION

Debates have, at times, arisen about the split jurisdiction over the review of the CRA's actions. The Tax Court of Canada has exclusive original jurisdiction over taxpayer's appeals of the correctness of their tax assessments. However, the Tax Court has no jurisdiction to review the exercise of discretion of the Minister of National Revenue. These judicial reviews must go to the Federal Court.

The result of this split jurisdiction is that taxpayers will sometimes find themselves in the wrong forum. Taxpayers may appeal a tax assessment not because they have a dispute with the Minister about the facts of the case or the law that applies, but because they feel they have been unfairly treated by a CRA auditor. However, the Tax Court's jurisdiction is limited to a review of the correctness of the tax assessment, so questions and complaints about the behaviour of CRA officers involved in the process are considered irrelevant.<sup>21</sup> Judicial review of the CRA's processes and exercises of discretion with respect to, for example, the waiver or cancellation of penalties and interest, various collection and enforcement actions,

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Calgary. In an arrangement like this, a meeting at the lawyers' offices would require the dentist to drive three hours through the mountains.

<sup>21</sup> *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at 83: "The Tax Court does not have jurisdiction on an appeal to set aside an assessment on the basis of reprehensible conduct by the Minister... If an assessment is correct on the facts and the law, the taxpayer is liable for the tax."; *Ereiser v Canada*, 2013 FCA 20 at 31: "the role of the Tax Court of Canada ... is to determine the validity and correctness of the assessment... [T]he conduct of a tax official who authorizes an assessment is not relevant."



advance tax rulings, and the process of completing an audit are all outside the jurisdiction of the Tax Court.<sup>22</sup>

Some have suggested that oversight of the CRA and access to justice might be improved if a single court dealt with all tax related matters.<sup>23</sup> In 2012, David Spiro (then a prominent tax litigator, now a judge of the Tax Court) wrote that “this jurisdictional uncertainty would disappear overnight if one court had jurisdiction over (1) judicial review of all decisions made by the minister of national revenue and (2) the determination of the correctness of assessments issued by the minister of national revenue.”<sup>24</sup> The same year, the Canadian Bar Association passed a resolution relating to the “multiplicity of venues, procedures and deadlines for challenging actions undertaken and decisions made by the Minister of National Revenue” and suggesting that “the efficient administration of justice and access to justice may be

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<sup>22</sup> For a thorough review of jurisdictional issues in Canadian tax law, see: David Jacyk, “The Dividing Line between the Jurisdictions of the Tax Court of Canada and Other Superior Courts” (2008) 56:3 Can Tax J 661. It is particularly noteworthy that the Tax Court cannot vary or set aside an assessment on the grounds of abuse of process: *Main Rehabilitation Co v Canada*, 2004 FCA 403, leave to appeal to SCC refused, [2005] SCCA No 37.

<sup>23</sup> Ian MacGregor et al, “The Development of the Tax Court of Canada: Status, Jurisdiction, and Stature” (2010) 58:ss Can Tax J 87 at 97; See also: John A Sorensen, “A Comprehensive Review of Penalty and Interest Relief Under the Income Tax Act” (2015) 67 Can Tax Found 42 (noting the “regrettable lack of TCC jurisdiction to deal with [discretionary] interest relief.”); Brian M Studniberg, “JP Morgan: All but Closing the Door on Judicial Oversight of the CRA” (2014) 62:1 Can Tax J 183; Guy Du Pont & Michael H Lubetsky, “The Power to Audit Is the Power to Destroy: Judicial Supervision of the Exercise of Audit Powers” (2013) 61:ss Can Tax J 103.

<sup>24</sup> David E Spiro, “Should the Crown Move to Strike Out Judicial Review Applications in the Federal Court when the Impugned Decision Culminates in an Assessment?” in *2012 Tax Dispute Resolution, Compliance, and Administration Conference Report* (Toronto: Canadian Tax Foundation, 2013) 4:1 at 4:19, n 63.

enhanced by a substantive and procedural review” of tax issues.<sup>25</sup> However, policy makers have so far declined to expand the jurisdiction of the Tax Court, evidently preferring to leave the review of the CRA’s actions and decisions in the hands of the Federal Court judges who are regularly apply the rules around the judicial review of administrative action.

There is certainly anecdotal evidence of this problem—stories of taxpayers who make it through the administrative appeal process, take a day off work, and show up to their hearing at the Tax Court of Canada only to be told by a sympathetic judge that what the taxpayer wants is outside the power of the Tax Court to grant. However, I can find no empirical work to confirm the impressions of the Canadian Bar Association and much of the tax law community. So, while we may be convinced that the split jurisdiction is an access to justice problem, the work of mapping its size and contours remains to be done.

### C. THE COST OF TAX LAWYERS

In addition to effective access to courts, much of the work of early supply-side research focussed on access to lawyers, and, in particular, legal aid programs to allow the poor to benefit from legal representation. Access to tax lawyers may be a challenge for the Canadian tax system, given the specialized nature of tax litigation practice and the relatively small number of lawyers in the private tax bar. A former Chief Justice of

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<sup>25</sup> Canadian Bar Association, Resolution 12-01-A, “Access to Justice - Tax” (12 August 2012), online: <[www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2012/Access-to-Justice-%E2%88%92-Tax/12-01-A-ct.pdf](http://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2012/Access-to-Justice-%E2%88%92-Tax/12-01-A-ct.pdf)> [perma.cc/H3MY-V5SS].

the Tax Court has remarked that tax lawyers charge fees that are “among the highest in the legal profession.”<sup>26</sup> Even with conservative estimates of these high fees, a rough analysis has indicated a “‘cost trap’ in the income tax appeal process which likely constitutes a significant disincentive to pursue appeals.”<sup>27</sup>

Provincial legal aid programs in Canada do not cover tax law. To take the local example, Nova Scotia’s legal aid program provides assistance regarding criminal law, family law, income assistance, residential tenancies, some administrative law and other issues.<sup>28</sup> An appellant in Tax Court for a dispute arising under the *Employment Insurance Act* or the *Canada Pension Plan* may be represented by a legal aid lawyer, but this is never the case for tax appeals.<sup>29</sup> At first blush, this seems sensible enough—someone with a low enough income to qualify for legal aid ought to have no tax liability to dispute in our progressive income tax regime. Chief Justice Rip took on this line of reasoning in *Pytel v. The Queen*:

The rationale, I could only guess, is that if a person has a tax problem, the person must have money. There are appeals before the Court that are family related matters, such as Canada Child

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<sup>26</sup> Hon Donald GH Bowman, “Pro Bono Representation, Legal Aid and the Self-Represented Litigant in the Tax Court of Canada” (2014) 12 International Association of Tax Judges Newsletter at 4, online: <[www.iatj.net/content/newsletters/Volume12-March2014.pdf](http://www.iatj.net/content/newsletters/Volume12-March2014.pdf)> [perma.cc/X5HW-BR55] [Bowman, “Pro Bono, Legal Aid, and the SRL”].

<sup>27</sup> Colin Campbell, “Access to Justice in Income Tax Appeals” (2012) 63 UNBLJ 445 at 455. Note, however, that some of Campbell’s recommendations have since been implemented, and so the effects he sketches may have been mitigated.

<sup>28</sup> Legal Aid Nova Scotia, “Legal Aid Services Provided”, online: <[www.nslegalaid.ca/what-we-do/what-legal-services-provided/](http://www.nslegalaid.ca/what-we-do/what-legal-services-provided/)> [perma.cc/2ZX3-5Q7F].

<sup>29</sup> *Employment Insurance Act*, SC 1996, c 23; *Canada Pension Plan*, RSC 1985, c C-8.

Tax benefits, and if disputed before a Family Court judge, may entitle the parties to legal aid. There are also appeals claiming medical expenses ... among others, that impact upon low income persons.<sup>30</sup>

Seeing this need, several law faculties, together with law firms and Pro Bono Students Canada, have begun offering free representation in informal procedure appeals. The Tax Advocacy Project run by Pro Bono Students Canada in partnership with Dentons Canada LLP now allows students to represent low-income individuals before the Tax Court of Canada. Students from law faculties at the University of Toronto, Osgoode Hall Law School, Université de Montréal, McGill University, Université de Sherbrooke, and the University of Alberta have participated.<sup>31</sup> Separately, a similar project has been launched at the University of Calgary.<sup>32</sup>

However, it is unlikely that these programs will be able to meet the need. Consider the experience of the United States, where a more robust system of Low-Income Taxpayer Clinics began with pilot projects in the 1970s.<sup>33</sup> The number of clinics grew quickly after the American *Internal Revenue Code* was amended to provide

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<sup>30</sup> *Pytel v The Queen*, 2009 TCC 615 at para 43.

<sup>31</sup> Dentons, “Tax Advocacy Project”, online: <[www.dentons.com/en/whats-different-about-dentons/an-entrepreneurial-approach-to-pro-bono-and-social-responsibility/pro-bono-in-canada/tax-advocacy-project.aspx](http://www.dentons.com/en/whats-different-about-dentons/an-entrepreneurial-approach-to-pro-bono-and-social-responsibility/pro-bono-in-canada/tax-advocacy-project.aspx)> [perma.cc/R3NB-E7NT].

<sup>32</sup> Drew Hasselback, “Calgary Law Students to Tackle Tax Court Cases”, *Financial Post* (19 March 2014), online: <[financialpost.com/legal-post/calgary-law-students-to-tackle-tax-court-cases](http://financialpost.com/legal-post/calgary-law-students-to-tackle-tax-court-cases)> [perma.cc/HF3M-E4YH]; Student Legal Assistance, “Tax Court of Canada”, online: *Student Legal Assistance* <[slacalgary.com/tax-court-of-canada/](http://slacalgary.com/tax-court-of-canada/)> [perma.cc/N7KZ-ZLLP].

<sup>33</sup> For an excellent review of the history of low income taxpayer clinics in the US, see: T Keith Fogg, “Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics” (2013) 67:1 *Tax Lawyer* 3.

grant funding for the clinics in 1998.<sup>34</sup> In 2016, 129 clinics received more than \$10 million in matching grants from the US government.<sup>35</sup> However, even with the funding and the support that Low-Income Taxpayer Clinics receive from several sources—including the Internal Revenue Service, the United States Tax Court, and the American Bar Association—the low-income taxpayer population remains underserved.<sup>36</sup> Thus it seems unlikely that the fledgling Canadian programs—operating only in a few major centres and reliant on third-year law students and the generosity of large law firms—will be sufficient to meet the need in the near future.

#### D. THE INFORMAL PROCEDURE AS A SMALL CLAIMS TAX COURT

There is a considerable body of literature on small claims courts as a measure to improve access to justice.<sup>37</sup> As Seana McGuire and Roderick Macdonald write, “[t]hese ‘people’s courts’ were designed as fora characterized by speed, low cost, informality, self-representation, and an activist adjudicator, in order that the benefits

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<sup>34</sup> IRC § 7526; *Ibid* at 26–27.

<sup>35</sup> Taxpayer Advocate Service, “IRS Announces Low Income Taxpayer Clinic Grant Recipients”, online: <[taxpayeradvocate.irs.gov/news/irs-announces-low-income-taxpayer-clinic-grant-recipients](http://taxpayeradvocate.irs.gov/news/irs-announces-low-income-taxpayer-clinic-grant-recipients)> [perma.cc/QM5F-BXUL].

<sup>36</sup> Fogg, *supra* note 33 at 61.

<sup>37</sup> Among many others, see: Beatrice A Moulton, “The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California” (1969) 21:6 *Stan L Rev* 1657; Christopher S Axworthy, “Controlling the Abuse of Small Claims Courts” (1976) 22 *McGill LJ* 480; John C Ruhnka, Steven Weller & John A Martin, *Small Claims Courts: A National Examination* (Williamsburg, Va: National Center for State Courts, 1978); Christopher J Whelan, ed, *Small Claims Courts: A Comparative Study* (Oxford: Clarendon Press, 1990); Seana C McGuire & Roderick A Macdonald, “Small Claims Courts Cant” (1996) 34 *Osgoode Hall LJ* 509; Pierre-Claude Lafond, “L’exemple québécois de la Cour des petites créances : « cour du peuple » ou tribunal de recouvrement ?” (1996) 37:1 *C de D* 63; Marc W Patry, “How Small Are Contemporary Small Claims? An Evaluation of the Nova Scotia Small Claims Court” (2012) 5 *Web JCLI*.

of official law could be visited upon all citizens regardless of their socio-economic status.”<sup>38</sup> It is in this sense that observers of the tax system liken the Tax Court’s informal procedure to small claims courts.<sup>39</sup>

The informal procedure is available for taxpayers when the amount in dispute is no more than \$25,000 for each taxation year at issue.<sup>40</sup> If the taxpayer chooses the informal procedure, the rules provide for no pre-trial discovery process. The taxpayer is often self-represented, but may be represented by counsel or by a non-lawyer agent, while the Crown will usually be represented by counsel, but will in some cases be represented by an articling student or a law student working for the summer at the Department of Justice.<sup>41</sup> Tax Court judges in informal procedure hearings are “not bound by any legal or technical rules of evidence” and are directed to conduct the hearing “as informally and expeditiously as the as the circumstances and considerations of fairness permit.”<sup>42</sup>

Some work has been done to examine the informal procedure and suggest improvements. In 2005, André Gallant looked at a number of Tax Court transcripts and found, while the informal procedure may provide easier, faster, and less expensive access to the Court, and despite judges’ efforts to ensure a fair process, self-

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<sup>38</sup> McGuire & Macdonald, *supra* note 37 at 511, citing Ruhnka, Weller & Martin, *supra* note 37.

<sup>39</sup> André Gallant, “The Tax Court’s Informal Procedure and Self-Represented Litigants Problems and Solutions” (2005) 53:2 Can Tax J 333 at 334; Campbell, *supra* note 27 at 446. See also: *Wagg v Canada*, 2003 FCA 303 at para 6 (calling the informal procedure “the equivalent of a ‘small claims’ process.”).

<sup>40</sup> *TCC Act*, *supra* note 12, s 18(1)(a). Where a loss determination is at issue rather than tax owing, the limit is \$50,000.

<sup>41</sup> *Ibid*, s 18.14.

<sup>42</sup> *Ibid*, s 18.15(3).

represented taxpayers may be significantly disadvantaged because of their lack of knowledge, particularly about evidence and procedure.<sup>43</sup> Gallant suggested remedying this problem by encouraging more activist judges and by providing taxpayers with more information in advance and during the court hearing. Along the same lines, Colin Campbell suggested that access to justice might be improved by the provision of assistance to taxpayers in the informal procedure.<sup>44</sup> While the Tax Court certainly tries to provide guidance to self-represented taxpayers via its website,<sup>45</sup> Tax Court judges are still warned against “descending into the arena”,<sup>46</sup> compromising the court’s impartiality, or replacing adversarial with “inquisitorial” process.<sup>47</sup>

Campbell has also suggested that the informal procedure improves the cost/benefit ratios for appellants whose disputes fall under the amount-in-dispute limit, and, as such is effective in mitigating economic barriers to access to justice.<sup>48</sup> Campbell’s paper, published in 2012, suggested increasing the limit from \$12,000. In 2013, the limit was increased to \$25,000.

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<sup>43</sup> Gallant, *supra* note 39.

<sup>44</sup> Campbell, *supra* note 27 at 456.

<sup>45</sup> See: Tax Court of Canada, “Self-Represented Litigants and Counsel”, online: <[www.tcc-cci.gc.ca/tcc-cci\\_Eng/Litigants.html](http://www.tcc-cci.gc.ca/tcc-cci_Eng/Litigants.html)> [perma.cc/8A3T-4PH9]; Tax Court of Canada, “Your Day in Court”, online: <[www.tcc-cci.gc.ca/tcc-cci\\_Eng/Process/Your\\_day.html](http://www.tcc-cci.gc.ca/tcc-cci_Eng/Process/Your_day.html)> [perma.cc/5B4D-KZ8X]. The Tax Court has also made videos available to help litigants prepare for their hearings: Tax Court of Canada, “Your Day at the Tax Court of Canada”, online: <[www.tcc-cci.gc.ca/tcc-cci\\_Eng/Process/Your\\_day\\_video.html](http://www.tcc-cci.gc.ca/tcc-cci_Eng/Process/Your_day_video.html)> [perma.cc/F7KN-NBSQ].

<sup>46</sup> *Corsaut v Canada (MNR)*, 2005 TCC 112 at para 14.

<sup>47</sup> Hon Donald GH Bowman, “The Settlement of Tax Disputes in Canada” (2011) 3 International Association of Tax Judges Newsletter at 6, online: <[www.iatj.net/content/newsletters/Newsletter-Volume3.pdf](http://www.iatj.net/content/newsletters/Newsletter-Volume3.pdf)> [perma.cc/JKU8-F255] [Bowman, “Settlement of Tax Disputes”]; *Heron Bay Investments Ltd v Canada*, 2010 FCA 203.

<sup>48</sup> Campbell, *supra* note 27 at 455.

While the work that has been done to consider, evaluate, and improve the informal procedure is helpful, we may still be left wondering whether the informal procedure is open to the same criticisms that small claims courts have received. For example, some empirical studies of small claims courts have found that they are disproportionately used by people with socio-demographic characteristics associated with social power and privilege.<sup>49</sup> Small claims courts may effectively function as debt-collection tribunals rather than the “people’s courts” they were intended to be, and have been accused of effecting the persecution of low-income litigants.<sup>50</sup> A recent study on the increase in the small claims limit in Ontario in 2010 showed unintended regressive consequences.<sup>51</sup> While small claims courts have been the subject of extensive empirical study and criticism, little has been done to question the degree to which the informal procedure’s similarities to small claims courts leave it open to the same criticisms.

There is some reason to think that the Tax Court may fare better than small claims courts in such a study. One empirical study looking at the small case procedure in the United States Tax Court concluded that it was a “small claims court that works”, to the surprise of the researcher, William Whitford.<sup>52</sup> Indeed, there are at least three key differences between the informal procedure and small claims courts that

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<sup>49</sup> McGuire & Macdonald, *supra* note 37; Anthony Niblett & Albert H Yoon, “Unintended Consequences: The Regressive Effects of Increased Access to Courts” (2017) 14:1 J Empirical Leg Stud 5.

<sup>50</sup> Lafond, *supra* note 37; Moulton, *supra* note 37.

<sup>51</sup> Niblett & Yoon, *supra* note 49.

<sup>52</sup> William C Whitford, “The Small-Case Procedure of the United States Tax Court: A Small Claims Court that Works” (1984) 1984 Am B Found Res J 797; William C Whitford, “Lowered Horizons: Implementation Research in a Post-CLS World” (1986) 1986 Wis L Rev 755 at 771.



may serve to ameliorate the documented weaknesses of small claims courts as access-improving institutions.

First, small claims cases are between two private parties. Studies have found that these courts tend to be used by businesses to collect debts.<sup>53</sup> It is much less frequent that the small claims court functions as a venue for the weaker party to seek redress for a wrong done by a stronger party. In the informal procedure, the reverse is always the case. The taxpayer is always the one initiating the proceedings by appealing government's decision about her tax liability.

Second, in his study of the American small case procedure, Whitford suggested that the mixture of the formal and informal helped increase the litigants' satisfaction. In the Canadian informal procedure, judges are not bound to "legal or technical" rules of evidence, and so proceedings may be relatively informal. However, cases are heard by a tenured judge with expertise in tax law, in a courtroom, with a court clerk and court reporter present. The judge issues considered reasons (either oral or written) and a transcript of the proceedings may be requested. This blend of the formal and

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<sup>53</sup> "Small Claims Courts as Collection Agencies" (1952) 4:2 Stan L Rev 237; Moulton, *supra* note 37 at 1662 (writing, "wherever small claims courts exist they tend in practice to be taken over by business-organization claimants--both reputable and disreputable--unless statutory curbs are imposed.... Small claims courts are 'courts of the poor' only in the sense that many poor people are brought into them by compulsory process."); David Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* (New York: Free Press, 1974) at 222 (finding "strong support for the notion that the courts act as collection agencies rather than judicial bodies in the field of consumer credit."); Axworthy, *supra* note 37; McGuire & Macdonald, *supra* note 37 (finding that in Quebec, where corporations are excluded from the small claims system, a high percentage of cases involved a lawyer or another professional claiming fees from a client); Peter A Holland, "The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases Articles & Essays" (2011) 6 J Bus & Tech L 259 (examining the problem of small claims procedures being used by professional debt purchasers).

informal may reduce the barriers to participation in the Tax Court process, as small claims courts attempt to do, but with a stronger claim to institutional credibility than small claims courts have.

Third, one of the common complaints about small claims courts as means of improving accessibility relates to the enforcement of judgments.<sup>54</sup> A recent study of the Nova Scotia Small Claims Court found a significant number of successful plaintiffs reported trouble collecting the money and a number of unsuccessful litigants did not feel obligated to pay the money that the adjudicator found they owed.<sup>55</sup> Taxpayers who appeal their assessments face no such barrier. If the Tax Court finds in their favour, it will order the Minister of National Revenue to reassess the taxpayer in accordance with the decision, and the Minister can be trusted to do so. In nearly every case, the taxpayer need not pursue the matter further.<sup>56</sup>

While there may be good reason to believe that the unique context of tax litigation mitigates the faults found in other small claims processes, there is no published research to confirm this intuition. The socio-demographics of taxpayers

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<sup>54</sup> Patry, *supra* note 37; Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 61 [Macdonald, “Scope, Scale and Ambitions”].

<sup>55</sup> Patry, *supra* note 37. Of those who responded to Patry’s survey, 62.3% of successful claimants reported “trouble” in collecting, and 34.5% of unsuccessful litigants “indicated that they did not feel obligated to pay.”

<sup>56</sup> The Crown rarely appeals judgments decided under the informal procedure. For one recent example, see *Canada v Tallon*, 2015 FCA 156. In that case, the Crown won the appeal but agreed to pay costs to the taxpayer. See also *Canada v Diflorio*, 2015 FCA 11, in which the Crown appealed a decision of the Tax Court decided under the informal procedure, but only with respect to the costs awarded by the Tax Court judge.

who use the informal procedure and their experiences in the process have not been studied. In particular, a study of the effects of raising the informal procedure limit would have value, given the regressive results of raising the small claims limit in Ontario.<sup>57</sup>

#### E. ACCESS AND EFFICIENCY IN THE GENERAL PROCEDURE

Where more than \$25,000 is at stake in a tax dispute for a given year, the general procedure is used. Here, again, the Tax Court has implemented a number of notable features with the aim of increasing efficiency and reducing delays, and thereby improving access to the court. In this section, I discuss one unique example relating to the procedural rules used in the general procedure stream.

Rule 81 of the *General Procedure Rules* provides for “partial disclosure” of documents.<sup>58</sup> The civil procedure rules of every province except Quebec provide that parties in civil litigation must disclose all relevant documents to the other party.<sup>59</sup> However, in Tax Court litigation, the default rule is for partial disclosure, under

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<sup>57</sup> Niblett & Yoon, *supra* note 49.

<sup>58</sup> *General Procedure Rules*, *supra* note 7, s 81.

<sup>59</sup> *Supreme Court Civil Rules*, BC Reg 168/2009, rule 7-1(1); *Alberta Rules of Court*, Alta Reg 124/2010, rules 5.6, 5.14; Saskatchewan, *The Queen’s Bench Rules*, online: <sasklawcourts.ca/index.php/home/court-of-queen-s-bench/rules-and-practice-directives> [perma.cc/ZBG8-TWGC], rule 212; *Court of Queen’s Bench Rules*, Man Reg 553/88, rule 30.02; *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 30.02; *Rules of Court*, NB Reg 82-73, rule 32; Nova Scotia, *Nova Scotia Civil Procedure Rules*, online: <www.courts.ns.ca/Civil\_Procedure\_Rules/documents/cpr\_consolidated\_rules\_18\_12.pdf> [perma.cc/DYR3-SSAX], rules 15.01-15.02; Prince Edward Island, *Rules of Civil Procedure*, online: <www.courts.pe.ca/supreme/index.php?number=1003816> [perma.cc/SP52-VKAR], rule 30.02; *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Schedule D, rule 32.02. In Quebec, parties are only required to disclose documents on which they intend to rely, but may be required to produce other documents as well: arts 331.1, 397, 398, 402 CCP.

which each party discloses the documents that it will use as evidence, with the possibility of “full disclosure” by agreement of the parties or on application to the court.<sup>60</sup> This partial disclosure rule has the potential to make the litigation process both quicker and less expensive, and therefore to improve access to justice. It is said to cause the parties to “reflect carefully on the documents that [they] anticipate will be required at trial and to make appropriate judgment calls at an early stage.”<sup>61</sup> It then reduces costs throughout the process by “causing the parties to be specific in their document requests” later in the process.<sup>62</sup>

Streamlining the disclosure and discovery processes has long been on the wish list of access to justice advocates. Lord Woolf, in his interim report, quoted the Heilbron/Hodge report: “At present, the cost of litigation makes it uneconomic to go to court unless the amounts at stake are very large. Our system of justice is in practice available only to the very rich or the very poor. Much of the expense is caused by discovery.”<sup>63</sup> Lord Woolf went on to say that he received many submissions related to the discovery process, all of which acknowledged it as a “significant problem.”<sup>64</sup> In his final report, Lord Woolf wrote that “disclosure of documents ... is an area of procedural activity which I am seeking to curb.”<sup>65</sup> Similar attitudes toward the scope

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<sup>60</sup> *General Procedure Rules*, *supra* note 7, ss 81–82.

<sup>61</sup> Pooja Samtani, “The Possibilities and Perils of Tax Litigation” (2013) 65 *Can Tax Found* 38:1 at 38:7–38:8.

<sup>62</sup> *Ibid.*

<sup>63</sup> Sir Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) at 164.

<sup>64</sup> *Ibid.*

<sup>65</sup> Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), ch 10. It is worth noting that Lord Woolf’s proposed rule would have given

and cost of the discovery process in civil proceedings have been expressed in Australia.<sup>66</sup> In the United States in the 1990s, a debate played out about an amendment to the *Federal Rules of Civil Procedure* that added a “mandatory automatic disclosure” rule.<sup>67</sup> While the amendment attracted both advocates and critics, the key point for present purposes is that much of the argument centred on how the rules and process could be structured to minimize unnecessary delay and expense.<sup>68</sup> A streamlined disclosure and discovery process is one of the benefits often trumpeted by proponents of alternative dispute resolution, one that rule 81 incorporates as the default rule in Tax Court litigation.

However beneficial the design of the rule may appear, there seems to be no empirical research confirming or quantifying its benefits in the unique context of tax litigation, nor have I found any data tracking how often the default of partial disclosure is accepted by the parties and how often requests for full disclosure are made. Anecdotally, there is a sense emerging recently that “requests for full disclosure

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parties much more fulsome disclosure obligations than rule 81 of the *General Procedure Rules*, *supra* note 7.

<sup>66</sup> GL Davies & SA Sheldon, “Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale” (1993) 3 J Judicial Administration 111 at 118; Australia, Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Canberra: Australian Government Publishing Service, 1994) at 400–403.

<sup>67</sup> *Federal Rules of Civil Procedure*, rule 26(a)(1), which requires that the parties to federal litigation must provide certain key information without awaiting a discovery request.

<sup>68</sup> Griffin B Bell, Chilton Davis Varner & Hugh Q Gottschalk, “Automatic Disclosure in Discovery—The Rush to Reform” (1992) 27:1 Ga L Rev 1; William W Schwarzer, “In Defense of Automatic Disclosure in Discovery” (1993) 27:3 Ga L Rev 655; Carl Tobias, “In Defense of Experimentation with Automatic Disclosure” (1993) 27:3 Ga L Rev 665.

(under rule 82) are slowly becoming the norm in tax cases,”<sup>69</sup> which has the potential to make tax litigation more like litigation in the superior courts and undermine any efficiency and access benefits of the partial disclosure rule.

#### F. JUDICIAL MEDIATION AND INCENTIVES TOWARD SETTLEMENT

In addition to relaxed formality of the small claims court and the streamlined disclosure procedures, access to justice proponents have often called for more cases to be settled outside the courtroom. As Justice Abella recently wrote in a unanimous decision of the Supreme Court of Canada:

The justice system is on a constant quest for ameliorative strategies that reduce litigation’s stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.<sup>70</sup>

The Tax Court provides an interesting venue to examine some institutional strategies for encouraging settlement against a unique set of constraints. In recent years, the Tax Court has implemented a program of pre-trial judicial mediation to

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<sup>69</sup> Samtani, *supra* note 61 at 38:7-38:8; See also note 13 at 162, where tax litigator Edwin G Kroft, as part of a panel, notes a “growing desire on the part of Justice lawyers to seek full disclosure”; and similar comments by Pizzitelli J as part of a panel discussion: Hon Marshall Rothstein et al, “Judges’ Panel: Topical Issues in Tax Litigation” (2013) 65 Can Tax Found 3:1 at 3:11.

<sup>70</sup> *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at para 1.

encourage settlement. The past few years have also seen a noticeable increase in the use of cost awards to encourage settlement. The current chief justice of the Tax Court said in a panel discussion that “[t]here is no question that we have pushed the agenda on settlement conferences,” and the same seems to be true of the use of cost awards as well.<sup>71</sup>

These moves evidence a concerted effort by the tax judges and the tax court rules committee to encourage pre-trial settlement of disputes, but tax law also offers unique constraints. Settlements of tax disputes are constrained by what is sometimes referred to as the principled basis requirement. Briefly stated, the requirement is that tax disputes only be settled in accordance with the *Income Tax Act*. The Minister of National Revenue, and her representatives in the CRA, can only apply the law as they understand it to the facts and they understand them. An agreement that implements a “compromise”, rather than an application of the law to the facts, is beyond the powers of the Minister.<sup>72</sup>

In this section, I explore the measures that have been implemented in the tax system to encourage pre-trial settlement and the unique constraints under which these incentives operate.

#### I) JUDICIAL MEDIATION

Access to justice advocates have often praised alternative dispute resolution process for putting the dispute back in the hands of the parties and for mitigating the

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<sup>71</sup> Hon Eugene Rossiter et al, “Tax Litigation: Current Topics” (2012) 64 Can Tax Found 31:1 at 31:11 (Rossiter AC) [as he then was] speaking as part of a panel discussion).

<sup>72</sup> *Galway v Canada (MNR)*, [1974] 1 FC 600, 2 NR 324, 74 DTC 6355 (Fed CA) [*Galway (FCA)* 2].

cost and delay associated with traditional court processes. Others have cautioned against the privatization of traditionally public and open processes.<sup>73</sup> Judicial mediation, its proponents argue, “works towards resolving the stark dichotomy” between alternative modes of conflict resolution and traditional state-based adjudication.<sup>74</sup> Judicial mediation is now available in every province in Canada, and in some cases is required.<sup>75</sup> Among the reported advantages of judicial mediation programs is improved access to justice for self-represented litigants and litigants of limited means.<sup>76</sup>

The Tax Court of Canada has been formally offering judicial mediation in a dedicated “settlement conference” since 2010, and in “pre-hearing conferences” before that.<sup>77</sup> A settlement conference may be ordered by the judge or requested by the parties.<sup>78</sup> Before meeting, the parties submit a brief to explain their respective

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<sup>73</sup> The classic text is Owen M Fiss, “Against Settlement” (1983) 93 Yale LJ 1073. See also: Carrie Menkel-Meadow, “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference” (1985) 33:2 UCLA L Rev 485.

<sup>74</sup> Louise Otis & Eric H Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6 Pepp Disp Resol LJ 351 at 364.

<sup>75</sup> For a recent review and comparison of judicial mediation in each province, see: Ontario Bar Association Judicial Mediation Taskforce, *A Different “Day in Court”: The Role of the Judiciary in Facilitating Settlements*, online: <[www.oba.org/en/pdf/aDifferentDayInCourt7122013.pdf](http://www.oba.org/en/pdf/aDifferentDayInCourt7122013.pdf)> [perma.cc/QC8R-HN4H].

<sup>76</sup> *Ibid* at 18–19.

<sup>77</sup> *General Procedure Rules*, *supra* note 7, s 126.2. This rule was proclaimed in force in 2014, but the Tax Court’s practice has conformed to the (proposed) rule since 2010: Tax Court of Canada, “Practice Note No. 17”, online: <[www.tcc-cci.gc.ca/tcc-cci\\_Eng/Process/Practice17.html](http://www.tcc-cci.gc.ca/tcc-cci_Eng/Process/Practice17.html)> [perma.cc/5]QT-6FE4]; Prior to the availability of settlement conferences in the Rules, section 126 provided for “pre-hearing” conferences, which included the consideration of settlement possibilities. The Ontario Bar Association Taskforce notes that there are disadvantages to subsuming judicial mediation under the broader category of pre-trial conferences: Ontario Bar Association Judicial Mediation Taskforce, *supra* note 75 at 21–22.

<sup>78</sup> *General Procedure Rules*, *supra* note 7, s 126.2(1).



theories of the case. Many, if not all, Tax Court judges have received training in mediation, and tend to come prepared to guide the parties to an agreement.<sup>79</sup> This process will often include the judge expressing an opinion on the merits of the case.<sup>80</sup>

## 2) ADVERSE COST AWARDS AS AN INCENTIVE TO SETTLE

Canadian courts have moved toward recognizing access to justice as a goal of the law of costs. The Supreme Court listed among the policy goals of the law of costs “to encourage settlement.”<sup>81</sup> Looking at traditional cost rules, the Court saw that “they make the legal system more accessible to litigants who seek to vindicate a legally sound position.”<sup>82</sup> Meanwhile, more modern costs rules have incorporated other purposes, such as “penaliz[ing] a party who has refused a reasonable settlement offer,” “sanction[ing] behaviour that increases the duration and expense of litigation,” and furthering “the efficient and orderly administration of justice.”<sup>83</sup>

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<sup>79</sup> Rossiter et al, *supra* note 71 at 31:11.

<sup>80</sup> Julius Melnitzer, “Tax Court Sees More Room for Settlements”, *Financial Post* (15 March 2011), online: <[business.financialpost.com/legal-post/tax-court-sees-more-room-for-settlements](http://business.financialpost.com/legal-post/tax-court-sees-more-room-for-settlements)> [perma.cc/2XLN-AVTE]; Bowman, “Settlement of Tax Disputes”, *supra* note 47; Pooja Samtani & Justin Kutyan, “Special Report: Tax Litigation Demystified” (2011) 59:3 Can Tax J 527 at 534-535. Should the case proceed to trial, the judge who conducts the mediation is barred from hearing the case and prohibited from sharing any information with the judge who does.

<sup>81</sup> *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 22 [*Okanagan Indian Band*], citing: Mark M Orkin, *The Law of Costs*, 2nd ed (Aurora, ON: Canada Law Book, 1987) at 2-24.2.

<sup>82</sup> *Okanagan Indian Band*, *supra* note 81 at para 26.

<sup>83</sup> *Ibid* at para 25. See also: *1465778 Ontario Inc v 1122077 Ontario Ltd* (2006), 82 OR (3d) 757, 275 DLR (4th) 321 (adding “access to justice as a fifth consideration” in awarding costs); *Catalyst Paper Corp v Companhia de Navegacao Norsul*, 2009 BCCA 16 at para 18 (cost rules “encourage reasonable settlements”); *Doucet v Spielo Manufacturing Inc*, 2011 NBCA 44 at para 19 (reducing a cost award and writing that “in New Brunswick, such awards are not intended to provide the successful litigant with substantial indemnification. Access to justice remains the overarching objective.”).

In addition to encouraging parties to settle with the offer of judicial mediation, the Tax Court has become more aggressive in recent years in using its discretion in awarding costs to encourage parties to settle disputes wherever possible.<sup>84</sup> In particular, since 2010, the Court has had the power to award “substantial indemnity” costs against parties that rejected a formal settlement offer and went on to achieve a less favourable result at trial.<sup>85</sup> The rule forces both the Crown and the taxpayer to be careful in rejecting any settlement offer, as they risk being forced to pay 80% of solicitor and client costs starting from the date of the rejection.<sup>86</sup>

The Tax Court has interpreted the rule’s purpose to be to “encourage the parties to settle wherever possible.”<sup>87</sup> The rule functions to remove “the usual impediment to the award of enhanced costs,” as it “awards 80% of solicitor and client costs without the need to satisfy the conditions typically imposed on the granting of solicitor and client costs.”<sup>88</sup> Moreover, while judges may be hesitant to award full solicitor-client costs in the absence of egregious behaviour,<sup>89</sup> the rule allows for

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<sup>84</sup> *General Procedure Rules*, *supra* note 7, s 147. See Rossiter et al, *supra* note 71 at 31:12-31:13 where Rossiter ACJ (now chief justice) notes that the Tax Court has broader discretion in awarding costs than the Federal Court or the Ontario Supreme Court, and that Tax Court judges have recently been “a little more aggressive” in exercising their discretion.

<sup>85</sup> *General Procedure Rules*, *supra* note 7, ss 147(3.1)-147(3.8) were proclaimed in force in 2014. The Tax Court’s practice has reflected these rules since 2010: Tax Court of Canada, “Practice Note No. 18”, online: <[www.tcc-cci.gc.ca/tcc-cci\\_Eng/Process/Practice18.html](http://www.tcc-cci.gc.ca/tcc-cci_Eng/Process/Practice18.html)> [perma.cc/KZQ9-BFXW]; however, the application of the proposed rule was not consistent, see: *Potash Corporation v The Queen*, 2012 TCC 235 (finding that “invoking Practice Note No. 18 as the centrepiece of an analysis of a motion for enhanced costs is premature”, but awarding enhanced costs on a different basis).

<sup>86</sup> *General Procedure Rules*, *supra* note 7, s 147(3.5) defines “substantial indemnity costs” to mean 80% of solicitor and client costs.

<sup>87</sup> *Sun Life Assurance Co of Canada v The Queen*, 2015 TCC 171 at para 8 [*Sun Life*].

<sup>88</sup> *Ibid.*

<sup>89</sup> *Repsol Canada Ltd v Canada*, 2015 TCC 154 at para 10.

substantial indemnity notwithstanding that a party's "conduct was irreproachable, that her position had a reasonable degree of sustainability, and that there were no unusual circumstances that would justify an increase award of costs" other than the rejected offer.<sup>90</sup>

### 3) THE "PRINCIPLED BASIS" REQUIREMENT

While the Tax Court continues to make efforts to encourage more and earlier pre-trial settlements, these efforts pull against a well-established rule of Canadian tax law. While the Crown may desire to settle disputes out of court, it is forbidden from compromising to do so. That is, the Crown may settle a dispute only on a "principled basis": one consistent with the application of the law, as the government interprets it, to the facts as the government understands them. As a result, "unprincipled" or "compromise" settlements are unenforceable against the Crown, and perhaps unenforceable against the taxpayer as well.<sup>91</sup> The requirement is generally supported by citing both the *Income Tax Act* and the case law on tax settlements.<sup>92</sup>

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<sup>90</sup> *Sun Life*, *supra* note 87 at para 19.

<sup>91</sup> For a thorough review of the case law with respect to the binding effect of settlements, see: Saul Templeton, "A Defence of the Principled Approach to Tax Settlements" (2015) 38 Dal LJ 29 at 35-44.

<sup>92</sup> *ITA*, *supra* note 3, s 220 requires the Minister of National Revenue to "administer and enforce" the *ITA*. *Galway (FCA) 2*, *supra* note 72 at para 7, held that "the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it. It follows that he cannot assess for some amount designed to implement a compromise settlement and that, when the Trial Division, or this Court on appeal, refers an assessment back to the Minister for re-assessment, it must be for re-assessment on the facts in accordance with the law and not to implement a compromise settlement". For more on the justifications for the principled approach, see: Templeton, *supra* note 91.

The principled basis requirement for settlements has been both assailed<sup>93</sup> and defended<sup>94</sup> in the tax literature. Former Chief Justice Bowman has notably expressed frustration with the state of the law.<sup>95</sup> On the other hand, the federal departments of justice and finance have recently affirmed their support for the principled approach.<sup>96</sup>

Putting aside the overall merits of the principled approach as the avenue for resolving tax disputes in accordance with the goals of tax policy and tax administration, the question for present purposes is whether this unique feature of the tax system has an effect on access to justice. As is often pointed out, the principled approach imposes a constraint on the Crown that is absent in most other circumstances. Public bodies regularly settle environmental disputes<sup>97</sup> and claims at

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<sup>93</sup> See Daniel Sandler & Colin Campbell, “Catch-22: A Principled Basis for the Settlement of Tax Appeals” (2009) 57:4 Can Tax J 25. Sandler and Campbell point out that cases settle because of uncertainty as to the outcome, but the principled approach requires certainty as the law, creating a “catch-22”. Given the problems and inconsistencies created by the principled approach and the potential efficiency gains to be had, Sandler and Campbell suggest an amendment to explicitly authorize compromise settlements and argue that the gains outweigh any concerns about expanding ministerial discretion. See also: Peter W Hogg, Joanne E Magee & Jinyan Li, *Principles of Canadian Income Tax Law*, 8th ed (Toronto: Carswell, 2013) at 569–570.

<sup>94</sup> See Templeton, *supra* note 91. Templeton argues that the principled approach is not as problematic as some have suggested and that expanding ministerial discretion would undermine public confidence in the administration and enforcement of tax law.

<sup>95</sup> Bowman, “Settlement of Tax Disputes”, *supra* note 47 at 6–7.

<sup>96</sup> Ed Kroft, “Dealing with Tax Officials: Selected Issues in Administration, Enforcement and Appeals” in Canadian Bar Association, ed, *2011 Tax Law for Lawyers* (CBA, 2011) 1 at 49. For more on this series of events, see: Templeton, *supra* note 91 at 62–63.

<sup>97</sup> Anthony HJ Dorsey & Christine L Riek, “Negotiation-Based Approaches to the Settlement of Environmental Disputes in Canada” in *The Place of Negotiation in Environmental Assessment* (Hull, QC: Canadian Environmental Assessment Research Council, 1987) 7.

human rights tribunals,<sup>98</sup> the Crown is free to settle contract and tort claims,<sup>99</sup> coordinate or negotiate on a range of constitutional and aboriginal rights issues,<sup>100</sup> and, though not without controversy, plea bargain in criminal cases.<sup>101</sup> The constraint of the principled basis requirement is part of what makes dispute resolution in tax exceptional, and has yet to be thoroughly studied from an access to justice perspective.

The constraint of the principled basis requirement seems to pull against the move to encourage settlement, though how strongly the effect of the requirement is felt is unclear. It is sometimes suggested that the principled basis requirement rarely (or perhaps never) prevents settlement of disputes where a skilled practitioner is involved in the case.<sup>102</sup> In many cases, there are multiple issues at play and so some

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<sup>98</sup> Philip Bryden & William Black, “Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission’s Early Mediation Project” (2004) 37:1 UBC L Rev 74.

<sup>99</sup> Although “observers have commented on the culture of the Crown (in particular, the federal Crown) as averse to settlements”, this is not a legal inability to settle: Lorne Sossin, “Class Actions against the Crown, or Administrative Law by Other Means” (2006) 43 Can Bus LJ 380 at 381; see the comments of Bowie J in *1390758 Ontario Corp v The Queen*, 2010 TCC 572, 2010 DTC 1385 at para 37.

<sup>100</sup> Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 SCLR (2d) 433; Michael Coyle, “ADR Processes and Indigenous Rights: A Comparative Analysis of Australia, Canada and New Zealand” in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, Osgoode readers (Oxford: Hart, 2009) 371; Roshan Danesh & Jessica Dickson, “Alternative Dispute Resolution and Aboriginal Reconciliation in Canada” in Humberto Dalla Bernardina de Pinho & Juliana Loss de Andrade, eds, *Contemporary Tendencies in Mediation* (Madrid: Editorial Dykinson, 2015) 67.

<sup>101</sup> Douglas D Guidorizzi, “Should we Really Ban Plea Bargaining: The Core Concerns of Plea Bargaining Critics” (1998) 47 Emory LJ 753; Joseph Di Luca, “Expedient McJustice or Principled Alternative Dispute Resolution - A Review of Plea Bargaining in Canada” (2005) 50:1-2 Crim LQ 14.

<sup>102</sup> Templeton, *supra* note 91 at 38 (“The possibility of a settlement [in most cases] is limited only by the creativity of the parties.”); Samtani & Kutyan, *supra* note 80 at 534 (“Grounding a settlement in principle often requires a certain amount of strategizing, although some would suggest that if the litigants are keen on settling the case, it is always possible to find a principled basis.”).

degree of horse trading within the constraints is possible. Empirically, it is clear that most disputes over tax assessments are resolved without a trial.<sup>103</sup>

However, even if the principled basis requirement does not prevent the settlement of disputes, it structures and influences which cases settle and how. One key advantage of alternative dispute resolution in general and mediation in particular is the availability of flexible and innovative remedies; that is, ADR is unconstrained by the limits of the remedies available to a court.<sup>104</sup> This benefit of mediation is directly undermined by the principled basis requirement. The Tax Court is unable to approve a settlement that differs from what it could have granted as the outcome of the case, and the combination of case law, statute, and administrative directive seems to put the Minister of National Revenue and her representatives in the CRA in the same position. While the remedies available in ADR in other civil litigation contexts are

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<sup>103</sup> Canada Revenue Agency, *Tax Appeals Evaluation: Final Report* (2012) at para 5.1.2, online: <[www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/internal-audit-program-evaluation/internal-audit-program-evaluation-reports-2012/tax-appeals-evaluation.html](http://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/internal-audit-program-evaluation/internal-audit-program-evaluation-reports-2012/tax-appeals-evaluation.html)> [perma.cc/7YZ2-DZBD]. This study indicates that at the administrative appeals state, the CRA appeals branch found in favour of the taxpayer in 27% of the cases sampled. An additional 17% were “partially agreed upon.” In 26% of the cases, the appeals branch found in favour of the CRA’s position and in 30% of the cases the objection was dismissed because the taxpayer had missed a deadline or the notice of objection was invalid for another reason. At the next stage, the appeal to the Tax Court of Canada, 52% of the cases were resolved without a hearing.

<sup>104</sup> Kenneth R Feinberg, “Mediation - A Preferred Method of Dispute Resolution” (1988) 16 Pepp L Rev S5 at S7; Joseph F Weis Jr, “Are Courts Obsolete?” (1991) 67 Notre Dame L Rev 1385 at 1387; Sherry Landry, “Med-Arb: Mediation with a Bite and an Effective ADR Model” (1996) 63 Def Counsel J 263 at 265; “Judicial Mediation: You Can Negotiate Remedies”, *Montreal Gazette* (8 June 2011), online: <[www.montrealgazette.com/news/Judicial+mediation+negotiate+remedies/4920861/story.html](http://www.montrealgazette.com/news/Judicial+mediation+negotiate+remedies/4920861/story.html)> [perma.cc/7GUB-9DNQ].

much less constrained, settlements in the tax context, including mediated settlements, are strictly limited to the remedies a court could grant.<sup>105</sup>

Saul Templeton sums up the current state of this literature when he writes that there is no empirical data to bolster or oppose the contention that the principled basis requirement creates barriers to access:

As easy as it is to assume that the principled basis is difficult for taxpayers to navigate, it is also possible to speculate that the principled basis might be simpler for unrepresented taxpayers to apply. Unrepresented taxpayers are in a good position to determine, e.g., which of their expenses can be sacrificed as non-deductible on a principled basis when negotiating with the Minister. Unrepresented taxpayers are perhaps less able to assess the merits of compromise settlement on the basis of litigation risk, since they are typically unfamiliar with the rules and costs of litigation before the Tax Court.

Neither side of the principled vs. compromise settlement debate has empirical grounds to show one system is simpler for unrepresented taxpayers than the other.<sup>106</sup>

Professor Templeton further suggests that the principled basis approach might simplify the pre-trial settlement process for taxpayers. It seems unlikely to me that

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<sup>105</sup> *Galway (FCA) 2*, *supra* note 72 at para 9.

<sup>106</sup> Templeton, *supra* note 91 at 61–62.

adding the requirement that settlements accord with the *Income Tax Act* would simplify matters, and quite likely that the rules and costs of Tax Court litigation loom over settlement discussions regardless of whether the settlement is required to comply with the *Income Tax Act*. However, the key point—that the question calls for empirical study—remains. Questions around how taxpayers experience the settlement process, the demographics of those who settle cases and those who go to trial and the reasons that they do so are potentially fruitful paths for future research.

#### IV. QUESTIONS TO BE ASKED AND LESSONS TO BE LEARNED

The review in this chapter reveals that access to justice has been a persistent preoccupation of the tax bench and bar in Canada. The vision of the Tax Court as a “people’s court” has become an important part of the Court’s identity. The idea that every taxpayer is entitled to contest her tax assessment regardless of geography or financial means has helped to shape how the Court operates.

However, the attention of empirical access to justice research has generally focused elsewhere. The paucity of research here is entirely understandable—after all, tax is often seen as a niche area of the law and criminal and family law disputes have more dramatic consequences. However, the tax system’s access to justice interventions and its unique features make it a potentially rich field for supply-side access to justice research. Moreover, the fact that tax law affects everyone in Canada makes these questions important, even if the consequences are not dramatic in most individual cases.



The review above suggests a number of hypotheses and questions for future research. The Court prides itself on eliminating geographic barriers to access, and anecdotes serve to illustrate that it does so. However, this might be confirmed with data, perhaps by looking at the delay involved in resolving a tax dispute for taxpayers who live in different places. There is also the question of access to effective assistance or representation, which we might reasonably expect to be better in large and mid-size centres than in more remote locations.

The question of the split jurisdiction over the CRA's administrative actions has been raised by the tax bench and bar as a possible venue for reform. Again, anecdotes are available to suggest that access to justice would be improved by unifying the review of tax assessments and other administrative actions and decisions of the CRA. And again, the size and contours of this problem has not been confirmed in the published literature. Certainly some tax appeals end with a Tax Court judge explaining that the conduct of a CRA auditor is beyond their jurisdiction, but how many? And how many of those appellants have a viable claim in Federal Court or elsewhere to complain about the auditor's conduct? Is the best answer to this problem expanding the jurisdiction of the Tax Court, expanding the powers and profile of the Office of the Taxpayers' Ombudsman, or providing more or better assistance at the beginning of the dispute resolution process?

Part of the problem of access to tax lawyers, of course, includes their cost. Experience teaches that tax lawyers are among the most expensive, though, how large a problem this poses for access to justice remains to be measured. While government-

funded legal aid programs provide no help in tax disputes, pro bono programs may alleviate the problem somewhat. There are likely also some tax disputes—how many is another subject for empirical inquiry—which do not require a specialist tax lawyer. In these cases, effective representation may be provided by a generalist lawyer or, in the informal procedure, a non-lawyer agent such as an accountant.

The small claims court for civil litigation was heralded as champion of access to justice, but empirical research has revealed a more ambiguous picture. The unique features of tax litigation and the characteristics of the informal procedure can reasonably be expected to yield the benefits of small claims courts without many of its drawbacks. However, we still know very little about who uses the informal procedure and what the effects of the recent increase in its amount-in-dispute threshold were.

The Tax Court also has unique rules in its general procedure cases. In particular, the effects of the partial disclosure rule are worth examining for access to justice advocates interested in procedural reforms. The steps taken to facilitate judicial mediation and encourage pre-trial settlements could also be evaluated, both for their merits in tax dispute resolution and for lessons that might be applied in other courts. Whether more cases are, in fact, settling without a hearing and how satisfied the taxpayers are with the justice of those settlements are questions that remain to be answered. In looking at these questions, however, it also be difficult to disentangle the hypothesized benefits and drawbacks of the principled basis requirement for settling tax cases—careful qualitative empirical work would be needed to gain more insight on this question.

In other words, it seems clear that we have many questions and hypotheses, but few answers or conclusions around access to tax courts and lawyers. Much could be done here to confirm the effectiveness of the Tax Court's access to justice interventions, to measure and improve access to effective representation in tax cases and to investigate taxpayer's experiences of the unique features of dispute resolution in the Canadian tax system.

More recently, access to justice researchers have shifted their gaze, moving from a focus on the supply-side toward examining the demand for legal services. This shift represented a broader vision for access to justice research and a recognition that access to justice means more than merely access to courts and lawyers. The next chapter reviews this research as it pertains to Canadian tax law.

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## CHAPTER 3: DEMAND-SIDE ACCESS TO JUSTICE

### RESEARCH IN TAX LAW

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#### I. THE SHIFT IN PERSPECTIVE

The recent history of research on access to justice has seen a helpful shift toward empirical research that examines the population’s demand for legal services.<sup>1</sup> Rather than looking at the supply-side of legal services provision, it looks at the incidence of legal problems on the population and asks if and how the people affected go about resolving those problems and how satisfied they are with the outcomes.

This approach—sometimes described as “bottom up”<sup>2</sup>—expands the scope of access to justice research by acknowledging that some legal problems are never seen by a court or a lawyer. Indeed, many legal problems are not conceived as “legal” by the people experiencing them. Demand-side research insists that all of these problems, their incidence, and the responses, experiences, and outcomes of all those who face them, are properly the subject of study for access to justice researchers. There is

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<sup>1</sup> On the distinction between research and theory on the “demand-side” and the “supply-side” of the legal services market, see: Catherine R Albiston & Rebecca L Sandefur, “Expanding the Empirical Study of Access to Justice” (2013) 2013 Wis L Rev 101; Deborah L Rhode, “Access to Justice: An Agenda for Legal Education and Research” (2012) 62 J Leg Educ 531; Jamie Baxter, Michael Trebilcock & Albert Yoon, “The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 55 at 56–57.

<sup>2</sup> Rebecca L Sandefur, “Access to Civil Justice and Race, Class, and Gender Inequality” (2008) 34:1 Annual Rev Sociology 339 at 341.

certainly a continued importance to the fair and efficient resolution of problems that are brought to the court system and its alternatives, but the scope of access to justice research needs to be larger.

Catherine Albiston and Rebecca Sandefur, writing in 2013, explained the shift in perspective this way: “Thirty years ago, researchers thought and wrote of disputes as if they were found objects in the world: quarrels that entered the legal system *sui generis* to be processed and resolved.”<sup>3</sup> This approach, the archetype of supply-side research, is contrasted with the Civil Litigation Research Project (CLRP), an early form of demand-side research conducted in the United States.<sup>4</sup> The CLRP research “stepped back to consider the social landscape of *potential* legal disputes and the processes through which these disputes came to the legal system in the first place.”<sup>5</sup> The shift in perspective was important. Researchers realized that many legal disputes never reached a court. For example, a high percentage of tort claims settled before reaching court and a high percentage of instances of discrimination were not pursued at all.<sup>6</sup>

This paradigm shift is profoundly important for understanding access to justice. As Albiston and Sandefur write, “the CLRP project revolutionized how scholars understood legal problems and disputes. Scholars stopped regarding disputes as found objects in the world and instead recognized disputes for what they are: social

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<sup>3</sup> Albiston & Sandefur, *supra* note 1 at 103.

<sup>4</sup> See the special issue of *Law & Society Review* for results of the project and commentary: *Special Issue on Dispute Processing and Civil Litigation*, (1980–81) 15:3 *Law & Soc’y Rev.*

<sup>5</sup> Albiston & Sandefur, *supra* note 1 at 103 [emphasis added].

<sup>6</sup> *Ibid.*

constructs.”<sup>7</sup> Put another way, there is a limited amount that can be learned about the barriers to the justice system by examining only the cases that arrive at the courthouse steps, as much supply-side research does. By expanding the field to include all of the legal problems faced by the population, we may learn more and escape “the tautological position that a problem is defined as ‘legal’ because it is subject to action by the formal legal system.”<sup>8</sup>

The supply-side and demand-side perspectives, of course, are not mutually exclusive. While demand-side research allows for a richer understanding of the legal needs of the population, the goal would then to be adjust the supply to meet these needs. New supply-side interventions might be better-targeted by providing services to resolve these legal problems in the places and ways that work best for the people involved.

Demand-side research is typified by modern legal needs surveys. These surveys ask questions of the population at large rather than focussing on the disputes that reach court. The scope of research is thus expanded to include legal problems that individuals experience, whether or not the individuals resolve them using courts or lawyers, and in some cases regardless of whether the individuals identify them as “legal.” In this chapter, I review the treatment of tax law in these legal needs surveys.

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<sup>7</sup> *Ibid* at 104.

<sup>8</sup> Ab Currie, *Nudging the Paradigm Shift, Everyday Legal Problems in Canada* (Canadian Forum on Civil Justice, 2016) at 2, online: <cfcj-fcjc.org/sites/default/files//publications/reports/Nudging%20the%20Paradigm%20Shift%2C%20Everyday%20Legal%20Problems%20in%20Canada%20-%20Ab%20Currie.pdf> [perma.cc/3Q3P-PFUS] [Currie, *Paradigm Shift*].

In the next section, I explain the methodology of legal needs surveys in more detail, and go on to note that tax problems faced by individuals have received relatively little attention in this research. I then discuss some of the conclusions that can be drawn from legal needs research in general, and suggest that there is good reason to think that demand-side research in tax law would yield new insights that can not be inferred from the data we currently have. Finally, I conclude by arguing that demand-side research in Canada can and should be pursued to give us more information about legal needs in tax law.

## II. DEMAND-SIDE RESEARCH AND HYPOTHESES

Legal needs surveys have been done in many different jurisdictions.<sup>9</sup> The “justiciable event” is the core concept underlying most of this demand-side research. A justiciable event—called an “everyday legal problem” in a recent Canadian study—can be defined as “a problem arising out of the normal activities of people’s daily lives that has a legal aspect and has a potential legal solution.”<sup>10</sup> The definition is therefore intended to include all problems that are justiciable—that could be resolved within the state-based legal system, although they “may be more sensibly dealt with in other

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<sup>9</sup> P Pleasence, NJ Balmer & RL Sandefur, “Apples and Oranges: An International Comparison of the Public’s Experience of Justiciable Problems and the Methodological Issues Affecting Comparative Study” (2016) 13:1 J Empirical Leg Stud 50.

<sup>10</sup> Trevor CW Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016) at 5, online: <[www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf)> [perma.cc/S8NV-2XA9]; Sandefur, *supra* note 2 at 341, similarly defines justiciable events as “happenings and circumstances that raise legal issues but that people may never think of as legal and with respect to which they may never take any legal action.”

ways.”<sup>11</sup> To study justiciable events, many jurisdictions in the past two decades “have adopted the approach and questionnaire structure” of Hazel Genn’s ground-breaking *Paths to Justice* surveys in the U.K.<sup>12</sup>

In Canada, two broad national studies are notable. The first is Ab Currie’s 2009 report (based on a survey conducted in 2006).<sup>13</sup> Its aim was to “inform policy makers about the incidence of civil justice problems and the extent of unmet need for assistance that justiciable problems in civil matters might represent.”<sup>14</sup> Using a list of 80 specific justiciable events, the survey asked respondents to identify which they had experienced in the past three years.<sup>15</sup> The survey asked about problems related to discrimination, housing, treatment by police, consumer disputes, debt, family break-up, and social assistance, among others. In each case, the respondent was asked about a “problem or dispute” which was not framed by the questioner as legal. Respondents who had experienced a justiciable event were then asked questions about whether and how they sought to resolve the problem, about connections between problems, and about the effects of the problems they reported.

A more recent effort—the *Cost of Justice* project—was led by Trevor Farrow. Farrow and his colleagues (including Currie) collected data in 2013 and 2014 and have

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<sup>11</sup> Farrow et al, *supra* note 10 at 5.

<sup>12</sup> Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart, 1999); Hazel Genn & Alan Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think about Going to Law* (Oxford: Hart, 2001); See also: Pleasence, Balmer & Sandefur, *supra* note 9 at 52–53.

<sup>13</sup> Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice, 2009) [Currie, *Legal Problems of Everyday Life*].

<sup>14</sup> *Ibid* at 1.

<sup>15</sup> *Ibid* at 6–7.



recently released several reports based on the data.<sup>16</sup> It follows a similar structure, asking questions about 84 different problems that people might have experienced without framing those problems as legal. In addition to providing more recent data, Farrow and his colleagues take particular aim at the costs associated with justiciable events, measured “not just in dollars, but in time and opportunity costs, costs to their physical and mental health, and costs to their livelihood.”<sup>17</sup>

It is worth noting that both of these Canadian surveys employed a triviality filter. Currie’s 2006 survey only asked respondents to identify events that were “serious and difficult to resolve.”<sup>18</sup> Similarly, the *Cost of Justice* surveys in 2013 and 2014 were interested only in “serious problems that were not easy to fix.” This triviality filter was included in the original *Paths to Justice* survey and many, but not all, of the studies that have followed around the world.<sup>19</sup> Critics of the triviality filter argue that it conflates problem incidence and problem resolution strategy.<sup>20</sup> That is, the filter is likely to remove self-help strategies and problems faced by individuals who are more capable or confident in their problem-solving abilities. For his part, Currie admits “some ambiguity” in his data “because of the variability of people’s judgments”

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<sup>16</sup> Farrow et al, *supra* note 10; Currie, *Paradigm Shift*, *supra* note 8; David Northrup et al, *Design and Conduct of the Cost of Justice Survey* (Canadian Forum on Civil Justice, 2016), online: <[www.cfcj-fcjc.org/sites/default/files/Design%20and%20Conduct%20of%20the%20Cost%20of%20Justice%20Survey.pdf](http://www.cfcj-fcjc.org/sites/default/files/Design%20and%20Conduct%20of%20the%20Cost%20of%20Justice%20Survey.pdf)> [perma.cc/2CNU-DVU8]. For more reports based on the survey data, see: Canadian Forum on Civil Justice, “Publications”, online: *CFCJ-FCJC* <[cfcj-fcjc.org/cost-of-justice/publications/](http://cfcj-fcjc.org/cost-of-justice/publications/)> [perma.cc/LAU2-G35V].

<sup>17</sup> Farrow et al, *supra* note 10 at 4.

<sup>18</sup> Currie, *Legal Problems of Everyday Life*, *supra* note 13 at 7.

<sup>19</sup> Genn, *supra* note 12; Genn & Paterson, *supra* note 12; Pleasence, Balmer & Sandefur, *supra* note 9 at 64.

<sup>20</sup> Pleasence, Balmer & Sandefur, *supra* note 9 at 84–85.

as to the meaning of “serious” and “difficult to resolve.”<sup>21</sup> He devotes a chapter of his report to discussing degrees of seriousness and importance of justiciable problems.<sup>22</sup>

In addition to these two broad national projects, several more targeted studies have been done. In British Columbia, Carol McEown summarized both Currie’s national work and surveys that had targeted low-income residents of British Columbia.<sup>23</sup> The B.C. study found higher incidence rates of legal problems compared to the national survey, and higher rates of respondents that chose to do nothing or to engage in self-help measures to resolve problems.<sup>24</sup>

The Ontario Civil Legal Needs Project released its report, *Listening to Ontarians*, in May 2010.<sup>25</sup> This project used a telephone survey and focus groups, and targeted low- and middle-income residents of Ontario. It asked about civil (that is, non-criminal) legal problems and where the respondents turned for assistance. While the interviewer did identify the subject of the survey as legal problems, respondents were not provided with a list of potential problem types. Rather, the interviewer asked open-ended questions and coded the responses into one of 18 potential problem types (including an “other” category).<sup>26</sup>

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<sup>21</sup> Currie, *Legal Problems of Everyday Life*, *supra* note 13 at 32.

<sup>22</sup> *Ibid*, ch 4.

<sup>23</sup> Carol McEown, *Civil Legal Needs Research Report*, 2nd ed (Vancouver: Law Foundation of British Columbia, 2009), online: <[www.lawfoundationbc.org/wp-content/uploads/Civil-Legal-Needs-Research-FINAL.pdf](http://www.lawfoundationbc.org/wp-content/uploads/Civil-Legal-Needs-Research-FINAL.pdf)> [perma.cc/23KW-8LXW].

<sup>24</sup> *Ibid* at 7, 9.

<sup>25</sup> Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Needs Project* (Toronto: Ontario Civil Needs Project Steering Committee, 2010), online: <[lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110\\_oclnreport\\_final.pdf](http://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110_oclnreport_final.pdf)> [perma.cc/9TE8-MPSG] [Ontario Civil Legal Needs Project, *Listening to Ontarians*].

<sup>26</sup> For more on the methodology and results of the survey, see: Baxter, Trebilcock & Yoon, *supra* note 1.

A project that is currently ongoing is investigating the legal needs of trans people in Ontario.<sup>27</sup> The TRANSforming Justice project's first summary report indicates that trans people report notably higher rates of justiciable legal problems overall and in nearly every category surveyed. Methodologically, the surveys conducted were based on those used in the *Cost of Justice* project.

#### A. TAX PROBLEMS IN LEGAL NEEDS RESEARCH

Whatever the strengths and weaknesses of recent legal needs research in Canada may be, a key point for present purposes is that none of the recent legal needs surveys done in Canada included tax problems in the list of justiciable events presented to respondents. Research from other jurisdictions has, at times, included tax in its ambit; however, how these problems are categorized and reported varies. Nevertheless, I suggest that the little we can glean from both Canadian and other legal needs surveys indicates that tax problems are worth considering in future surveys.

The vast majority of responses to Currie's 2006 survey identified problems corresponding to one of 80 specific problems presented in the survey. However, 5.6 per cent of the problems were reported in the "other" category. Most of these could be recoded into one of the 80 predefined problems, but a number of business or financial issues, including those classed as "tax/income tax issues" could not. As a result, tax-

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<sup>27</sup> J James et al, *Legal Problems Facing Trans People in Ontario: Summary Report One* (HIV & AIDS Legal Clinic Ontario, 2018), online: <[www.halco.org/wp-content/uploads/2018/09/TransFJ-Report2018Sept-EN.pdf](http://www.halco.org/wp-content/uploads/2018/09/TransFJ-Report2018Sept-EN.pdf)> [perma.cc/9UYL-UP6N]. The TRANSforming Justice project uses "trans" "to refer to a diverse array of experiences and identities, including Two-Spirit, non-binary, agender, gender queer, cross dresser, transgender, and transsexual, as well as those who identify as men or women but have a history that involves a gender transition." (*ibid* at 1).

related problems were either excluded from the analysis or hidden in another category. For example, a survey respondent might have identified a letter from the CRA as a debt problem or a threat of legal action,<sup>28</sup> but any problems reported as tax-related were ignored.<sup>29</sup>

The more recent survey by Farrow and his colleagues used a slightly larger list of justiciable events. Again, engagements with the tax system were not included on the list (other than consumer problems related to tax preparation).<sup>30</sup> In this survey, respondents had no open-ended opportunity to add another problem type, though there were opportunities to add problems within a defined problem type. That is, respondents could specify an “other” immigration problem, an “other” neighbourhood problem, “other” housing problem, or “other” discrimination problem, but no “other” problem outside of the pre-defined categories.<sup>31</sup> Effectively, then, Canadians in this most recent survey had no opportunity to talk about tax problems at all.

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<sup>28</sup> It seems likely that most letters that individuals receive from the CRA are requests for information, notices of assessment, or notices of reassessment. Strictly speaking, none of these are related to a debt problem or a threat of legal action; however, the recipients of these letters may interpret them as such.

<sup>29</sup> Currie, *Legal Problems of Everyday Life*, *supra* note 13 at 7–8. The choice to exclude this relatively small number of results is perfectly defensible, and “makes little difference to the overall measure of the prevalence of problems” (at 8). It does, however, leave some work to be done for those of us interested in access to justice specifically in the tax system.

<sup>30</sup> Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Survey* (Toronto: Canadian Forum on Civil Justice, 2016) at 3, online: <[www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Survey.pdf](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Survey.pdf)> [perma.cc/3F6W-VZVY].

<sup>31</sup> Canadian Forum on Civil Justice, *supra* note 30; Northrup et al, *supra* note 16.

In the Ontario survey that asked open-ended questions about legal problems rather than giving a list of options, it is unclear whether tax problems were coded as “money or debt problems,” “legal action problems,” “small or personal business issues,” or “other”.<sup>32</sup> In this survey tax problems may have been mentioned, assuming that the respondents identified them as legal, but the analysis paid no specific attention to them. The *Listening to Ontarians* project also included focus groups, at least one of which engaged in a discussion of the tax system under the rubric of “social and income support programs.” The report mentions that people may not apply for benefits administered through the tax system “because they think there’s going to be some impediment in the way of it.”<sup>33</sup>

To take a slightly broader look at the world of legal needs surveys, we might compare with recent legal needs research in the U.K., U.S., and Australia.<sup>34</sup> The *English and Welsh Civil and Social Justice Panel Survey* in its 2010 report asked about interactions with the tax system under several different rubrics.<sup>35</sup> Respondents who

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<sup>32</sup> Environics Research Group, *Civil Legal Needs of Lower and Middle-income Ontarians: Quantitative Research* (2009), online: <[lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110\\_oqlnquantitativeresearchreport.pdf](https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110_oqlnquantitativeresearchreport.pdf)> [perma.cc/V82K-3VBX].

<sup>33</sup> Environics Research Group, *Civil Legal Needs of Lower and Middle-income Ontarians: Qualitative Research with Stakeholders* (2009) at 41, online: <[lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110\\_oqlnfocusgroupsresearchreport.pdf](https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110_oqlnfocusgroupsresearchreport.pdf)> [perma.cc/A5N9-MRG9].

<sup>34</sup> It is worth noting that there are significant difficulties in comparing legal needs research across jurisdictions: Pleasence, Balmer & Sandefur, *supra* note 9. Here I look at the U.S., the U.K., and Australia, which are common comparators for the Canadian tax system; however, methodological differences in their legal needs surveys (particularly the absence of a triviality filter) caution against any suggestion that results from those jurisdictions would be replicated in a Canadian legal needs survey.

<sup>35</sup> Pascoe Pleasence et al, *Civil Justice in England and Wales: Report of Wave 1 of the English and Welsh Civil and Social Justice Panel Survey* (Legal Services Commission, 2011), online:

reported being behind and unable to pay taxes had their problems classified under “debt”, respondents who had an incorrect tax assessment had their problems classified under “money”, and respondents who reported a problem or dispute related to tax credits had their problem classified under “benefits.” While it is clear that tax law problems were included in the data in this survey, the analysis of the data did not separate disputes over tax assessments from other money-related legal issues such as “insurance companies unfairly rejecting claims”, “disagreement over the content of a will” and “incorrect or disputed (large) bills.”<sup>36</sup>

The 2012 report of an Australian legal needs survey included both tax assessment and tax debt problems in the analytical category of government problems.<sup>37</sup> Again, the analysis yields few insights specific to tax law, as tax problems were not treated as their own group or subgroup. It does seem, however, that the inclusion of tax problems affects the results. For example, in the Australian survey, an accountant was consulted in 5.8 per cent of the problems for which the respondents sought advice. For reference, this is roughly the same rate of use as Legal Aid, and more than either the court services or community legal centres. In Canada, where tax

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<doc.ukdataservice.ac.uk/doc/7643/mrdoc/pdf/7643\_csjps\_wave\_one\_report.pdf> [perma.cc/9MQV-UULX]. This line of surveys used the triviality filter (asking only about “difficult to solve” problems) until 2009, after which it was removed. See: Pleasence, Balmer & Sandefur, *supra* note 9.

<sup>36</sup> Pleasence et al, *supra* note 35 at 138.

<sup>37</sup> Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012).

problems were left off the survey, accountants were never mentioned as a source of support or advice.<sup>38</sup>

The 1994 report of the American *Comprehensive Legal Needs Survey* also includes tax problems in its scope. Although for some of the analysis tax problems are obscured within the broader category of financial and consumer difficulties, the report does indicate the incidence and prevalence of tax problems for both low and moderate income households.<sup>39</sup> The report indicates that one per cent of low income households had a new tax problem within the year, while three per cent had an ongoing tax problem. Moderate income households reported a two per cent incidence and a two per cent prevalence of tax problems. These numbers, of course, are out of date (particularly given the significant restructuring of the U.S. tax system later in the 1990s) and difficult to translate to the Canadian context. Moreover, they indicate that tax problems were less prevalent than problems with creditors, problems with insurance, problems with police, personal injury, and problems related to household or marital dissolution. Nonetheless, if one out of every fifty households is experiencing a new or ongoing tax problem every year, the matter deserves some attention.

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<sup>38</sup> *Ibid* at 113–116; Currie, *Legal Problems of Everyday Life*, *supra* note 13 at 59–60, notes that the trade unions were the single most frequently mentioned source of non-legal assistance at 20%.

<sup>39</sup> Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans - Major Findings from the Comprehensive Legal Needs Survey* (Chicago: American Bar Association, 1994) at 11, online: <[www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/downloads/legalneedstudy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.authcheckdam.pdf)> [perma.cc/8RXV-5E9T].

## B. SOME LESSONS FROM LEGAL NEEDS RESEARCH

A number of conclusions can be drawn from legal needs research that lend support to the idea that the tax system deserves some attention from demand-side access to justice researchers. In this section, I briefly suggest four. First, legal needs research has indicated that researchers and policy makers interested in access to justice need to be attentive to problem types, as Canadians have different experiences and different needs related to different types of problems. Second, legal needs research has shown that legal problems tend to cluster. That is, some types of legal problems seem to occur together. For reasons I will explain, we might expect that tax problems cluster with other justiciable issues. Third, while Canada's tax system contains many features designed to reduce the cost of tax dispute resolution (discussed in chapter 2), recent work in the U.S. has indicated that factors other than cost drive many individuals' decisions around bringing a problem to lawyers and courts. Fourth, recent research indicates that even modest changes in the formulation of questions on legal needs surveys can yield significantly different results, and, in particular, that including more problem types increases the number of problems reported. Thus, we should not expect all of the tax related problems to appear in the survey's data if the survey makes no mention of tax problems.

### 1) TAX PROBLEMS, LIKE OTHER PROBLEMS, NEED SPECIFIC ATTENTION

One of the broad conclusions that can be drawn from legal needs research is that different types of legal problems require different responses from both researchers and policy makers. To explain the importance of attention to the nature



of the problems, the Canadian surveys can be used. Currie's Canadian study indicated that Canadians tend to experience some types of problems as very or extremely disruptive to their lives—problems relating to social assistance, disability pensions, and hospital treatment or release, for example. Other types, such as consumer problems, are not very disruptive, even where they are reported as “serious and difficult to resolve.”<sup>40</sup> Similarly, Canadians report that some problems are more important to resolve than others. For example, 81.5% of relationship breakdown problems were classified as very or extremely important to resolve, compared to 59.6% of problems related to debt and 47.9% of consumer problems.<sup>41</sup>

The *Cost of Justice* project inquired further and found respondents identify some problems as causing physical health problems and others as causing stress and emotional problems. Serious and persistent harassment at work was the most frequent problem to be reported as causing both kinds of problems. Eleven of the 84 problem types on the list were linked to about half of the physical health problems.<sup>42</sup> Thirteen legal problem types were identified as having caused half of the total of reported stress and emotional problems.<sup>43</sup>

In addition to experiencing different consequences for problems in different areas of law, people also have different initial responses. The survey data indicate that people will have different interpretations of the potential seriousness of the problem

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<sup>40</sup> Currie, *Legal Problems of Everyday Life*, *supra* note 13 at 34.

<sup>41</sup> *Ibid.*

<sup>42</sup> Currie, *Paradigm Shift*, *supra* note 8 at 25–27.

<sup>43</sup> *Ibid.*

and differing levels of knowledge about where to go for help and what kind of help they need. To illustrate with the extremes, only one third of respondents understood the seriousness of housing problems when they first occurred, while nearly 90 per cent of respondents understood the seriousness of threats of legal action or problems in the social assistance category. More than three quarters of respondents who experienced a problem related to a relationship breakdown knew where to go for help, while fewer than 40 per cent of those who experienced a social assistance or medical care problem knew where to turn. Overall, 78 per cent of survey respondents who had threats of legal action and two-thirds of those who experienced an immigration problem were satisfied with their overall knowledge. On the other hand, only one third of those with a social assistance problem and 23 percent of those with a disability support problem could say the same.<sup>44</sup>

Given the different experiences reported for different problem types, and particularly given the unique features of the tax system and tax dispute resolution discussed above, we cannot expect that the results of surveys that do not include tax problems can be generalized to cover the tax field. Rather, particular policy interventions and particular questions for further research are called for in particular areas of law. In tax, we may expect that many of those who experience problems will feel that they have a poor understanding of the problem given the legal complexity of tax problems in general. We may hope that tax problems do not generally cause physical or emotional problems, given that livelihood, family arrangements, and living

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<sup>44</sup> *Ibid* at 30–33.

status are generally not directly at stake. Without data to support these assumptions, however, it is difficult to prioritize policy interventions to deal with any potential problems.

## 2) TAX PROBLEMS MAY CLUSTER

Legal needs surveys have also shown that justiciable events tend to cluster. In his 2009 report, Ab Currie puts it this way: “Problems do not occur in isolation. They occur in clusters in which certain problems can sometimes serve as triggers for other problems.”<sup>45</sup> In Currie’s survey, more than half of the respondents who had at least one problem had more than one.<sup>46</sup> The clustering of legal problems in the Canadian data is particularly troubling because it also relates to social exclusion and is more likely to occur to members of visible minority groups and individuals with disabilities.<sup>47</sup> Looking at problem types, the Canadian data show that consumer problems, employment problems, and debt problems appear to cluster together.<sup>48</sup> It also appeared that employment problems and family problems are the greatest triggers for other problems.<sup>49</sup>

In his 2016 report looking at the more recent survey data, Currie finds “no evidence for substantial clustering in this sample.”<sup>50</sup> That is, the data in this survey do not show distinct patterns in which problems cluster together. However, another way

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<sup>45</sup> Currie, *Legal Problems of Everyday Life*, *supra* note 13 at 42.

<sup>46</sup> *Ibid* at 43. Specifically, 44.6% of respondents reported one or more problems, while 26.4% reported two or more.

<sup>47</sup> *Ibid* at 42–45.

<sup>48</sup> *Ibid* at 49–50.

<sup>49</sup> *Ibid* at 52.

<sup>50</sup> Currie, *Paradigm Shift*, *supra* note 8 at 10.

to get at the phenomenon of multiple problems is to look for problems that trigger other problems. In this survey, a substantial number of people reported that one everyday legal problem triggered another one. Further, some types of problems—consumer problems, employment problems, and family (relationship breakdown) problems, in particular—are more likely to be triggers than others.<sup>51</sup>

The triggering effect does not stop there, however. Currie writes that “[a]n intriguing aspect of multiple problems is that experiencing everyday legal problems appears to create momentum.”<sup>52</sup> In general, this most recent Canadian data seems to indicate that experiencing a legal problem makes it more likely for a person to experience another one. Respondents with one problem have a 34.7 per cent chance of having a second problem. Respondents with two problems have a 36.3 per cent chance of having a third. Respondents with three have a 40.5 per cent chance of experiencing a fourth. The trend, while irregular rather than entirely consistent, is remarkable.<sup>53</sup>

Some of the problems that have been found to cluster in legal needs surveys have significant tax consequences, including changes in employment status, changes in family status, money issues, and difficulty paying debts. Accordingly, we should expect that some of those experiencing justiciable employment issues, family issues, or debt issues, will also have a difficult encounter with the tax system. Thus, it is at least possible that, by leaving tax problems out of the analysis, Canadian researchers

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<sup>51</sup> *Ibid* at 11.

<sup>52</sup> *Ibid* at 13.

<sup>53</sup> *Ibid* at 14–15.

have underestimated the clustering and triggering effects experienced by the population.

### 3) WHAT PEOPLE DO ABOUT LEGAL PROBLEMS

In the recent *Cost of Justice* survey, very few people reported doing nothing to resolve problems that were “serious and not easy to fix.” However, the actions that people tend to take may not translate very well to disputes that arise in the tax system. The most common first action taken by people experiencing everyday legal problems was to negotiate with the other party. As I discussed in chapter 2, there is, strictly speaking, no ability to negotiate in a tax dispute. In a dispute over a tax assessment, the CRA is bound by the principled basis requirement for tax settlements, forbidding them from entering into “compromise settlements.” Similarly, in the collections context, the CRA has no ability to settle a tax debt outside of the bankruptcy process.<sup>54</sup> Thus, the first instinct of nearly 40 per cent of people is likely to be frustrated, as the CRA continues to take the role of adjudicator in the taxpayer’s case rather than party to a bargaining process.<sup>55</sup>

Seeking advice from friends or relatives was the second most common first action and the most common second action that people took to resolve their problems. While a friends or relatives may act as an agent for the appellant in an informal procedure case, it is unclear how effective this help is in a tax dispute. On

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<sup>54</sup> See Colin Jackson, “The Case for a Canadian Offer-in-Compromise Program” (2015) 40:2 Queen’s LJ 643.

<sup>55</sup> It is worth noting, however, that negotiating with the other party is not necessarily an effective course of action. In the survey, about half of respondents said that negotiating with the other party was not very helpful or not helpful at all. Currie, *Paradigm Shift*, *supra* note 8 at 21.

one hand, even non-specialist lawyers and accountants sometimes have difficulty in reading and interpreting tax laws, and so we might expect that friends and relatives would be unable to provide effective assistance. On the other hand, the ubiquity of tax law might expand the pool of possible helpers and increase the chances that a friend or relative has faced the same problem in the past.

The third most common first action is to search the internet. The CRA's website provides helpful information about many potential tax problems. The difficulty is that in a dispute with the CRA, taxpayers may be reluctant to rely primarily on information and legal interpretations provided by the CRA.

It seems that several of the most common actions taken by people to try to resolve everyday legal problems will operate differently (and perhaps not very well) in tax law. About 19 per cent of the sample in the *Cost of Justice* project obtained legal advice or assistance and only 6.7 per cent made use of the formal justice system (including courts and tribunals). We might expect that some form of legal help is important in how many people resolve tax disputes.

As is evident from the discussion in chapter 2, much of the thinking about access to justice in tax law has focused on making dispute resolution less expensive, particularly for low income individuals and those with relatively small disputes.<sup>56</sup> Certainly, the cost of accessing the justice system is important and is a deterrent for

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<sup>56</sup> See also: Colin Campbell, "Access to Justice in Income Tax Appeals" (2012) 63 UNBLJ 445; Hon Donald GH Bowman, "Pro Bono Representation, Legal Aid and the Self-Represented Litigant in the Tax Court of Canada" (2014) 12 International Association of Tax Judges Newsletter, online: <[www.iatj.net/content/newsletters/Volume12-March2014.pdf](http://www.iatj.net/content/newsletters/Volume12-March2014.pdf)> [perma.cc/X5HW-BR55] [Bowman, "Pro Bono, Legal Aid, and the SRL"].

some people.<sup>57</sup> However, a recent study in the U.S. found that cost played only “a modest role in people’s accounts of why they did not do more to respond to the situations they face.”<sup>58</sup> Rather, Americans do not seek formal assistance with their legal problems because “often, they believe there is no need to seek assistance, or that there is nothing to be done,” or because “they do not understand these situations to be legal.”<sup>59</sup>

Canadian data shows similar results, although the triviality filter used in the recent Canadian surveys filtered out most of the problems for which people took no action. Only 4.5 per cent of respondents took no action to resolve the problem. Of these, however, only 18 percent did not take action because they believed it would be too costly. More respondents answered that they did not take action because they thought nothing could be done (35 per cent), because they were frightened or feared it would cause more trouble to do anything about the problem (24 per cent), and because it would be too stressful (24 per cent).<sup>60</sup>

So, while the cost of disputes with the CRA is important, it may not be the largest or most important barrier to access that people face. While policy makers

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<sup>57</sup> Noel Semple, “The Cost of Seeking Justice in Canada” (2016) 93:3 Can Bar Rev 639.

<sup>58</sup> Rebecca L Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study* (American Bar Foundation, 2014) at 12, online: <[www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf)> [perma.cc/23XB-PXPB] [Sandefur, *Accessing Justice in the Contemporary USA*]; See also: Rebecca Sandefur, “Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 222.

<sup>59</sup> Sandefur, *Accessing Justice in the Contemporary USA*, *supra* note 58 at 13.

<sup>60</sup> Currie, *Paradigm Shift*, *supra* note 8 at 17.

continue to reform the system with attempts to reduce the cost of tax disputes, data may be helpful in showing us other areas where our resources and attention could be more fruitfully applied.

#### 4) THE IMPORTANCE OF SURVEY DESIGN

Finally, a recent series of experiments in the U.K. has demonstrated the significant effects of modest differences in the formulation of questions. For example, Pleasence, Balmer and Sandefur explain: “very different results can be obtained depending on whether a single question, with a list of options, or a series of separate questions, one for each option, are used to identify where respondents obtain help and which processes they make use of in resolving their problems.”<sup>61</sup> They also demonstrate the significant effects of the triviality filter and of framing the survey as legal.<sup>62</sup> While it was not included in the range of experiments, they also discuss the effect of including new problems in a legal needs survey, with reference to the Canadian experience:

The effect of modifying the scope of a legal needs survey was well illustrated by the 2008 Canadian survey, which saw the inclusion of neighbor-related problems for the first time. This contributed half the rise in the percentage of respondents reporting one or more problems from 45 percent in 2006 to 55 percent in 2008.<sup>63</sup>

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<sup>61</sup> Pleasence, Balmer & Sandefur, *supra* note 9 at 84.

<sup>62</sup> Pleasence, Balmer & Sandefur, *supra* note 9.

<sup>63</sup> *Ibid* at 65–68.



So, while a number of Canadian respondents discussed tax problems under the “other” category of Currie’s 2006 survey, we can reasonably expect that increasing the scope of the survey to specifically ask about tax problems would yield significantly more results.

As discussed above, the data indicates that different types of legal problems create different needs. Our surveys to date, however, have not been designed to adequately capture tax problems. We also might expect to see that tax problems add to the clustering effects that have already been identified, and that these may have important social justice implications. Finally, this data is needed to help direct both future research and interventions to improve access to the tax system.

### III. CONCLUSION

The shift to demand-side research is a welcome one, broadening the field of analysis from the legal problems that find their way into courthouses to the legal problems experienced by the population at large. From this research, we have discovered that there were many more legal problems than we had imagined. We learned the extent to which people “self-help” in attempts to resolve their legal problems and that some people take no action at all even though they understand the problem to be serious.

More recently, researchers have been able to gather data on the various effects legal problems in the lives of those experiencing them. We also have data about when people choose to consult a lawyer or take a problem to court, and why they choose not to do so in some cases. One key finding from much of this data is that different

areas of law are experienced differently, need different policy responses, and call for different research questions. Family law problems and consumer problems create different legal needs and so should, to some extent, be considered separately.

Because tax law has been left out of Canadian legal needs research, it is difficult to say exactly what people's needs are in this area. Nor can we say how people respond to a tax law problem or how often tax law problems arise and are considered to be serious and difficult to fix. Tax disputes are generally only about money, and so they may be seen to have less serious consequences than family law problems, employment problems, or problems around housing. However, tax law's relationship to other areas of law may create situations where tax problems cluster together with some of these other problems that tend to have effects on physical or emotional health. For example, because housing and employment may be closely linked to financial security, the impact of the tax system on these problems may be important.

While I suggest that it would be helpful to include tax problem in Canadian legal needs research, in the next chapter I argue that tax law also illustrates why our access to justice strategy needs to be broader still. Considering access to justice only in terms of discrete justiciable events still leaves courts to set the terms and misses much of the power of law. Thinking of tax law in particular, it is difficult to imagine exactly what should be considered a justiciable event. Moreover, it is clear that any definition of justiciable event would leave many of the ways that tax law influences our social and economic lives.

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## CHAPTER 4: TOWARDS A COMPREHENSIVE ACCESS TO JUSTICE STRATEGY

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### I. ACCESS TO JUSTICE RENAISSANCE

Catherine Albiston and Rebecca Sandefur have noticed a renaissance in access to justice research, pointing to recent studies of both legal service delivery and public experience with the civil justice system in the United States and to an access to justice initiative being established within the American justice department.<sup>1</sup> Albiston and Sandefur point out that, “to be fruitful,” the renaissance “must include important rediscoveries alongside theoretical and empirical innovations.”<sup>2</sup> They then call for a research agenda that would explore and question current understandings of access to justice.<sup>3</sup> In particular, Albiston and Sandefur call for theoretical development of the goals of access to justice, or, in their words, “how should the ‘effectiveness’ of civil legal services be defined?”<sup>4</sup> They then also call for theoretical development on both the supply-side of the civil justice system (“How do we currently deliver services to people facing civil justice problems?”)<sup>5</sup> and the demand-side (exploring “the dynamics

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<sup>1</sup> Catherine R Albiston & Rebecca L Sandefur, “Expanding the Empirical Study of Access to Justice” (2013) 2013 Wis L Rev 101 at 101.

<sup>2</sup> *Ibid* at 102.

<sup>3</sup> *Ibid* at 103.

<sup>4</sup> *Ibid* at 111.

<sup>5</sup> *Ibid* at 114.

of how people come to think about their civil justice problems and their options for responding to them.”)<sup>6</sup>

As I noted in chapter 3, Albiston and Sandefur have also discussed a shift in the perspective of access to justice research. In the old paradigm, “researchers thought and wrote of disputes as if they were found objects in the world: quarrels that entered the legal system *sui generis* to be processed and resolved.”<sup>7</sup> In the new paradigm, “[s]cholars stopped regarding disputes as found objects in the world and instead recognized disputes for what they are: social constructs.”<sup>8</sup> In this chapter, I argue that the ambition of access to justice scholarship as described by Albiston and Sandefur is not fully realized by the shift to demand-side research. Fortunately, the literature contains both examples of research other than legal needs surveys to help point to other directions and a broad theoretical conception of access to justice that can help to unify this research and shape the work to come.

In this chapter, I begin by arguing that there is a need for a broader theoretical understanding of access to justice than that which underlies most of the work I looked at in chapters 2 and 3. Both supply-side and demand-side access to justice research are valuable, but neither is capable of investigating the social construction of disputes and thereby achieving the ambitions of access to justice research. Moreover, I suggest that considering tax law as an example helps to explain the need for a broader

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<sup>6</sup> *Ibid* at 117.

<sup>7</sup> *Ibid* at 103.

<sup>8</sup> *Ibid* at 104.

conception of access to justice and highlights the importance of some areas of access to justice that cannot be explored in the supply-side/demand-side paradigm.

Then, in part III, I discuss Roderick Macdonald's conception of access to justice and argue that it provides a framework that can unify and direct access to justice research in answer to the concerns raised in part II. Importantly, this conception of access to justice centres not on dispute resolution, but on human agency and the empowerment of people. This view of access to justice is not new, and so I also point to some examples of the work that has been done which reflects the broader conception.

To conclude, I discuss several directions that are opened up by this broader conception of access to justice and which might have been overlooked in a more traditional paradigm. Again using the example of tax law, I apply a framework that shifts the focus away from dispute resolution and the courts' definitions of legal disputes highlights other important access to justice issues and questions. The subsequent two parts of this dissertation are occupied with exploring one of these issues: the effect of legal complexity on access to justice, particularly in Canadian tax law.

## **II. THE NEED TO REFRAME ACCESS TO JUSTICE**

### **A. THE BROAD AMBITIONS OF 'ACCESS TO JUSTICE'**

Access to justice researchers have long talked about making their research about more than access to courts. As far back as 1978, Cappelletti and Garth saw the third wave of access to justice research as having "a much wider range" than previous

interventions that focused on legal representation.<sup>9</sup> They saw this third wave as going “*beyond advocacy*, whether inside or outside of the courts, and whether through governmental or private advocates.”<sup>10</sup> This vision of access to justice would include “the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies.” Moreover, Cappelletti and Garth wrote: “We call it the ‘access-to-justice approach’ *because of its overall scope*.”<sup>11</sup> In other words, it is by going beyond access to courts and access to lawyers that the field earns the name “access to justice.”

Similarly, in the American context, Gary Blasi wrote,

Plainly, ‘access to justice’ implicates not only dispute resolution, but also preventative law and transactional expertise, for these also determine outcomes over the longer term. Finally, a full conception of ‘access to justice’ would also encompass procedural rules or substantive law, or assistance in planning to avoid future problems under those rules.<sup>12</sup>

For Blasi, it was obvious that access to justice had a much wider ambit than courts and lawyers, even as advocates and researchers had difficulty imagining policy interventions that moved beyond access to courts and access to lawyers.

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<sup>9</sup> Mauro Cappelletti & Bryant Garth, *Access to Justice* (Milan: Giuffrè, 1978) at 49.

<sup>10</sup> *Ibid* [emphasis in original].

<sup>11</sup> *Ibid* [emphasis added].

<sup>12</sup> Gary Blasi, “How Much Access? How Much Justice?” (2004) 73 *Fordham L Rev* 865 at 878.

In a later look at the history of social scientific studies of access to justice, Rebecca Sandefur commented that the access to justice perspective, “[f]rom its inception, ... has been fueled by scholars’ aspirations for social justice through law.”<sup>13</sup> She includes in this aspiration not only the resolution of disputes and “but also social and economic inequality more generally.”<sup>14</sup> Patricia Hughes, the founding executive director of the Law Commission of Ontario, fleshes out this broad view of access to justice, which includes social and economic justice, as follows:

Access to justice may also be viewed more broadly to include ways in which law may be employed to advance or impede other forms of justice (such as social or economic justice). This view necessarily encompasses the impact of non-legal actors on the effectiveness of law. Primarily because they treat law as an isolated branch of knowledge and practice, some people are challenged by the idea that law commissions are prepared to step outside the comfort of the legal system....

As a result, one can trace the evolution of the meaning of access to justice from “issues about access to courts and lawyers,” including an emphasis on legal aid, to consideration of “new

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<sup>13</sup> Rebecca L Sandefur, “Access to Civil Justice and Race, Class, and Gender Inequality” (2008) 34:1 Annual Rev Sociology 339 at 340, citing: Cappelletti & Garth, *supra* note 9; Earl Johnson Jr, “Justice and Reform: A Quarter Century Later” in Francis Regan et al, eds, *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford: Oxford University Press, 1999) 9; David M Trubek, “Critical Moments in Access to Justice Theory: The Quest for the Empowered Self” in Allan C Hutchinson, ed, *Access to Civil Justice* (Toronto: Carswell, 1990) 107.

<sup>14</sup> Sandefur, *supra* note 13 at 340.

institutional [or legal] arrangements,” “procedural initiatives,’ and “community legal education and the prevention of disputes”—all of which share the notion of availability-to considerations of equality and fairness, or “the degree to which the citizen has access to and can participate in the procedures by which substantive law is made.”<sup>15</sup>

In defining access to justice, the Canadian Forum on Civil Justice (CFCJ) writes that it “does not only refer to reductions in costs, access to lawyers and access to courts.”<sup>16</sup> While advocates and theorists continuously attempt to define and redefine their field, this move also reflects the fact that citizens may have conceptually separated access to justice from access to lawyers and courts. On the first page of *Paths to Justice*, Hazel Genn quoted a survey respondent who said, “I’d like more access to justice and less access to courts.”<sup>17</sup>

The legal needs research made popular by Genn and continued with the support of the CFCJ in Canada succeeds in centring the experience of individuals in the population rather than the institutions of the state’s court system. Rather than asking about the legal disputes that arrive at the courthouse door, this research aims to examine all of the legal disputes that individuals in the population experience. This

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<sup>15</sup> Patricia Hughes, “Law Commissions and Access to Justice: What Justice Should We Be Talking About” (2008) 46:4 Osgoode Hall LJ 773 at 780, citing Martin Partington, “Relationship between Law Reform and Access to Justice: A Case Study - The Renting Homes Project” (2005) 23 Windsor YB Access Just 375 at 376.

<sup>16</sup> Canadian Forum on Civil Justice, “Clearinghouse”, online: <[cfcj-fcjc.org/clearinghouse/](http://cfcj-fcjc.org/clearinghouse/)> [perma.cc/4HAT-NAQF].

<sup>17</sup> Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart, 1999) at 1.



is certainly an important step forward. The results of these surveys provide, in Genn's words, "information about what the civil justice system delivers and the extent to which the courts are regarded as valuable or irrelevant to those for whom they ostensibly exist."<sup>18</sup> For the CFCJ, this vision of access to justice is not just about courts and lawyers, but about "the efficaciousness of a justice system in meeting the dispute resolution needs of its citizens."<sup>19</sup>

However, the methods of the legal needs surveys still focus on legal problems or disputes and still leave the definition of those problems to the courts. Researchers ask about a list of justiciable events. In other words, the subject of the research is still the list of problems that courts have defined as being within their purview. That the research includes problems which the respondents did not recognize as legal and that may have been more sensibly dealt with in other ways helpfully expands the set of problems that are examined; however, the scope of this access to justice research is still limited to the resolution of disputes that the official legal system sees as justiciable in the courts.

While Albiston and Sandefur tout a shift in which access to justice researchers have come to see the disputes as social constructs rather than found objects in the world,<sup>20</sup> the legal needs methodology does not go quite this far. The shift to demand-side research ceases looking only at the objects that appear on the courthouse door and instead goes looking for them in the world at large. However, these are still, for

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<sup>18</sup> *Ibid.*

<sup>19</sup> Canadian Forum on Civil Justice, *supra* note 16.

<sup>20</sup> Albiston & Sandefur, *supra* note 1 at 104.

the most part, treated as found objects in the world; we have not yet come to interrogate their social construction. While Sandefur may be correct that the goal of social justice underlies and motivates this research, our recent demand-side studies remain grounded in a corrective justice model.

My aim here is not to disparage demand-side access to justice research or minimize the exciting step forward that it represents. However, relying heavily on the justiciable event concept leaves this research still essentially wedded to court-defined views of justiciability, legality, and, ultimately, law and justice. This limitation prevents demand-side research from fully matching the aims and ambitions of access to justice scholars.

#### B. THE NEED FOR A BROADER CONCEPTION OF ACCESS TO JUSTICE IN TAX LAW

In some of the areas of law with which access to justice research has usually been preoccupied, the focus on the resolution of discrete disputes as understood by courts is understandable. An introductory course in criminal law or family law, for example, is typically concerned with how courts and lawyers respond to particular sets of facts. Indeed, this court-centred understanding of justice may also describe much of a legal practice for criminal and family lawyers.

However, tax law is an example of an area that is difficult to fully explore without a broader conception of access to justice. An introductory tax class is often quite explicit about the social and economic justice implications of the tax system. Moreover, the private tax bar as a whole engages in much more transactional work, tax planning, and law reform advocacy than it does litigation. While tax is not unique in

this way, taking it as an example helps to highlight the need to look beyond justiciable events.

In chapter 2, I provided an overview of dispute resolution in the Canadian tax system, which started with the Minister's assessment of tax liability and the taxpayer's opportunity to appeal. In this system, it would be difficult to draw the boundaries around justiciable disputes in the tax system. Even if this issue were resolved, however, Canadians' interaction with tax law is not limited to those instances where a dispute with the CRA arises. Moreover, the justice implications of tax law extend far beyond the resolution of disputes.

#### I) JUSTICIABLE DISPUTES IN THE CANADIAN TAX SYSTEM

The CRA reviews about 28 million income tax returns for individuals and, in response, issues assessments of tax liability each year.<sup>21</sup> For each of those, a taxpayer had the right to object and engage the dispute resolution process described in chapter 2, beginning with an internal review at the CRA and continuing through to the Federal Court of Appeal (or, with leave, to the Supreme Court of Canada). Of course, for many of these assessments there was no dispute about the taxpayer's tax liability for the year in question. They include "as filed" assessments, assessments that implement a resolution to a previous dispute between the taxpayer and the CRA, and other assessments that did not reflect any dispute. In the 2016–2017 year, taxpayers

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<sup>21</sup> Canada Revenue Agency, *Annual Report to Parliament 2014-2015* at 40, online: <[www.canada.ca/content/dam/cra-arc/migration/cra-arc/gncy/nnnl/2014-2015/ar-2014-15-eng.pdf](http://www.canada.ca/content/dam/cra-arc/migration/cra-arc/gncy/nnnl/2014-2015/ar-2014-15-eng.pdf)> [perma.cc/M7XZ-R9G8].

initiated more than 85,000 income and commodity tax disputes.<sup>22</sup> More than 97,000 disputes were resolved (including many carried over from previous years) and more than 5,200 appeals were filed before the Tax Court of Canada.<sup>23</sup>

A simple answer might be that every assessment other than “as filed” assessments constitute a potential justiciable event. However, the problems that individuals experience in the tax system are not limited to these reassessments. As I noted in chapter 2, taxpayers regularly have problems with the conduct of a CRA representative, but the Tax Court has no jurisdiction over those issues. In 2014–2015, the CRA resolved more than 3,300 service complaints<sup>24</sup> and another 150 were investigated by the Office of the Taxpayers’ Ombudsman.<sup>25</sup> Whether legal needs research should consider these problems “justiciable” is open to question. Taxpayers are free to apply for judicial review of the CRA’s decisions in the Federal Court system, though it is not always clear how this type of remedy fits into the justiciable event framework.

In addition to the complaints that the Office of the Taxpayer Ombudsman investigates or refers to the CRA’s complaint department every year, there are some

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<sup>22</sup> Canada Revenue Agency, *Departmental Results Report 2016-17* at 71, online: <[www.canada.ca/content/dam/cra-arc/corp-info/aboutcra/dprtmntl-prfrmnc-rprts/2016-2017/drr17cra-en.pdf](http://www.canada.ca/content/dam/cra-arc/corp-info/aboutcra/dprtmntl-prfrmnc-rprts/2016-2017/drr17cra-en.pdf)> [perma.cc/MB82-2PNQ].

<sup>23</sup> *Ibid* at 72. The numbers here indicate that the CRA has been catching up on a backlog of disputes. It is unclear where the number of disputes that the CRA reports as “resolved” includes those resolved by a court decision, though the number of court decisions in tax cases would be relatively low compared to the total number of disputes resolved.

<sup>24</sup> Canada Revenue Agency, *supra* note 21 at 74.

<sup>25</sup> Office of the Taxpayers’ Ombudsman, *Annual Report 2014-2015* at 10, online: <[www.canada.ca/content/dam/oto-boc/migration/rprts/nnl/rprt1415-eng.pdf](http://www.canada.ca/content/dam/oto-boc/migration/rprts/nnl/rprt1415-eng.pdf)> [perma.cc/4PM]-VLXL].

claims that it rejects as outside its mandate. At least some of these have to do with issues that are “legislative, not service-related.”<sup>26</sup> In other words, the Ombudsman’s office takes the view that these complaints are primarily about the content of the legislation and not the CRA’s administration or application of it. In 2013–2014, the Ombudsman’s office received a surge of over 1,000 complaints in this category, which is an awkward one for legal needs research.<sup>27</sup> These legislative complaints reflect legal problems and therefore at least arguably reflect a legal need. They were non-trivial at least in that taxpayers felt they were important enough to complain about. However, they are also non-justiciable and so would generally be ignored by legal needs surveys.

At least at the margins, it would be difficult to determine what constitutes a justiciable dispute in the tax system. Using numbers from 2016–2017, certainly all 5,200 appeals filed in Tax Court would be included. Perhaps all of the 85,000 disputes should be included, or at least those that respondents report as meeting the threshold imposed by the triviality filter. Of course, the incidence of justiciable events would include all of these as well as those “lumpers” who had a serious problem with the CRA’s assessment of their tax liability but did not file an objection.<sup>28</sup> However, the treatment of the legal needs represented by service complaints and legislative issues is less clear. At the very least, it could be said that any definition of justiciable event in

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<sup>26</sup> *Ibid.* The main example in this report had to do with “the disallowance of [charitable] donations in a given year as a result of the arrangement they entered into with the recipient organization.”

<sup>27</sup> *Ibid.*

<sup>28</sup> The term “lumpers”, meaning those who experience a justiciable event and do nothing about it, originated in Genn, *supra* note 17.

the tax system would risk being either over- or under-inclusive when compared to taxpayers' actual legal needs.

## 2) BEYOND JUSTICIABLE DISPUTES

Resolving justiciable problems and responding to complaints still leaves us far from exhausting all of Canadians' interactions with the tax system and the justice issues encompassed in it. Tax is ubiquitous and pervasive. The tax system is a legal regime with which everyone is required to directly interact every year.

In addition to the annual ritual in which we turn our minds to the tax system, we may be more or less conscious of our daily interactions with tax law. Employees may have ceased noticing the withholdings on their paycheques, though employers will be aware of the heavy penalties for failing to remit these to the Receiver General. Many individuals will take advantage of programs administered through the tax system that are intended to encourage post-secondary education, home ownership, saving for retirement, and charitable donations. People may or may not notice the sales taxes added to the bills of most things they buy. Those who pay attention to their receipts may notice the differential treatment of ice cream (generally zero-rated—meaning that customers pay no GST/HST—unless sold in a single serving), potato chips (to which GST/HST applies), children's clothes (which are subject to a point-of-sale rebate for the provincial part of the HST in Ontario, Nova Scotia, and Prince Edward Island, meaning that consumers pay only the federal portion of the

HST), and dental services (which are generally exempt from GST/HST).<sup>29</sup> Similarly, people may be aware of the excise taxes on gasoline, alcohol, and cigarettes that are included in the prices of those items.

Regardless of whether we are conscious of the influence of tax law on our lives or not, it is ubiquitous. It affects the price of housing, food, child care, education, and charitable giving. It influences the structure of every small business and every large corporate commercial transaction. It shapes and structures our economy and our social institutions. Tax law is one of the key fora in which Canadians decide what they value and how their society will be structured.<sup>30</sup>

Dispute resolution in tax is important, but its focus is ensuring that tax liability is calculated in accordance with the tax statutes. Many of the key justice issues in the tax system are decided elsewhere. These are questions of social and economic justice that are answered in the structure of the system. The structure of the system is reflected in the drafting of tax statutes, in the legislative processes that lead up to that drafting, in the CRA offices where the statute is interpreted and rendered into guidance for CRA officers, and in the processes of evaluating tax

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<sup>29</sup> Canada Revenue Agency, “General Information for GST/HST Registrants”, online: <[www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4022/general-information-gst-hst-registrants.html](http://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4022/general-information-gst-hst-registrants.html)> [perma.cc/F964-N]9X]; Canada Revenue Agency, GST/HST Info Sheet GI-063, “Point-of-Sale Rebate on Children’s Goods” (August 2014), online: <[www.canada.ca/en/revenue-agency/services/forms-publications/publications/gi-063/point-sale-rebate-on-childrens-goods.html](http://www.canada.ca/en/revenue-agency/services/forms-publications/publications/gi-063/point-sale-rebate-on-childrens-goods.html)> [perma.cc/8DV8-QTU9].

<sup>30</sup> Sagit Leviner, “The Normative Underpinnings of Taxation” (2012) 13 Nev LJ 95 at 95, writes: “Questions about the appropriate rules and mechanisms of taxation are first and foremost questions concerning the nature of society. What can be taxed, what may not, for what purpose, when, and how are all matters that go to the heart of society and, in particular, concern society’s underlying beliefs and values vis-à-vis the meaning and attainment of justice.”

returns, auditing, answering questions and providing guidance, and on. Justice in the tax system, however, is not only implicated in the actions of government officials. Both individuals and corporations plan their affairs based on their understanding of the tax system, and tax justice is implicated here as well.

None of this makes tax law unique, though the tax system is a helpful example to make this point. Practicing lawyers in criminal and family law, for example are primarily engaged resolving discrete disputes, and so the corrective justice model of the official court system is a natural reference point for them. In contrast, much of tax law practice (at least for the private bar) is the work of planning transactions, structuring affairs, and arguing for changes to the rules or their interpretations even in the absence of any discrete dispute.

To illustrate the point outside of the tax system, take the example of an intersection. Justice is certainly implicated in the mechanisms by which society compensates victims of car accidents and holds those responsible to account. However, justice is equally implicated in the design of the intersection. A two-way stop may be objectionable to those whose comings and goings it interrupts, as it may be seen to give an unjust preference to those whose routes it leaves uninterrupted. An all-way stop may be seen as providing formal equality, though its substantive justice will be questioned if some sides are much busier than others and therefore suffer longer delays. Similar concerns will attend the particular design and operation of a traffic light, roundabout, or traffic circle. A full analysis would consider many other factors as well: whether the roads are laid out in a way that serves the needs of all of



the users, or whether some communities are forced to take the long way around while others are catered to; what alternate routes are available; the needs of pedestrians and cyclists who use the intersection; and whether improved traffic flow is a worthwhile goal given that it leads to urban sprawl and the attendant effects on the environment. Justice is implicated at all of these levels and so access to justice cannot be limited to the question of whether lawyers and courts are available to ensure that the insurance company will pay for car repairs following a collision.

For access to justice research to reflect the social justice aspirations of the access to justice movement, its research methodologies need to reflect a broader understanding of the field than the supply-side/demand-side dichotomy. Without diminishing the value of legal needs research or the supply-side research that has helped to reveal problems and inefficiencies in our court systems, this broader understanding should provide access to justice researchers with a framework that allows them to be less anchored in the framing provided by the court system. The tax system is not unique in demanding this, but it does serve as a helpful illustration to highlight the need a more holistic view of access to justice.

### **III. THE SCOPE AND AMBITIONS OF ACCESS TO JUSTICE: A COMPREHENSIVE STRATEGY**

While access to justice ambitions may have had broad ambitions, part of the difficulty in turning those ambitions into a concrete agenda for research or advocacy lies in finding an organizing theme to replace the framing provided by court-litigated disputes. In a 2005 essay entitled, “Access to Justice in Canada Today: Scope, Scale and

Ambitions”, Roderick Macdonald reviewed the history of access to justice research and outlined what he called a comprehensive access to justice strategy, which I suggest answers this need for a new framework.<sup>31</sup> In this section, I suggest that Macdonald’s conception of access to justice responds to the concerns raised in part II. To some extent, Macdonald’s review of the history and his account of the scope, scale, and ambitions of access to justice reflect his view of law generally, and so for the sake of clarity and completeness I briefly explain Macdonald’s legal theory. Finally, I provide concrete examples to acknowledge that, while the supply- and demand-side binary has come to dominate our thinking about access to justice, the comprehensive approach has been reflected both in the academic literature and in practice in the tax system.

#### A. TOWARDS EMPOWERMENT: A COMPREHENSIVE ACCESS TO JUSTICE STRATEGY

The idea that access to justice is a useful framework for looking at things other than disputes and dispute resolution is part of what Macdonald was driving at in his review of the access to justice movement’s history and his suggestions for its future trajectory. He reviewed features that commentators would agree characterize an accessible justice system: “(1) just results, (2) fair treatment, (3) reasonable cost, (4) reasonable speed, (5) understandable to users, (6) responsive to needs, (7) certain, and (8) effective, adequately resourced and well-organized.”<sup>32</sup> He pointed out, however,

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<sup>31</sup> Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 [Macdonald, “Scope, Scale and Ambitions”].

<sup>32</sup> *Ibid* at 23–24.

that “these are not features of an accessible *justice* system; they are merely features of an accessible dispute-resolution system.”<sup>33</sup> Macdonald then suggested two main themes to organize a “comprehensive access to justice strategy”: multi-dimensionality and legal pluralism.<sup>34</sup>

A multi-dimensional strategy, as Macdonald explained it, recognizes that citizens are differently situated and that this diversity implies differing needs, different conceptions of justice, and differing perceptions of legal problems.<sup>35</sup> The multi-dimensional strategy that will respond to this reality, in Macdonald’s view, requires “a menu, and a menu implies an individualized choice by those who read it – that is, by those who are seeking justice.”<sup>36</sup>

A legal pluralistic strategy recognizes the importance of including a plurality of legal orders, processes, institutions, and sites of law. It requires that we “embrace preventative law” (like Duggan and Ramsey’s front-end strategies discussed below) and “address access to institutions of law-making, law-application and ultimately, law learning.”<sup>37</sup> Macdonald would expand the scope of access to justice wider still, and include sites of law other than the state’s institutions. As he points out, law is also made and administered by standards organizations, property owners, community groups, corporations, unions, religious institutions, universities, and many others.<sup>38</sup>

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<sup>33</sup> *Ibid* at 24 [emphasis in original].

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* at 24–25.

<sup>36</sup> *Ibid* at 25.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* at 25–26.

The example of tax law can help to show the importance of part of this broader vision. Access to this social and economic justice cannot be captured by looking at discrete disputes between the CRA and individual taxpayers over the correct application of the *Income Tax Act*. Tax law's ubiquity and its power to shape our economy and society show the importance of access to all of the sites and processes in which law is made, interpreted, and applied.

This line of thinking might be facilitated by using the language of empowerment. In his conclusion, Macdonald writes,

Access to justice will be achieved by empowering a diverse citizenry to make, decide and enforce their own law in the multiple sites where they actually find normative commitment.

The most egregious examples of lack of access do not have to do with narrowly cast legal rights: they have to do rather with recognition and respect.<sup>39</sup>

The various threads of access to justice research can be thought of as united around the goal of empowering the legal subject, or, better still, reimagining the legal subject as a legal agent. Macdonald reviews nearly fifty years of access to justice scholarship and advocacy and finds various themes and threads of research. These threads included: access to lawyers and courts, including issues of cost and delay, and legal aid programs to remedy some of the problems; institutional redesign, including proposals to create small claims courts and various tribunals to deal with specific

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<sup>39</sup> *Ibid* at 107.

issues; demystification of law, which included various law reform efforts and push toward alternative dispute resolution; preventative law to help avoid conflicts or resolve them before the official legal system became involved; and proactive access to justice, which includes providing equal opportunities for access to positions of authority, access to legal education, and so on. The supply- and demand-side research I reviewed in chapters 2 and 3, as well as these various other threads in the access to justice movement are all unified by the goal of empowering individuals in the legal system.

In the context of tax law, citizens need to be empowered not just when their disputes arrive at the Tax Court of Canada. Rather, citizens need to be empowered at all the sites where the law is made, interpreted, and applied: at the audit stage, in the CRA rulings office, in completing and filing their tax returns, in Parliament where tax statutes are amended and at the Department of Finance where the amendments are drafted. Removing barriers to access in the tax system means not only giving taxpayers access to a tax judge to decide their case impartially, but empowering them to understand how the tax system affects their lives, to plan their affairs with this understanding, and to be a part of making and remaking the norms that govern them.

Readers familiar with Macdonald's work will recognize that this framework for access to justice thinking is consonant with his legal theory more generally. As in much of Macdonald's legal thinking, traces of Lon Fuller's influence are evident. In particular, Fuller's claim that law necessarily conceives of the person—the legal

subject—as a responsible agent is hinted at here.<sup>40</sup> However, while Fuller saw recognition of human agency as a precondition for law (violations of which lead to a state of non-law, or the simple exercise of power as distinct from the rule of law),<sup>41</sup> Macdonald’s access to justice framework sees increased empowerment of the legal subject as an aspiration.

The reference to “multiple sites where [the diverse citizenry] actually find normative commitment”<sup>42</sup> also echoes Macdonald’s legal pluralism, which sees law as a social construct not exclusively or necessarily tied to the political state.<sup>43</sup> The hypothesis of legal pluralism explicitly rejects the ideas that law is uniquely tied to the political state (centralism), that there can only be a single legal system in any particular space (monism) and that law is always or only produced by the explicit

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<sup>40</sup> Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), ch 4 [Fuller, *Morality of Law*]: “To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.” (at 162). See also: Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012) at 97–101.

<sup>41</sup> Fuller, *Morality of Law*, *supra* note 40 at 163; Rundle, *supra* note 40 at 98.

<sup>42</sup> Macdonald, “Scope, Scale and Ambitions”, *supra* note 31 at 107.

<sup>43</sup> Roderick A Macdonald, “L’hypothèse du pluralisme juridique dans les sociétés démocratiques avancées” (2002) 33 RDUS 133 at 135 [Macdonald, “L’hypothèse du pluralisme juridique”]. For more on Macdonald’s legal pluralism, see: Martha-Marie Kleinhans & Roderick A Macdonald, “What Is a *Critical Legal Pluralism*?” (1997) 12 Can J L & Soc 25; Roderick A Macdonald, “Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism” (1998) 15 Ariz J Int’l & Comp L 69 [Macdonald, “Metaphors of Multiplicity”]; Roderick A Macdonald & David Sandomierski, “Against Nomopolies” (2006) 57 N Ir Legal Q 610; Roderick A Macdonald, “Custom Made—For a Non-Chirographic Critical Legal Pluralism” (2011) 26:2 CJLS 301. Again, Fuller’s influence is evident. See Lon L Fuller, “Human Interaction and the Law” (1969) 14 Am J Juris 1 at 1: “I mean the word ‘law’ to be construed very broadly. I intend it to include not only the legal systems of states and nations, but also the smaller systems—at least ‘law-like’ in structure and function—to be found in labor unions, professional associations, clubs, churches, and universities.”

activity of a law making institution such as a legislature (positivism).<sup>44</sup> On this view, multiple legal systems can be found anywhere that humans interact. Accordingly, the access to justice framework can work to reveal disempowerment in families, religious communities, curling clubs, and condominiums, as well as the political state.

What Macdonald called critical legal pluralism also reimagined the legal subject as “law inventing and not merely ‘law abiding.’”<sup>45</sup> Critical legal pluralism states this as a claim, arguing that individuals are subject to “a web of multiple, sometimes conflicting legal regimes, whether by virtue of their affiliations with various social groups, by their own individual normative standards, [or] through their interactions with institutions” and that law is made, sustained, and remade through these interactions and as the legal subject acts in the midst of this normative tension.<sup>46</sup> The access to justice framework, on the other hand, seems not to require that we accept precisely this view of law’s origins. However, the aspirations of access to justice include recognizing the legal subject’s role as a law inventing and not merely law abiding within whatever legal system the access to justice lens is applied to.

Again, my goal in this brief review was neither to defend Fuller’s legal morality nor Macdonald’s critical legal pluralism, but only to trace some of the main threads of legal theory that seem to influence Macdonald’s account of access to justice. My hope is that this brief review will help readers identify more precisely any discomfort they

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<sup>44</sup> Macdonald, “L’hypothèse du pluralisme juridique”, *supra* note 43 at 135.

<sup>45</sup> Kleinhans & Macdonald, *supra* note 43 at 39, citing: Boaventura de Sousa Santos, “Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South Charting a Course for Sociolegal Scholarship: A Symposium” (1995) 29 *Law & Soc’y Rev* 569 at 573.

<sup>46</sup> Macdonald, *supra* note 43 at 324.

have with the broad view of access to justice, particularly if the discomfort is linked to an implicit understanding of access to justice that accepts the centralism, monism, or positivism that Macdonald rejects.

However, we need not whole-heartedly embrace critical legal pluralism to find Macdonald's access to justice framework useful. Rather, if we accept that the empowerment of individuals in the legal system (however defined) is a worthy goal, then the access to justice framework can be useful. If we accept even a less radical form of legal pluralism, then we may find it worthwhile to use the access to justice lens in a multiplicity of legal systems and institutions where law is made, administered, and applied.

## B. THE COMPREHENSIVE ACCESS TO JUSTICE FRAMEWORK IN THE EXISTING LITERATURE

Macdonald laid out his view of access to justice in part to encapsulate the history of access to justice work and in part to guide the ambitions of future work. The goal of empowering individuals allows us to unite diverse strategies like legal aid, human rights commissions, substantive law reform, conflict avoidance, alternative dispute resolution, and improved access to legal education—which have all been done in the name of access to justice—with some coherence. Macdonald also invited future access to justice work with a wide scope and large ambition. While much of the work that has been done in the past ten years fits neatly into the supply-side/demand-side dichotomy, it is worth noting some work that has push forward what have come to be called “front-end” access to justice strategies.



Motivated by the prevalence of consumer problems on Canadian legal needs surveys and those in other jurisdictions, Anthony Duggan and Iain Ramsay considered what they termed “front-end” strategies to improve access to justice, particularly focusing on consumer credit.<sup>47</sup> While policy makers have attempted to implement features like the small claims court and class action suits to attempt to improve access to justice in this area, these are, in Duggan and Ramsay’s terminology, “back-end” solutions. They are analogous to an ambulance service that “aims to pick up the pieces, so to speak, after the accident has happened.”<sup>48</sup> Further improvements to access to justice might be available, to continue the analogy, with a guard rail that aims to prevent accidents.<sup>49</sup> Taking a law and economics approach, Duggan and Ramsay suggest that front-end strategies in the consumer field might include education initiatives and mandatory disclosure of information to better equip consumers in their decision making, cooling off periods to give consumers a chance to reconsider their decisions, behavioural economics “nudges” to better align consumers decisions with their long-term or unrevealed preferences, and substantive regulation to protect consumers by restricting their range of choices.<sup>50</sup>

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<sup>47</sup> Anthony Duggan & Iain Ramsay, “Front-End Strategies for Improving Consumer Access to Justice” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 95.

<sup>48</sup> *Ibid* at 97, borrowing the analogy from: Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008) at 231.

<sup>49</sup> Duggan & Ramsay, *supra* note 47 at 97.

<sup>50</sup> *Ibid.*

Duggan and Ramsey primarily discuss these front-end strategies as ways of “heading off disputes that might otherwise lead to costly litigation.”<sup>51</sup> Front-end strategies, then, expand our gaze beyond resolving justiciable problems and to include avoiding justiciable problems altogether. This line of thinking was also picked up by the CFCJ’s Action Committee on Access to Justice in Civil and Family Matters in its report, *A Roadmap for Change*.<sup>52</sup> The report suggested nine “Justice Development Goals”, the first of which included “widening the focus from dispute resolution to education and prevention,” supporting early dispute resolution, and improving accessibility to public legal information.<sup>53</sup>

It is worth noting that here, the litigated legal dispute is still the reference point for much of what access to justice ought to mean, even as researchers attempt to take a wider view. In part, the difficulty is in imagining another way to frame the field. Gary Blasi concluded that “the most practical way to operationalize ‘access to justice,’ at least in the short term, may be to equate it with ‘access to lawyers’ and recognize why we are evaluating second-best and third-best options for those who cannot afford to obtain legal services in the private market.”<sup>54</sup> The broader access to justice framework with a focus on empowerment, on the other hand, allows researchers to break free of the framing of courts, lawyers, and disputes, and then to

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<sup>51</sup> *Ibid* at 139.

<sup>52</sup> Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Canadian Forum on Civil Justice, 2013), online: <[www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> [perma.cc/H9XE-SLHD].

<sup>53</sup> *Ibid* at 11–13.

<sup>54</sup> Blasi, *supra* note 12 at 879.

take more seriously the issues and ideas around front-end preventative law, transactional planning, and many others.

### C. ELEMENTS OF THE COMPREHENSIVE STRATEGY IN THE TAX SYSTEM

Some elements of a comprehensive strategy can be found in the tax system. For example, the CRA takes a range of steps that aim to avoid disputes by giving taxpayers information about their tax obligations and help in complying with those obligations. In this section, I review some of the elements of the comprehensive strategy that exist already and suggest areas that researchers and advocates might explore as they think along the lines of a comprehensive access to justice strategy in the tax system.

Partially to compensate for the difficulty of understanding the statute itself, the CRA has, for a long time, been prolific in the publication of administrative documents: guides, rulings, and interpretations of the legislation. These aim to give taxpayers a clearer picture of their tax situation by using clearer language and concrete examples. In recent years, the technology has made these more accessible and more easily navigated. Moreover, the CRA offers a toll-free telephone information service to provide more information or answer specific questions. The CRA also facilitates the Community Volunteer Income Tax Program, which provides

tax information clinics and arranges for volunteers to prepare income tax returns for individuals with “a modest income and a simple tax situation.”<sup>55</sup>

While these services are certainly helpful to taxpayers themselves and to accountants and lawyers who assist taxpayers in fulfilling their obligations under the tax statutes, we should not overstate the empowering effects of these programs. These measures help taxpayers manage and meet their obligations under the tax statutes and thereby prevent conflicts between taxpayers and the CRA. However, the extent to which they facilitate understanding of the tax system or empowerment to engage in processes of making, applying, and interpreting the law (as opposed to simple compliance with the law) is unclear.

Thinking further about law making in the tax field, it is clear on one level that the public has always been highly engaged and interested. Tax platforms are among the most hotly debated in election campaigns, with various candidates rallying support for various tax policy positions: taxes in general, taxes on the rich, taxes on corporations, or taxes on goods and services need to be raised, lowered, or eliminated. However, due to the complexity of tax law, a relatively small number of individuals and groups have the understanding needed to participate in law-making (as opposed to signing on to a broad policy slogan).

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<sup>55</sup> Canada Revenue Agency, “Free Tax Clinics”, online: <[www.canada.ca/en/revenue-agency/services/tax/individuals/community-volunteer-income-tax-program.html](http://www.canada.ca/en/revenue-agency/services/tax/individuals/community-volunteer-income-tax-program.html)> [perma.cc/DBA6-V4GQ].

Moving beyond the broad slogans of election campaigns to the details of making, interpreting, and applying the law, we might ask whom is excluded from these processes. Macdonald wrote:

In a liberal democracy, true access to justice requires that all people should have an equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied. This means providing equal opportunities for the excluded to gain full access to positions of authority within the legal system. Improving access to legal education, to the judiciary, to the public service and the police, to Parliament and to various law societies is now seen as the best way of changing the system to overcome the disempowerment, disrespect and disengagement felt by many citizens.<sup>56</sup>

Such a radically inclusive and emancipatory approach to access to justice should apply with particular force in tax law, which forms much of the foundation of “the social life of citizens”. In this vein, decades of activism and scholarship on behalf of those excluded and discriminated against should be acknowledged. Drawing from, and contributing to, a larger critical tax conversation in the United States,<sup>57</sup> Canadian

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<sup>56</sup> Macdonald, “Scope, Scale and Ambitions”, *supra* note 31 at 23.

<sup>57</sup> See: Anthony C Infanti & Bridget J Crawford, eds, *Critical Tax Theory: An Introduction* (New York: Cambridge University Press, 2009); Lawrence Zelenak, “Taking Critical Tax Theory Seriously” (1997) 76 NCL Rev 1521; Nancy E Shurtz, “Critical Tax Theory: Still Not Taken Seriously” (1997) 76 NCL Rev 1837;

scholars have been active in pointing out injustices in our tax laws, and have some success to show for it.<sup>58</sup>

Even acknowledging these contributions and this progress, however, much is left to do. For example, to some degree, the *Income Tax Act* remains based on outdated or contestable assumptions regarding family structures and gender roles.<sup>59</sup> The plethora of places where family or household income is taken into account, for example, evidence the continued power of the assumption that couples pool their resources. The first woman associate chief justice of the Tax Court was appointed in 2015, and the Court has yet to see a woman as its chief justice. Of the 28 judges on the Court, only 8 are women.<sup>60</sup> While more complete data are not available, it seems likely that the tax bench and bar do not reflect the diversity of Canada.

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Michael A Livingston, "Radical Scholars, Conservative Field: Putting Critical Tax Scholarship in Perspective" (1997) 76 NCL Rev 1791.

<sup>58</sup> Kathleen A Lahey, *The Taxation of Women in Canada: A Research Report* (1988) [unpublished]; Lisa Philipps & Margot Young, "Sex, Tax and the Charter: A Review of *Thibaudeau v. Canada*" (1994) 2 Rev Const Stud 221; Lisa Philipps, "Measuring the Effects of Feminist Legal Research: Looking Critically at Failure and Success" (2004) 42 Osgoode Hall LJ 603; Judith E Grbich, "The Tax Unit Debate Revisited: Notes on the Critical Resources of a Feminist Revenue Law Scholarship" (1990) 4 Can J Women & L 512; Claire FL Young, "Child Care—A Taxing Issue" (1994) 39:3 McGill L J 539; Claire FL Young, "Taxing Times for Lesbians and Gay Men: Equality at What Cost" (1994) 17 Dalhousie LJ 534; Claire FL Young, "(In)visible Inequalities: Women, Tax and Poverty" (1995) 27:1 Ottawa L Rev 99; Claire Young, "Taxing Times for Women: Feminism Confronts Tax Policy" (1999) 21 Sydney L Rev 487; Claire FL Young, *Women, Tax, and Social Programs: The Gendered Impact of Funding Social Programs through the Tax System* (Ottawa: Status of Women Canada, 2000).

<sup>59</sup> Tammy Schirle, "Gender equity and 100 Years of Income Taxes", *Policy Options* (13 May 2016), online: <[policyoptions.irpp.org/2016/05/13/gender-equity-100-years-income-taxes/](http://policyoptions.irpp.org/2016/05/13/gender-equity-100-years-income-taxes/)> [perma.cc/2CZD-2CLC].

<sup>60</sup> As of 5 June 2019. Supernumerary judges are included in the count. See: Tax Court of Canada, "About the Court - Judges", online: <[www.tcc-cci.gc.ca/tcc-cci\\_Eng/About/Judges.html](http://www.tcc-cci.gc.ca/tcc-cci_Eng/About/Judges.html)> [perma.cc/YJL7-APGX].

Moreover, as the comprehensive approach pushes our thinking toward empowerment at sites of law making and legal interpretation, the tax system leaves much to be desired. Indeed, the language used in tax discourse generally tends away from ideas of citizen engagement and empowerment. Rather than *engagement* with the tax law, tax scholars, administrators, and practitioners talk in terms of *compliance*. This language takes *the law* as a given and the challenge that remains is only to ensure the faithful top-down projection of the law on the taxpaying subjects.

#### IV. THE CHALLENGES AND POSSIBILITIES OF ACCESS TO JUSTICE IN THE CANADIAN TAX SYSTEM

##### A. THE UBIQUITY AND INFLUENCE OF TAX LAW

Tax law affects everyone who lives in Canada and everyone who earns income in Canada. In previous chapters, I suggested lines along which supply-side and demand-side research might be carried out in the tax law. With respect to demand-side research, I noted in this chapter that we may have some difficulty in deciding what, exactly, should constitute a justiciable event: certainly not all of the 28 million potential appeals per year, but perhaps something more than then 85,000 objections that the CRA receives. Still, the sheer volume of the citizenry's interaction with the processes and institutions of tax law—compared with those of criminal law, family law, or tort law, for example—might lead us to ask whether any of what is missed by justiciable event research needs to be examined.

In addition to the handful of times every year that Canadians are conscious of their interactions with the tax system, the system shapes our daily lives in important

ways. Perhaps most fundamentally, tax law is about the distribution of resources in society and is our main mechanism for adjusting that distribution. As such, the tax system is a key venue in which our notions of social and economic justice are played out.

Further, tax law influences behaviour in important ways. Indeed, much of the *Income Tax Act* consists of “tax expenditures”<sup>61</sup>—government spending programs carried out through the tax system—and many of these are explicitly aimed at influencing people’s behaviour.<sup>62</sup> These tax measures are intended to encourage savings, to encourage investment, to encourage employment, or to support some particular business activity (such as film and video production)<sup>63</sup> or achieve some particular social objective (supporting adoption, for example).<sup>64</sup> However, even those parts of the *Income Tax Act* that aim at neutrality (the goal that tax policy not influence decision making) always fall short.<sup>65</sup> Taxpayers—employers and employees, corporations and shareholders, debtors and creditors, parents and children, spouses—

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<sup>61</sup> Stanley S Surrey, *Pathways to Tax Reform: The Concept of Tax Expenditures* (Cambridge, Mass: Harvard University Press, 1973); Stanley S Surrey & Paul R McDaniel, *Tax Expenditures* (Cambridge, Mass: Harvard University Press, 1985); Neil Brooks, Jinyan Li & Lisa Philipps, eds, *Tax Expenditures: State of the Art* (Toronto: Canadian Tax Foundation, 2011).

<sup>62</sup> Canada, Department of Finance, *Report on Federal Tax Expenditures: Concepts, Estimates and Evaluations 2019* (Ottawa: Department of Finance, 2019) at 44, online: <[www.fin.gc.ca/taxexp-depfisc/2019/taxexp-depfisc19-eng.pdf](http://www.fin.gc.ca/taxexp-depfisc/2019/taxexp-depfisc19-eng.pdf)> [perma.cc/F8CR-CLCR] [Canada, Department of Finance, *Tax Expenditure Report 2019*].

<sup>63</sup> *Ibid* at 68.

<sup>64</sup> *Ibid* at 58.

<sup>65</sup> For a brief primer on the traditional tax policy goals of equity, neutrality, and administrability, see: David G Duff et al, *Canadian Income Tax Law*, 6th ed (Toronto: LexisNexis, 2018) at 80–81.



plan their affairs and structure their relationships under the influence of the tax statutes, the CRA's published interpretations, and the courts' rulings.

I do not claim that this is unique to tax law. Providing people with a framework within which to plan their lives is a key function of law—indeed, Lon Fuller's view was that at its core law “furnishes [man] with base lines against which to organize his life with his fellows.”<sup>66</sup> However, it may be easier to see the everyday guiding effects of the *Income Tax Act* than it is to see the ways in which the *Criminal Code* or the *Divorce Act* influences our everyday lives. For this reason, it may be more important in tax law to look for barriers to access in a plurality of legal institutions and processes. Some injustices in the tax system may be remedied in a court, but many are more likely to be remedied in a conversation with a CRA officer, in a CRA publication, in a Parliamentary committee hearing, or in the legislative drafting office at the Department of Finance. And, while many of these systemic injustices will not appear as justiciable problems in a legal needs survey, we still need data to begin to measure the access and the barriers to these various sites of law.

## B. MOVING FORWARD IN ACCESS TO JUSTICE RESEARCH IN THE TAX SYSTEM

Having looked at supply-side research and demand-side research, and having proposed the need for a comprehensive approach to access to justice in the tax system, I turn in this section to collect some of the challenges and the possibly fruitful research questions suggested by the discussion above.

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<sup>66</sup> Fuller, *supra* note 43 at 24.

Thinking first about access to lawyers and courts—the supply side of the tax dispute resolution system—the tax system is unique. Specialized tax lawyers’ services are expensive and geographically concentrated in a few major centres. Legal aid is unavailable, though a few taxpayers will have access to the assistance of supervised law students through one of the nascent pro bono assistance programs. While this may seem to severely limit access, tax law is also unusual in that there is a more accessible profession operating in the same space. Accountants may be helpful in providing advice and assistance to taxpayers, including representation in informal procedure appeals. The Tax Court is efficient,<sup>67</sup> combining the speed and flexibility of a small claims court with the credibility offered by a tenured, independent, specialized judiciary.

Chapter 2 offered several potentially fruitful lines of future inquiry. Investigations of these supply-side questions have the potential both to reveal barriers to access and to confirm the success of various access-enhancing features of the tax system. Thus, they might both help formulate a strategy for access to justice in the tax dispute resolution system and reveal the successful elements that might be incorporated in other judicial or administrative adjudicative fora.

The discussion in chapter 3 found that Canadian demand-side or “legal needs” research has left out questions of tax law and argued that the answers to these

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<sup>67</sup> See Julius Melnitzer, “Tax Court Sees More Room for Settlements”, *Financial Post* (15 March 2011), online: <[business.financialpost.com/legal-post/tax-court-sees-more-room-for-settlements](http://business.financialpost.com/legal-post/tax-court-sees-more-room-for-settlements)> [perma.cc/2XLN-AVTE], quoting Rossiter ACJ (as he then was) as follows: “If you look at the time elapsed from the filing of the notice of appeal to the time of trial, we’re probably the most efficient court in the country.”

questions might be revealing. Anecdotally, many people report anxiety and frustration with their yearly encounter with income tax. Moreover, most adults in Canada have the legal right to contest a tax assessment every year, and as many as 85,000 take up this opportunity.

Each year, many taxpayers are audited (though some audits are more rigorous than others) and many taxpayers appeal a tax assessment. Most of those appeals are resolved during the administrative appeal process or after the file is referred to a department of justice lawyer for litigation, and a minority are eventually heard in Tax Court. However, there is no published research on the socio-demographics of the taxpayers who decide to dispute their assessments compared with those who accept the CRA's evaluation of their tax liability or those who decide to settle compared with those who want their day in court. Who are the people that decide to contest their assessments and what motivates their decisions? How would including tax problems in our legal needs research affect our analysis of clustering and triggering effects of justiciable problems?

A close look at the tax system also illustrates some of the problems with limiting access to justice thinking to lawyers, courts, and justiciable problems. Some areas of law—criminal law, family law, and personal injury law, for example—are often studied as systems that need to be activated in response to particular events. On this view, people may be generally free to ignore these areas of law most of the time, but it is vitally important that these services are accessible in the rare cases where they are needed. While this view ignores important ways that these areas of law shape our

day-to-day lives, it captures much of what practicing lawyers in these fields do. On the other hand, looking at tax law in terms of only of discrete conflicts or justiciable events misses much of what tax law and tax lawyers do.

Tax law affects the ways that we access food, health care, housing, and employment. It influences our society and economy in both obvious and subtle ways. To the extent that tax law causes injustice in any of these areas, it may be felt as an ongoing reality rather than a discrete and identifiable event.

Of course, systemic problems and ongoing injustices can be made up of smaller discrete moments. Many of us interact with the tax system daily as consumers who pay value-added taxes or retail sales taxes like the HST and PST. Self-employed people and managers of corporations who collect the GST/HST will have this reality brought to mind more frequently. Those who also pay employees, and so collect withholdings on behalf of the Crown, may have this realization made even more acute by the stiff penalties associated with failing in their duties. And, all taxpayers are forced to interact with the tax system at least once per year with the annual requirement to file a tax return.

While access to the dispute resolution process is important in tax law, access to justice must be broader. Taxpayers may need help more acutely when headed to court to contest a tax assessment, but many also need, and may have trouble accessing, legal assistance in the administrative appeal process, when responding to requests from the CRA, when filing their tax returns, and when planning their affairs.

Justice and access to it cannot be limited to these points at which the state requires taxpayers to turn their minds to tax law. Tax consequences are attached to a wide variety of transactions and events—buying or selling property, mortgage, marriage, divorce, death, creating a trust, and nearly every corporate and commercial transaction—and so the importance of access to professional tax advice cannot be limited to those few cases that end up before a judge.<sup>68</sup>

Because tax law shapes our economic and social structures, access to justice in tax law cannot even be limited to the scope of a tax lawyer's practice. Justice is implicated in the subtle ways that tax law affects individuals' salaries, rents, and family relationships. Access to justice requires the empowerment of these individuals in the system.

“Access to justice will be achieved,” Macdonald wrote, “by empowering a diverse citizenry to make, decide and enforce their own law in the multiple sites where they actually find normative commitment.”<sup>69</sup> Tax law's ubiquity and its power to shape the world around us also underscore the need to consider access to the plurality of sites and institutions in which the law is made, interpreted, and applied. A comprehensive strategy to empower people and provide access to justice in tax law would include not only assistance filing tax forms and access to tax courts, but also access to the legislatures, committees, and administrative venues where the law is made and administered.

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<sup>68</sup> Neil Brooks, “The Logic, Policy and Politics of Tax Law” in Tim Edgar, Arthur Cockfield & Martha O'Brien, eds, *Materials on Canadian Income Tax*, 15th ed (Toronto: Carswell, 2015) 1 at 1.

<sup>69</sup> Macdonald, “Scope, Scale and Ambitions”, *supra* note 31 at 106–107.

In the next section, I turn to the issue of complexity and its effect on individual's agency in the tax system. While legal complexity has sometimes been mentioned in a list of access to justice problems,<sup>70</sup> the discussion has rarely gone further. In chapter 5, I argue that legal complexity is worth taking seriously as an access to justice issue, given the broad access to justice framework. In chapter 6, I put forward a framework that I suggest provides a practical way to approach simplification in the Canadian tax system.

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<sup>70</sup> See, for example, Cappelletti & Garth, *supra* note 9 at 118; Deborah L Rhode, *Access to Justice* (New York: Oxford University Press, 2004) at 20; Action Committee on Access to Justice in Civil and Family Matters, *supra* note 52 at 8.

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## CHAPTER 5: LEGAL COMPLEXITY AS AN ACCESS TO JUSTICE ISSUE

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### I. REFRAMING A PERSISTENT COMPLAINT

Thus far I have reviewed the traditional concerns and recommendations of access to justice scholarship and suggested that Canada's tax system has been admirably responsive to many of these. Where robust data is not available to confirm that Canada's tax system minimizes the delays and costs associated with dispute resolution, I have laid out potential paths for empirical research. Still, the indications are that the Tax Court takes access to justice concerns seriously and has taken steps to mitigate geographic and monetary barriers to its processes and to avoid long delays as much as possible.

I have also picked up a thread of access to justice thinking that reframes the discussion. Access to justice research has already moved from focussing on the state's formal dispute resolution processes, to including less formal alternatives, and more recently to centring legal subjects and their experiences of legal disputes. This move, however, does not fully realize the stated ambitions of access to justice research.

The next move broadens the field even further, to look not only at resolution of justiciable disputes, but at the participation, agency, and engagement of legal subjects in all of the processes and institutions where law is made, administered, and applied. Rather than privileging dispute resolution as the main element of justice to

which people need access, it includes law making and administration as equally important. Rather than seeing the legal system as separate from the legal subjects, it sees the subjects as important sources of law within the system. Thus, we might shift our visual metaphor away from removing barriers to the distant and obscure justice system and toward empowering the legal subjects who already reside within that system.

In addition to the empirical inquiries I proposed in Part I, reframing access to justice in this way opens up additional lines of investigation. In the rest of this dissertation, I suggest that this framing can help to see old tax law debates in new ways. To provide an example, I discuss the complexity of the income tax system. While there is already a significant body of literature on legal complexity generally and tax complexity in particular, by looking at the problem through the lens of access to justice we can see the issue in a new way. Tax complexity generally and the specific choices made in the design and implementation of the tax system have usually been discussed and debated on the traditional tax policy grounds of equity, neutrality, and administrability. If we come to understand legal complexity as an access to justice issue in the tax system, these new insights should affect how we discuss some of the long-standing issues in the tax system, how we weigh these policy goals, and how we view complexity in tax law.



Complexity is perhaps the most common and enduring complaint about the income tax system.<sup>1</sup> The academic literature is rich with discussions of the sources of complexity and proposals for simplification.<sup>2</sup> However, for all of the discussion and

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<sup>1</sup> Recent examples in the media include: Ian McGugan, “When Even the Pros Don’t Understand Canada’s Income Tax System, You Know There’s a Problem”, *The Globe and Mail* (28 January 2019), online: <[www.theglobeandmail.com/business/rob-magazine/article-when-even-the-pros-dont-understand-canadas-income-tax-system-you/](http://www.theglobeandmail.com/business/rob-magazine/article-when-even-the-pros-dont-understand-canadas-income-tax-system-you/)> [perma.cc/3T3W-SZZL]; Charles Lammam & François Vaillancourt, “Your Tax Return Has Gotten out of Control and There’s No Good Reason for It”, *Financial Post* (27 April 2017), online: <[business.financialpost.com/fp-comment/your-tax-return-has-gotten-out-of-control-and-theres-no-good-reason-for-it](http://business.financialpost.com/fp-comment/your-tax-return-has-gotten-out-of-control-and-theres-no-good-reason-for-it)> [perma.cc/HR54-BEQG]; Charles Lammam, “Your Tax Return This Year Is Longer, Trickier and More Painful Than Ever. This Must Stop”, *Financial Post* (28 April 2016), online: <[financialpost.com/opinion/your-tax-return-this-year-is-longer-trickier-and-more-painful-than-ever-this-must-stop](http://financialpost.com/opinion/your-tax-return-this-year-is-longer-trickier-and-more-painful-than-ever-this-must-stop)> [perma.cc/BV6L-UYWF]; Corinne Purtill, “Filing Your Income Taxes Is a Pain, and That Is Not an Accident”, *Quartz* (1 March 2016), online: <[qz.com/628020/filing-your-income-taxes-is-a-pain-and-that-is-not-an-accident/](http://qz.com/628020/filing-your-income-taxes-is-a-pain-and-that-is-not-an-accident/)> [perma.cc/F78W-ZP7W]; Vern Krishna, “Canada’s Complicated Tax Rules Fail to Recognize That a ‘Buck Is a Buck’”, *Financial Post* (10 June 2015), online: <[financialpost.com/legal-post/canadas-complicated-tax-rules-fail-to-recognize-that-a-buck-is-a-buck](http://financialpost.com/legal-post/canadas-complicated-tax-rules-fail-to-recognize-that-a-buck-is-a-buck)> [perma.cc/FV7M-2RBC]; James Fitz-Morris, “Complex Income Tax System Costing Canadians: Study”, *CBC* (27 April 2015), online: <[www.cbc.ca/news/politics/complex-income-tax-system-costing-canadians-study-1.3048095](http://www.cbc.ca/news/politics/complex-income-tax-system-costing-canadians-study-1.3048095)> [perma.cc/5HVD-2XWG]; Jack M Mintz, “17 Reasons Why Canada Needs Simple Tax Reform Now”, *Financial Post* (3 April 2014), online: <[financialpost.com/financial-post-magazine/17-reasons-why-canada-needs-simple-tax-reform-now](http://financialpost.com/financial-post-magazine/17-reasons-why-canada-needs-simple-tax-reform-now)> [perma.cc/S8PQ-CFL3].

<sup>2</sup> See, for example: Stanley S Surrey, “Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail” (1969) 34:4 *Law & Contemp Problems* 673; Boris I Bittker, “Tax Reform and Tax Simplification” (1974) 29 *U Miami L Rev* 1 [Bittker, “Tax Reform and Tax Simplification”]; David F Bradford, *Untangling the Income Tax* (Cambridge, Mass: Harvard University Press, 1986) [Bradford, *Untangling the Income Tax*]; William J Strain, David A Dodge & Victor Peters, “Tax Simplification: The Elusive Goal” (1988) 40 *Can Tax Found* 4:1; Robert Couzin, “Simplification and Reform” (1988) 26 *Osgoode Hall LJ* 433; Edward J McCaffery, “The Holy Grail of Tax Simplification” (1990) 1990 *Wis L Rev* 1267; Sheldon D Pollack, “Tax Complexity, Reform, and the Illusions of Tax Simplification” (1993) 2 *Geo Mason Indep L Rev* 319; Louis Kaplow, “How Tax Complexity and Enforcement Affect the Equity and Efficiency of the Income Tax” (1996) 49:1 *Nat’l Tax J* 135; Deborah L Paul, “The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve” (1997) 76 *NCL Rev* 151; Steven A Dean, “Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification” (2005) 34 *Hofstra L Rev* 405; Chris Evans, Richard Krever & Peter Mellor, eds, *Tax Simplification* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015); Simon James, Adrian Sawyer & Tamer Budak, eds, *The Complexity of Tax Simplification: Experiences from around the World* (Basingstoke, UK: Palgrave Macmillan, 2016).

ideas that the complexity of income tax has generated, the *Income Tax Act* never seems to get simpler.<sup>3</sup> A glance at a library's shelf of old tax statutes makes this point in a compelling, if crude, way. A 1949–1950 edition of the *Income Tax Act*—including regulations, an index, a table of contents, a table of concordance, tax treaties, and the English text of the *ITA* with annotations—runs to 296 pages.<sup>4</sup> Ten years later, the same publisher and editor were putting out an annotated *ITA* that occupied 514 pages.<sup>5</sup> By 1970, it had grown to 910 pages and then to 1231 pages in 1980.<sup>6</sup> By 1990, the publisher had increased the size of the pages and the annotated *ITA* had grown to 1521 pages and added a half-dozen contributing editors to its masthead.<sup>7</sup> The 2000 edition comprised 2654 pages, at which point the length of these annotated *ITAs* appears to have stabilized somewhat; the 2015 edition had 2491 pages (though again the size of the pages had grown).<sup>8</sup>

Scholars generally agree that, all else being equal, simplicity should be preferred to complexity. However, what complexity means and why we should prefer simplicity are not always clear. In this chapter, I begin by reviewing the scholarship on legal complexity in general and tax complexity specifically to come to a working understanding of complexity in the tax system. In contrast to some of the work that

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<sup>3</sup> *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*].

<sup>4</sup> H Heward Stikeman, ed, *Income Tax Act Annotated* (Toronto: Richard De Boo, 1949).

<sup>5</sup> H Heward Stikeman, ed, *Income Tax Act Annotated* (Toronto: Richard De Boo, 1959).

<sup>6</sup> H Heward Stikeman, ed, *Income Tax Act Annotated* (Toronto: Richard De Boo, 1970); H Heward Stikeman, ed, *Income Tax Act Annotated*, 10th Tax Reform ed (Toronto: Richard De Boo, 1979).

<sup>7</sup> H Heward Stikeman et al, eds, *Income Tax Act Annotated*, 19th ed (Toronto: Richard De Boo, 1990).

<sup>8</sup> Richard W Pound et al, eds, *Stikeman Income Tax Act Annotated*, 29th ed (Scarborough, ON: Carswell, 2000); Richard W Pound et al, eds, *Stikeman Income Tax Act Annotated*, 57th ed (Toronto: Carswell, 2015).

has been done around tax complexity, I argue that complexity cannot be reduced to the cost of administering the tax system.

Next, I consider the effects of complexity. While little can be said empirically about levels of complexity in various legal systems and the effects of increased complexity, the literature is replete with plausible, common-sense accounts of the effects of legal and tax complexity. I review the literature discussing the effects of tax complexity, including arguments that simplicity is not worth pursuing. Much of this literature takes the posture of economic analysis of law or uses the traditional tax policy framework derived from economics. When looked at through the access to justice lens, I argue, the concerns about complexity's potential ill effects are magnified and the arguments against valuing simplicity accordingly fade.

With this understanding of complexity and the impetus toward simplification in the tax system, I turn in chapter 6 to argue against those that say simplification is impossible, and I put forward a framework that can help guide simplification-minded law reform.

## II. WHAT IS LEGAL COMPLEXITY?

Legal complexity—and complaints about it—are nothing new.<sup>9</sup> In the common law tradition, simplification seems to have been among the promises of law reform,

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<sup>9</sup> Indeed, when commentators and politicians today seek to denounce the complexity of a legal regime, they frequently compare it to the *Code of Justinian* with the epithet “Byzantine”. See, for example: House of Commons Debates, 33rd Parl, 1st Sess, Vol VI (18 November 1985) at 8550 (Barbara Jean McDougall) (“We also promised to dismantle the Byzantine system of oil-pricing controls”); *House of Commons Debates*, 36th Parl, 1st Sess, No 142 (4 Nov 1998) at 9862 (Jason Kenney) (“I would much prefer to completely overhaul the Byzantine, 1,300 page Income Tax Act which we have constructed in this

and codification efforts in particular, at least as far back as the seventeenth century.<sup>10</sup> In Canada, the drafting of the 1866 *Civil Code of Lower Canada* was meant as a way of rendering a complex body of law more accessible.<sup>11</sup>

Discussions of legal complexity generally assume that simpler legal regimes are preferable to complex ones. However, my claim in this chapter is not merely that simplicity is a virtue of its own, but that legal complexity raises access to justice concerns. Accordingly, this chapter first needs to explain what is meant by legal complexity and what the effects of legal complexity are. In reviewing the existing scholarship on this topic, I look at discussions of legal complexity broadly as well as those that have attacked and defended complexity in the tax system specifically.

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parliament over the past 80 years.”); *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 031 (11 March 2016) at 1762 (John McKay) (“Regrettably, the previous government left behind a procurement process that is so Byzantine as to defy anyone trying to get major procurements through.”).

<sup>10</sup> On seventeenth century law reform efforts, see: Barbara Shapiro, “Law Reform in Seventeenth Century England” (1975) 19 *Am J Legal Hist* 280; Barbara Shapiro, “Codification of the Laws in Seventeenth Century England” (1974) 1974 *Wis L Rev* 428. On the late nineteenth century push toward codification of commercial law, see: Roy Goode, “The Codification of Commercial Law” (1988) 14 *Monash UL Rev* 135; Robert B Ferguson, “Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes” (1977) 4:1 *Brit J L & Soc* 18; Aubrey L Diamond, “Codification of the Law of Contract” (1968) 31:4 *Mod L Rev* 361.

<sup>11</sup> John EC Brierley & Roderick A Macdonald, eds, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 25, reporting that “a technical reordering of a complex body of norms that was intended to make this private law more accessible in both its language and substance to legal professionals” was among the primary goals of the 1866 codification. In France, the goals of codification were more encompassing and utopian. Along with statist and nationalist goals of the French Revolution, the aim was “to state the law clearly and in a straightforward fashion, so that ordinary citizens could read the law and understand what their rights and obligations were.” John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed (Stanford, Cal: Stanford University Press, 2007) at 29. On the ideas animating European codification generally, including improved knowledge of the law, see: Jacques Vanderlinden, *Le concept de code en Europe occidentale du XIIIe au XIXe siècle: Essai de définition*. (Brussels: Éditions de l’Institut de sociologie de l’Université libre de Bruxelles, 1967).

## A. TYPOLOGIES OF LEGAL COMPLEXITY

A frequently cited definition of legal complexity was articulated by Peter Schuck:

I define a legal system as complex to the extent that its rules, processes, institutions, and supporting culture possess four features: density, technicality, differentiation, and indeterminacy or uncertainty.<sup>12</sup>

Schuck went on to acknowledge that complexity might easily be defined in other terms, including from the legal subject's point of view, rather than at looking at the system objectively. However, Schuck wrote, "I suspect that the four qualities on which I focus capture most, if not all, of what people would mean if they were to think about legal complexity."<sup>13</sup> The definition, then, is an objective one that attempts to describe a common sense understanding of complexity, reflecting most of the concerns that people have when they talk about legal systems being complex.

Density and technicality, in Schuck's definition, are mostly features of legal rules. Dense rules are numerous and precise, aiming to control a broad range of conduct in great detail. Technical rules are difficult to understand and apply and will often require sophisticated expertise. They make fine distinctions and use jargon.<sup>14</sup>

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<sup>12</sup> Peter H Schuck, "Legal Complexity: Some Causes, Consequences, and Cures" (1992) 42:1 Duke LJ 1 at 3.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid* at 3-4.

By differentiation, Schuck means that there are pluralities of decision structures that draw upon different sources of legitimacy, use different processes, and so on. In Canada, we can imagine a single construction project that might be subject to municipal zoning laws, provincial building codes, federal environmental assessment processes, privately governed industry standards, common law contract, tort, and property rules, and so on. These different legal regimes have different sources of legitimacy and different decision making processes, and implicate different legal institutions. Their rules will overlap and may even conflict.

Finally, for Schuck, indeterminacy or uncertainty is a feature both of legal rules and of processes or institutions. “Indeterminate rules,” Schuck writes, “are usually open-textured, flexible, multi-factored, and fluid... Turning on diverse mixtures of fact and policy, indeterminate rules tend to be costly to apply and their outcomes hard to predict.”<sup>15</sup> When lawmakers attempt to reduce indeterminacy in their legal system, they often do so in ways that increase the density, technicality, or differentiation of the system, which, counterproductively, lead to indeterminacy. Thus, indeterminacy is both an element and a consequence of complexity.

Looking specifically at tax law, many tax scholars have made use of the typology suggested by David Bradford in 1986.<sup>16</sup> Bradford distinguished between rule complexity, transactional complexity, and compliance complexity, with these

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<sup>15</sup> *Ibid* at 4, drawing on HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 124–132.

<sup>16</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 266–267; Bradford’s typology was been used in, among others: Dean, *supra* note 2; DJ Sherbaniuk, “Tax Simplification—Can Anything Be Done About It?” (1989) 40 *Can Tax Found* 3:1.

definitions focused more on the experience of the taxpayer than on the legal system itself. Rule complexity refers to “the problem of interpreting the written and unwritten rules.”<sup>17</sup> Rule complexity is something like Schuck’s technicality and density, but Bradford shifts the focus to the taxpayer rather than holding an objective view of the system. Building on Bradford’s work, Edward McCaffrey replaces rule complexity with technical complexity, which relates mainly to the difficulty of reading and understanding a particular section in isolation from the rest of the tax code.<sup>18</sup>

Transactional complexity refers “to the problems faced by taxpayers in organizing their affairs so as to minimize their taxes within the framework of the rules.”<sup>19</sup> Calling this type “structural complexity,” McCaffrey clarifies that it poses two related difficulties: first, transaction costs for taxpayers may be increased by uncertainty as to how the rules will be applied by the tax authorities or the courts; second, transactions may be complicated by the fact that the rules can be manipulated to minimize tax liability.<sup>20</sup> This structural or transactional complexity is more dynamic and involves problems of interpreting and applying the code as a whole and restructuring economic dealings to minimize tax liability.

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<sup>17</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 267.

<sup>18</sup> McCaffery, *supra* note 2 at 1271; see also Sherbaniuk, *supra* note 16.

<sup>19</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 267.

<sup>20</sup> McCaffery, *supra* note 2 at 1271.

Compliance complexity refers to “the problems faced by the taxpayer in keeping records, choosing forms, making necessary calculations, and so on.”<sup>21</sup> Separate from the problems of interpreting individual rules and working within the systems of rules are the procedural burdens of complying with the rules. As I explain further below, in my view much of what is loosely gathered under the umbrella of “compliance complexity” is not complexity at all. While the cost of compliance (in terms of both time and money) with any particular set of rules should certainly be considered, these costs are distinct from the access to justice problems raised by complexity.

Bradford also suggested that attempting to decrease one type of complexity risked increasing another. In Bradford’s account, transactional complexity arises in situations where economically equivalent activities are given different tax treatment, and the solution for this is often more precise rules.<sup>22</sup> Thus, a decrease in transactional complexity is accompanied by an increase in rule complexity. Bradford himself does not indicate that there is no hope for simplicity, though the thrust of this analysis risks leading there. That is, it risks a sense that simplicity is impossible, that the tax system is subject to an ironclad law of conservation of complexity, or worse yet, a law of decreasing simplicity, akin to the first and second laws of thermodynamics. In chapter 6, I argue that simplification of an income tax is possible. For the purposes of the present review, I simply note that neither Bradford nor Shuck see complexity as

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<sup>21</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 266–267. See also McCaffery, *supra* note 2 at 1272.

<sup>22</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 267.



irremediable, and that there is reason to doubt that increased rule complexity is the only or best response to transactional complexity.<sup>23</sup>

Deborah Paul, who wrote with the benefit of both Bradford's and Schuck's earlier work, offered a different typology of complexity, again comprising three types that she found in the American *Internal Revenue Code*.<sup>24</sup> As in Schuck's discussion of complexity, Paul takes a more objective view of the system. The first type of complexity in her model is complication, which overlaps with Schuck's discussion of density and technicality.<sup>25</sup> Tax law relies on a great, and seeming increasing, number of detailed rules.

The second of Paul's types of complexity is intractability, which is to say that tax law relies on uncertain concepts. This type of complexity seems to be the dominant incarnation of Schuck's indeterminacy that appears in a tax system.<sup>26</sup> A tax regime that was uncomplicated might still be complex if it relied on concepts whose content was difficult to determine. For example, a tax on income might be expressed in one sentence in a statute. Such a tax would be uncomplicated, but would still be complex because of the inherent difficulty in the concept of income.<sup>27</sup>

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<sup>23</sup> Bittker, "Tax Reform and Tax Simplification", *supra* note 2 at 2; Schuck, *supra* note 12 at 4.

<sup>24</sup> Paul, *supra* note 2. Also see Bradford's response to Paul: David F Bradford, "What's in a Name? Income, Consumption, and the Sources of Tax Complexity Reply" (1997) 76 NCL Rev 223.

<sup>25</sup> Paul sees Schuck's "density" as a combination of her "complication" with attention to the scope of a legal regime. She also sees her three types of complexity as contributing to technicality. See: Paul, *supra* note 2.

<sup>26</sup> Paul herself sees indeterminacy as arising from intractability and incoherence. See: *Ibid*.

<sup>27</sup> *Ibid* at 159-160.

The third type of complexity in Paul’s model is incoherence. Paul writes, “[a] tax regime’s level of coherence depends on the degree to which its purposes are expressed in, and served by, the legal authorities.”<sup>28</sup> Here, Paul describes a type of complexity that is in some ways similar to Schuck’s differentiation, but with notable differences. In discussing differentiation, Schuck referred to the different overlapping sources of law, legal processes, and decision structures, one result of which may be incoherence. Paul’s incoherence refers not to what would normally be considered to be a plurality of legal systems, but to logical inconsistencies within a single (purportedly unified) tax system.

Paul also points out that a tax regime may lack global coherence but have local coherence. That is, while the tax regime as a whole may not be able to achieve coherence as it needs to balance too many competing goals, sub-parts of the regime may reflect a logical framework that enables practitioners to reason about legal consequences within that particular sub-field.<sup>29</sup> For example, a regime for a tax on corporate profits may have a logical consistency internal to itself but logically conflict with the broader income tax system.

## B. COMPLEXITY THEORY AND LEGAL COMPLEXITY

Recently, legal scholars have started to draw insights from complexity theory to examine legal complexity. Complexity theory is an interdisciplinary field that

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<sup>28</sup> *Ibid* at 161.

<sup>29</sup> *Ibid* at 162.

developed from systems theory.<sup>30</sup> In laying out complexity on this basis, Richard Posner describes complexity as resulting from “complicated interconnections or interactions—in other words when it is a question about a system rather than a monad.” Complexity in the systems sense can be distinguished from difficulty or complicatedness.<sup>31</sup>

J.B. Ruhl and Daniel Martin Katz explain the distinction this way:

To be sure, the complicatedness of the law should not be discounted. Law can be vast, dense, vague, and intricate, making compliance a daunting undertaking. Complexity... is getting at something different. Even in a world where all individual rules were perfectly clear and cost-efficient, knowing how to comply would still be burdensome. An *effort burden* would be associated with learning all the rules, and an *information burden* would be associated with compiling the evidence needed to test for and comply with the rules. But beyond that, the *system* of rules could be difficult to navigate and predict because of interactions between the multitude of rules and institutions administering them.<sup>32</sup>

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<sup>30</sup> For an accessible introduction to complexity theory, see: Neil F Johnson, *Simply Complexity: A Clear Guide to Complexity Theory* (Oxford: Oneworld, 2009).

<sup>31</sup> Richard A Posner, *Reflections on Judging* (Cambridge, Mass: Harvard University Press, 2013) at 54–55.

<sup>32</sup> JB Ruhl & Daniel Martin Katz, “Measuring, Monitoring, and Managing Legal Complexity” (2015) 101 Iowa L Rev 191 at 201 [emphasis in original].

For the purposes of the present project, there is no need to define complexity so as to exclude complicatedness. Nor is it necessary to resolve the question of whether the sociolegal system generally or the tax system specifically can be usefully modelled as a complex adaptive system or whether complexity theory can or should generate prescriptions for law reform.<sup>33</sup> When scholars, commentators in the media, and individual taxpayers complain about the complexity of the tax law, their complaints include Schuck's density and technicality of the rules—elements that render the system difficult or complicated, even if not complex in the systems theory sense of the word. Moreover, as I argue below, complexity and complicatedness create similar access to justice problems. Accordingly, for the purposes of the present project, I will take the common understanding of complexity to include complicatedness.

Still, two key insights of complexity theory are worth bearing in mind. First, reducing complicatedness—clarifying the rules, reducing the use of jargon, reducing density and technicality—may not reduce complexity (in the systems theory sense). Complexity theory has to do with the difficulty in understanding the system and predicting its outcomes because of the interactions between the parts; clarifying individual rules will not necessarily simplify these interactions. Second, to the degree

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<sup>33</sup> For the debate on these questions, see: JB Ruhl & Harold Ruhl Jr, "The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society" (1996) 30 UC Davis L Rev 405; Jeffrey Rudd, "J.B. Ruhl's Law-and-Society System: Burying Norms and Democracy under Complexity Theory's Foundation" (2004) 29 Wm & Mary Envtl L & Pol'y Rev 551.

that a system is complex (again, in the systems theory sense) it may difficult to predict the effect of removing components of the system.

### C. INTERNAL AND EXTERNAL COMPLEXITY OF LEGAL SYSTEMS

In addition to trying to define complexity and find more easily accessible proxies for it, the literature about legal complexity questions the degree to which legal complexity is epiphenomenal. While it appears that legal complexity is increasing, it may be that social complexity is increasing and legal complexity is keeping pace.

Schuck explains the hypothesis as follows: “Social complexity is growing remorselessly. Interdependencies increase. Cultures and markets fragment. Values and technologies change. Bureaucracies expand. Under these conditions, a denser, more intricate legal system may be both inevitable and desirable.”<sup>34</sup>

In *Reflections on Judging*, Richard Posner considers this question from the judge’s perspective. In Posner’s view, it is possible to analytically separate the complexity that is external to law from that which is internal. Economic systems may produce complex questions, as may political systems, ecological systems, and so on. For Posner, these are *external* to law. While judges must deal with questions related to complex biological systems, complex computer systems, complex economic systems, and so on, these must be taken as givens.<sup>35</sup> On the other hand, Posner writes, judges generate complexity (as do law clerks, legislators, and other actors in the legal system):

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<sup>34</sup> Schuck, *supra* note 12 at 18.

<sup>35</sup> Posner, *supra* note 31 at 55. While Posner’s reflects apply mostly to the role of judges, the observation can be extended to law generally.

Nothing outside law requires the Supreme Court to be overstuffed and produce increasingly complicated opinions, or requires a manual on legal-citation form to balloon to more than five hundred pages. Nothing outside law requires Justice Scalia to enumerate seventy canons of construction, fifty-seven of which he endorses and thirteen of which he rejects.<sup>36</sup>

Posner's framework helps by isolating and labelling the complexity that simplicity-minded law reformers can focus on and that which they can and should ignore. The division between internal and external complexity is not as clean as the framework suggests—internal legal complexity feeds social and economic complexity as legal subjects respond to developments in the law. However, the heuristic is still helpful and Posner makes a compelling case that at least some legal complexity is entirely generated within the legal system.

#### D. THE ILLUSORY SIMPLIFICATION OF A SAFE HARBOUR

In his book *Simple Rules for a Complex World*, Professor Richard A. Epstein agreed that Schuck's definition had "isolated most of the variables that we should regard as relevant," but was troubled by the fact that Schuck's definition did not seem to admit "any simple answer to the question of complexity."<sup>37</sup> In a drastically simplifying move, Epstein suggested that the analysis of complexity could turn solely

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<sup>36</sup> *Ibid* at 55–56.

<sup>37</sup> Richard A Epstein, *Simple Rules for a Complex World* (Cambridge, Mass: Harvard University Press, 1995) at 25.

on the cost of compliance and enforcement. To illustrate, Epstein took Schuck's paradigmatic example of a legal complexity, the rule against perpetuities. While the rule "represents an incredible labyrinth for those unwary people foolish enough to fall within its grasp," in practice American courts allow lawyers to avoid the rule's effects easily with a standard saving clause.<sup>38</sup> Since the rule against perpetuities can be avoided easily, there is little cost associated with enforcement or compliance, and so it should not be considered complex. Epstein takes the strongest version of this position, arguing that no rule that begins with "unless otherwise agreed" can be considered complex. And, so, in addition to using Schuck's definition, Epstein argues for a criterion of "pervasive application" as a *sine qua non* of legal complexity.<sup>39</sup>

In the access to justice framework, Epstein's safe harbour simplification cannot be fully accepted.<sup>40</sup> Moreover, the experience in tax law has been that options or elections which are intended to simplify may actually complicate the tax system.

For Epstein, the only complexity that we need to be concerned with is that which implicates government control. A private contract is never complex by Epstein's definition (regardless of how dense, technical, and uncertain it is) because the simplifying option of not signing the contract was available. Articles of incorporation and corporate by-laws can never be complex for the same reason. This

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<sup>38</sup> *Ibid* at 26. It is questionable whether avoiding the rule against perpetuities is as simple as Epstein portrays: David M Becker, "Tailoring Perpetuities Provisions to Avoid Problems" (1995) 9 Prob & Prop 10.

<sup>39</sup> Epstein, *supra* note 37 at 29.

<sup>40</sup> For a more thorough response to Epstein than is offered here, see: Eric W Orts, "Simple Rules and the Perils of Reductionist Legal Thought" (1995) 75 BUL Rev 1441.

reflects Epstein's acknowledged libertarian perspective on law and legal complexity.<sup>41</sup> However, the pluralist access to justice perspective sees no reason to limit the analysis to state action. The norms generated in private settings hold real sway in people's lives, regardless of whether and how state action is implicated. Justice concerns, and access to justice concerns, are therefore engaged. A complex lease agreement, corporate charter, or set of condominium bylaws may have at least as great an impact as a complex provincial system for the regulation of apiaries.

Of course, the tax system does involve government action, so the more specific question of whether options or elections in the tax system can have the simplifying effect that Epstein describes remains. Senator Russell B. Long proposed an optional simplified income tax in the United States in the 1960s.<sup>42</sup> The proposal would have allowed individual taxpayers the option to be taxed on a "simplified taxable income." This simplified income would have fully included capital gains and other exempt income and would have disallowed nearly all personal deductions. Taxpayers who elected to use this broader definition of income would have the advantage of lower tax rates.

In Bradford's terms, this proposal would at least have given taxpayers the option of reduced compliance complexity. It would reduce the need to keep records in order to claim deductions and exemptions, and simplify the process of calculating income. However, as Boris Bittker pointed out in evaluating the proposal, making it

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<sup>41</sup> Epstein, *supra* note 37 at 30 (acknowledging Epstein's "small-state, libertarian instincts").

<sup>42</sup> Charles H Traeger, "Simplified Taxable Income Note" (1966) 19 Stan L Rev 593.



optional undermined the simplification goals in a number of ways.<sup>43</sup> First, taxpayers would have the incentive to calculate their income under both the regular and simplified methods in order to minimize their tax liability, clawing back some of the reduction of compliance complexity. Second, the option would introduce new tax planning opportunities—arranging to have capital gains realized in years in which the election was not taken, for example—thus increasing what would later be called transactional or structural complexity.

Third, even if it could be admitted that some individual taxpayers would see their individual compliance complexity reduced (as would be the case for taxpayers who chose it), none of the complexity in the tax system as a whole would have been removed. None of the technicality, density, or ambiguity in the system would be reduced by the introduction of the optional safe harbour. To return to the example used by Schuck and contested by Epstein: even if the rule against perpetuities can be avoided by any competent lawyer, it remains complex. It remains a feature of the legal system with which lawyers and law students are forced to grapple. It remains a barrier to the ability of non-lawyers to plan their own lives and contribute to lawmaking processes. None of this is to say that the complexity cannot be justified; only that complexity does not necessarily disappear when it becomes avoidable.

As a second example, consider the “check-the-box” regulations introduced in the United States in the 1990s to simplify the rules governing the classification of business entities. The prior rules relied on objective factors to determine whether an

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<sup>43</sup> Boris I Bittker, “An Optional Simplified Income Tax” (1965) 21 Tax L Rev 1.

unincorporated entity would be treated as a partnership or a corporation for tax purposes, while the new rules allow entities to choose their classification. Looking at the results twenty years later, Steven Dean concluded that the reform had some simplifying effects on the law.<sup>44</sup> However, he argued that the simplification was accomplished mostly by replacing the complex law that was in place prior to the innovation of the check-the-box election, and that a mandatory (rather than elective) regime would have accomplished this as well.

Moreover, the election itself introduced significant new complexity into the tax system. Again, taxpayers choosing their tax treatment were driven to fully consider both paths. Complex dynamics emerged around the interactions between the check-the-box regulations and other tax rules. As Dean wrote: “The combination of [tax law’s] intricacy and the fact that the corporation/partnership distinction is close to the center of the spider’s web that is the income tax makes it impossible to trace all of the questions raised by the creation of the check-the-box election.”<sup>45</sup> Dean labelled this “attractive complexity”, because taxpayers do not generally complain about complexity that benefits them,<sup>46</sup> but in both economic and access to justice terms, attractive complexity retains all of the drawbacks of complexity.

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<sup>44</sup> Dean, *supra* note 2.

<sup>45</sup> *Ibid* at 455.

<sup>46</sup> Dean, *supra* note 2.

## E. AN ACCESS-TO-JUSTICE CENTRED TYPOLOGY OF TAX COMPLEXITY

### 1) COMPLICATION AND CONCEPTUAL COMPLEXITY

To conclude this review of the literature around legal complexity in general and tax complexity in particular, I will outline the terminology for complexity that I will use going forward, and, argue that some of what has been included under the heading of “tax complexity” should not be. For the purposes of this project, I will adopt a typology of complexity with two main components: complication and conceptual complexity. Consistent with the access to justice framing, my focus will be less on issues of predicting judicial or administrative decisions and more on issues of understanding and engaging with the norms in the tax system.

Complication, as I will use the term, refers to the intricacy of the system. It includes both the level of detail of the rules and the number of rules.<sup>47</sup> Those two factors combine to create complicated interactions between detailed rules. I also take complication to include the complex expression of these rules. In this category, I am including what Paul refers to as complication and what Schuck refers to as density and technicality.

What I will call conceptual complexity overlaps with Paul’s discussion of intractability. Tax systems make use of many concepts which are themselves complex or difficult to understand. As with complication, the conceptual complexity of the tax system may or may not be necessary or justified. The key point for present purposes is

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<sup>47</sup> Similar to Paul’s notion of “complication”, discussed above. See Paul, *supra* note 2 at 161.

that conceptual complexity makes the tax system more difficult to understand and engage with, and it falls in a different category from complication.

Putting forward a categorization of complexity with only two main components has the benefit of making the problem relatively simple. These two categories capture most of what is discussed in the conversation around tax complexity (indeed, I suspect that many of the public complaints refer primarily to complication). They also capture most or all of the troublesome notion that reducing complexity in one area increases complexity in another.<sup>48</sup> That is, this categorization scheme allows for the possibility that reducing complication would increase the impact of conceptual complexity or that a response to an instance of conceptual complexity might be to flesh out the concept in a series of complicated rules. Like any heuristic, it risks obscuring issues—for example, the category of complication includes several different types of complication—but it will be useful going forward.

## 2) EXCLUDING INCOHERENCE AND ADMINISTRATIVE BURDEN

I have left out of this system Paul's category of incoherence, though not because incoherence in tax law is unimportant. Incoherence may be the consequence of complexity, as drafters inadvertently introduce incoherence into the system because of its complication or as a multiplicity of complex concepts clash in some cases. Incoherence in the design of the tax system may also introduce complexity, as the system's designers draft complicated rules in an attempt to pursue a multiplicity

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<sup>48</sup> Schuck, *supra* note 12 at 4; Bradford, *Untangling the Income Tax*, *supra* note 2 at 267; R George Wright, "The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex" (1999) 27 Fla St UL Rev 715 at 716.

of conflicting goals. However, incoherence may also be relatively simple and straightforward, and so, while incoherence and complexity are often linked in practice, I do not view incoherence as an independent type of complexity.

While this typology captures most of what is usually discussed in the tax complexity literature, the issues often included under the heading of “compliance complexity” have been left out. Bradford defines compliance complexity as “referring to the problems faced by the taxpayer in keeping records, choosing forms, making necessary calculations, and so on.”<sup>49</sup> Similarly, McCaffrey refers to the “variety of record-keeping and form-completing tasks a taxpayer must perform in order to comply with the tax laws.”<sup>50</sup> In my view, these tasks are not necessarily complex, nor are they necessarily reflective of complexity.

Of course, the rules around record-keeping, doing calculations, and completing forms may be complicated or conceptually complex.<sup>51</sup> However, keeping a separate category of “compliance complexity” may lend itself to the view that complexity is best thought of as the overall cost of collecting taxes.<sup>52</sup> The overall cost may include the time and money spent by taxpayers in complying, the full budget of

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<sup>49</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 266–267.

<sup>50</sup> McCaffery, *supra* note 2 at 1272.

<sup>51</sup> On this issue in the United States, see: Deborah H Schenk, “Simplification for Individual Taxpayers: Problems and Proposals” (1989) 45 *Tax L Rev* 121 at 166–167.

<sup>52</sup> For this view, see: Joel Slemrod, “Why’d You Have to Go and Make Things So Complicated?” in Chris Evans, Richard Krever & Peter Mellor, eds, *Tax Simplification* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015) 1 at 1; Sidney I Roberts et al, “A Report on Complexity and the Income Tax” (1971) 27 *Tax L Rev* 325.

the tax authority in collection, administration, and enforcement, and any costs imposed on third parties in the process as well.

While the work that needs to be done to comply with, administer, and enforce the law should be considered in the process of designing and implementing law, this work is not necessarily complex in itself or reflective of complexity. For example, a law that required individuals to say “hello” to each other person they passed on the street would entail a significant compliance burden. The burden would be inequitably distributed, falling harder on introverts and those with speech disabilities. The law may be difficult and costly to enforce. For all its problems, however, the law need not be complex. It could be expressed clearly and concisely with no difficult concepts implicated. Where the law is straightforward and understandable, it confuses the analysis to include the compliance burden in the analysis of complexity.

A less complex tax system may still entail significant administrative costs. For example, a flat rate real property tax might require that the tax collector spend significant resources on valuation and enforcement. These are significant administrative costs and should, of course, be considered in the choice of tax and the design of the system. However, they arise from the repetition of relatively straightforward activities, not from the complexity of the system. Similarly, an income tax that requires substantial record keeping and frequent reporting is imposing a significant cost on taxpayers. However, these costs do not necessarily indicate complexity. The record keeping obligation is not necessarily difficult to interpret, understand, or engage with, even if it is burdensome.

### III. LEGAL COMPLEXITY MAKES JUSTICE LESS ACCESSIBLE

Thus far, little has been said about the drawbacks of complexity. Scholars often have an intuitive sense that simplicity is to be preferred, and in some cases spend time elaborating negative consequences of complexity. In reviewing these discussions in this section my goal is to argue that complexity has negative consequences in the context of the tax system. More than that, however, I argue in this section that complexity can be usefully understood as an access to justice problem in the tax system and that the access to justice lens highlights concerns that traditional tax policy analysis often misses.

With a view of the tax system that sees tax law as imposed on the subjects by the central authority, legal complexity raises some problems. It may waste resources, for example, in tax collection, in tax compliance, and by creating opportunities for socially unproductive tax planning. It may reduce tax compliance if taxpayers are unable to find or understand their obligations under the law. It may undercut compliance by lowering tax morale.<sup>53</sup>

Reframed as access to justice issues, however, these concerns are expanded. Complexity does make it more difficult and expensive for legal subjects to fulfill their obligations. But, more than that, complexity makes it more difficult for these citizens to play their full role as agents within the system, instead limiting them to the role of subjects who ought to comply. It makes it more difficult for them to plan their affairs

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<sup>53</sup> For more on tax morale and its link to tax compliance, see: Benno Torgler, *Tax Compliance and Tax Morale: A Theoretical and Empirical Analysis* (Cheltenham, UK: Edward Elgar, 2007).

guided by rules, to play a role in resolving disputes, and to exercise agency in the processes where law is made and interpreted.

#### A. TRADITIONAL ACCOUNTS OF PROBLEMS POSED BY LEGAL COMPLEXITY

In this section I briefly explain the reasons that scholars have concerned themselves with legal complexity in general and tax complexity in particular. In the literature, these have frequently been framed as economic costs, and scholars have explained the various ways in which legal complexity imposes these costs. In tax law in particular, complexity often concerns legal scholars because it wastes resources.<sup>54</sup> It increases the cost of complying with the law, of administering the law, and of enforcing the law. Society's resources are devoted to managing this complexity that would more usefully be applied elsewhere. In the next section, I argue that these concerns around complexity might also be usefully thought of as access to justice concerns.

#### I) COMPLIANCE, ENFORCEMENT AND ADMINISTRATIVE COSTS OF COMPLEXITY

The first and perhaps most intuitive cost of increased complexity is associated with the difficulty of complying with complicated rules. When rule complexity is increased—when rules become more dense, technical, or complicated—it becomes more difficult for the legal subjects to discover, interpret, and apply the rules to their

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<sup>54</sup> Henry C Simons, *Federal Tax Reform* (Chicago: University of Chicago Press, 1950) at 28; Werner Z Hirsch, "Reducing Law's Uncertainty and Complexity" (1973) 21 UCLA L Rev 1233; Schuck, *supra* note 12 at 18–20; Joel Slemrod & Jon Bakija, *Taxing Ourselves: A Citizen's Guide to the Great Debate over Tax Reform* (Cambridge, Mass: MIT Press, 1996) at 2–3; Dean, *supra* note 2 at 410, 416.



own situations. The legal subjects spend more time or money complying with the more complicated rule.

Those charged with the administration of the system will face similar difficulties. The more complicated set of rules will be more difficult to administer and enforce, costing yet more time and money. Thinking about the Canadian tax system, a more complicated rule requires that the CRA produce more detailed guidance and longer forms to deal with more exceptions and intricate interactions. Processing, auditing, and appeals may take more time and expertise.

For at least two reasons, the relationship between complication and administrative and compliance costs should not be overstated. First, the increasing availability of professional assistance in compliance, free assistance provided by volunteers, and software to facilitate compliance all ameliorate this situation. Further, as Professor Samuel Donaldson pointed out, the data in the United States lend themselves better to a different interpretation. These compliance, administration, and enforcement costs are perhaps more linked to frequent change than to increased complication.<sup>55</sup> Even a change that reduces complication will require that auditors be retrained, forms modified, computer systems changed, and taxpayers educated. Indeed, a more stable tax code would be more effective at reducing these costs than a program of progressive, incremental, simplification-oriented reforms.

While we should not overstate the effect of complication on administrative cost, it is worth remembering that frequent change is both a component and a

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<sup>55</sup> Samuel A Donaldson, "The Easy Case against Tax Simplification" (2002) 22 Va Tax Rev 645 at 703.

symptom of complexity.<sup>56</sup> Frequency of change in the tax code itself can be thought of as a type of complication. In most cases, the new rules will exist alongside the old rules (which will continue to be applied for previous tax years), adding intricacy as the new and old versions of the rule overlap. Frequency of change may also be a symptom of conceptual complexity, as the rules are added to delineate the content or boundaries of a difficult concept. Moreover, in a process that is explored further in chapter 6, complication can create tax planning strategies, which in turn leads the legislator to add new rules, creating further complexity.

## 2) COSTS ASSOCIATED WITH BEHAVIOURAL RESPONSES

For a number of reasons, legal subjects' responses to complexity have been thought to impose costs on society. These include the costs of non-compliance, the cost of an increased volume of disputes, transactions costs, and the costs of what is sometimes called "creative compliance."<sup>57</sup> Discussions of these costs are often accompanied by a lament for the social opportunity cost of devoting so many of our social resources to the study and management of legal complexity. Here, I briefly explain the discussion around these costs of complexity.

Increased complication may cause some legal subjects to decide to ignore the rule rather than undertake the task of understanding and complying.<sup>58</sup> In this case,

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<sup>56</sup> Indeed, Donaldson himself includes frequent change in his definition of tax complexity: *ibid* at 733–734.

<sup>57</sup> Sol Picciotto, "Constructing Compliance: Game Playing, Tax Law, and the Regulatory State" (2007) 29:1 Law & Pol'y 11.

<sup>58</sup> Kaplow, for example, includes this possibility in his model: Louis Kaplow, "A Model of the Optimal Complexity of Legal Rules" (1995) 11 JL Econ & Org 150 at 151.

society either bears the cost of non-compliance with the rule or further increases in the cost of enforcement. At least two responses can be given to this concern. First, as noted above, the increasing availability of software and free assistance in filing tax returns can be expected to reduce this effect. Second, the non-compliance in these situations may work in a variety of ways and may lead to either underpayment or overpayment of tax. While some taxpayers may fail to comply by not reporting a taxable gain, others will fail to claim all of the credits and deductions to which they are entitled. These cases are not usually thought of as non-compliance, though they do impose a social cost (after all, the policy goals of the tax system are not being met); however, there is surely no added cost of administration or enforcement in these situations.

Complication and conceptual complexity may contribute to uncertainty, which in turn gives rise to disputes and the costs involved in resolving them. However, Donaldson looked for whether the American data could support such an interpretation and found that it could not. The number of litigated disputes dropped between 1990 and 1999, perhaps because of reduced audit rates or various compromise programs.<sup>59</sup> Indeed, as I noted above, we should not presume that complexity or the resulting uncertainty in the tax system makes taxpayers more likely to dispute their assessments. It seems at least possible that complexity dissuades potential tax appellants from engaging in the process at all due to the steep learning curve involved in presenting a reasoned argument to an appeals officer or the court.

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<sup>59</sup> Donaldson, *supra* note 55 at 704.

In addition to the costs of administration, enforcement, and compliance, complexity increases transaction costs.<sup>60</sup> The legal subjects will incur these costs in bargaining and planning in a more complex legal system, whether it is more complicated or more conceptually complex. Transactions will require legal assistance that otherwise would not or will require more specialized lawyers than they otherwise would. Complication in the tax system in particular provides strong incentives to spend money restructuring transactions to have similar or identical economic effects with more favourable tax treatment. In general, these added transaction costs are a straightforward example of an economic deadweight loss.

We may add to these the cost of creative compliance.<sup>61</sup> Discussed further in chapter 6, creative compliance is technical compliance with the rule that cuts against the policy goal the rule is meant to achieve. In addition to the transaction costs associated with it, creative compliance often leads to law reform, which may also be more difficult, more time-consuming and more expensive where the law is complex.<sup>62</sup>

As professionals crop up to manage complexity on all sides of the system, a kind of social opportunity cost is incurred as well. In 1950, Henry Simons wrote that the American tax system was “insufferably complicated” and that “[i]f it is not simplified, half of the population may have to become tax lawyers and accountants.”<sup>63</sup> Talented and creative people devote their efforts to helping legal subjects comply with

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<sup>60</sup> Schuck, *supra* note 12 at 18–20; McCaffery, *supra* note 2 at 1271.

<sup>61</sup> See Picciotto, *supra* note 57.

<sup>62</sup> Schuck, *supra* note 12 at 18, writes that complex law “tends to be more ... more difficult for lawmakers to formulate and agree upon, and more difficult to reform once established.”

<sup>63</sup> Simons, *supra* note 54 at 28.

the complex rules, engaging in creative compliance (or outright evasion), administering the system, enforcing the rules, reforming the system, and so on. It is often argued that these are people whose time and talents would be better put to more socially productive uses—as playwrights, inventors, teachers, or doctors.<sup>64</sup>

In addition to being inefficient, these complexity costs are often inequitable.<sup>65</sup> Simply put, “[i]n order to cope with [a complex] legal system resources are required that are less available to the poor than the rich.”<sup>66</sup> The poor will have less access to the professional services needed to help them comply with complex laws or to bargain or plan around complex rules. Thus, complexity’s costs will bear more heavily on them than on the rich. On the other side of that coin, the rich are more likely to benefit from creative compliance and attractive complexity.<sup>67</sup>

### 3) GOVERNANCE COSTS

In addition to the costs traditionally considered by legal scholars looking at complexity, Schuck added two. The first he terms “governance costs.”<sup>68</sup> As a legal system becomes more complex, adding new rules becomes more difficult. Gaining

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<sup>64</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 266. Whether this argument, when made in the tax context, assumes too low a view of tax law or too high a view of tax lawyers is a question I leave for another day.

<sup>65</sup> Hirsch, *supra* note 54 at 1246–1247; Schuck, *supra* note 12 at 19.

<sup>66</sup> Hirsch, *supra* note 54 at 1246.

<sup>67</sup> Of course, not every example of complexity will benefit the rich. Dean, in his discussion of attractive complexity, gives the example of the American Earned Income Tax Credit, a complex measure that benefits low income taxpayers: Dean, *supra* note 2 at 416. In the main, however, it can be expected that attractive complexity will benefit those with the resources to hire professionals to take advantage of it and the power to lobby to enact and defend it.

<sup>68</sup> Schuck, *supra* note 12 at 20–22.

agreement on a new rule's formulation becomes more difficult and lawmakers become hesitant to make any changes to the existing complex structure. As a result, implementing any new policy or solving any social challenge through the lawmaking process becomes more difficult. In short, governance becomes more costly, more difficult, and, in the extreme case, impossible.

It has also been argued that this effect leads to further complication. Here, the argument is that it is not only legal subjects who have difficulty navigating legal complexity—lawmakers do as well. Looking specifically at tax, McCaffrey explains that “[j]ust as complexity ... causes taxpayers to lose themselves in the maze, it also creates risks that the tax process, by working only in narrowly defined areas, will make the overall maze more intricate.”<sup>69</sup> Moreover, lawmakers may be wise to tinker only in small ways and only tentatively, as the lessons of complexity theory indicate that changes may produce unintended and unexpected effects in addition to the expected increases in complication.

#### 4) LOSS OF FAITH IN THE SYSTEM

Finally, Schuck also added what he called “delegitimation costs”. Schuck wrote, “if the complex legal landscape contains many pitfalls for the governors, it is *terra incognita* for the governed.” Because complex rules “will often be opaque to the common mind, common sense, common experience, and even common morality” and because the complexity of the legal regime tends to benefit some and disadvantage others, “[p]rofound cynicism and alienation from the legal system may

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<sup>69</sup> McCaffery, *supra* note 2 at 1277.

result.”<sup>70</sup> This cynicism may result even if direct compliance with the rules for many people is relatively simple.<sup>71</sup>

Schuck admits that the costs created by delegitimation are difficult to measure and difficult to conclusively connect to legal complexity. In the tax context, there is strong evidence that compliance depends on a favourable attitude toward the tax system and on the perception that the system is fair.<sup>72</sup> We may question how complexity plays into perceptions of the system’s fairness, but there is at least some evidence establishing a link between complexity and non-compliance, both in the tax system and elsewhere.<sup>73</sup>

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<sup>70</sup> Schuck, *supra* note 12 at 22–23.

<sup>71</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 4, writes, “The common man needs no more to understand the complicated tax law than to understand the complicated laws regulating banks. However, just as stories about \$500 hammers weaken public confidence in the nation’s defense system, stories about millionaires” and multinational corporations’ taking advantage of special provisions of the law to eliminate their tax liabilities undermine support for the tax system.”; For recent iterations of this complaint, see: Robert W Wood, “Excuse Me Apple, Google, Starbucks & H-P: IRS Wants to Tax Stateless Income”, *Forbes* (6 August 2013), online: <[www.forbes.com/sites/robertwood/2013/08/06/excuse-me-apple-google-starbucks-h-p-irs-wants-to-tax-stateless-income/](http://www.forbes.com/sites/robertwood/2013/08/06/excuse-me-apple-google-starbucks-h-p-irs-wants-to-tax-stateless-income/)> [perma.cc/VPB6-PCFB] (quoting the U.S. Treasury Secretary as follows: “We must address the persistent issue of ‘stateless income,’ which undermines confidence in our tax system at all levels.”); Philippa Foster Back, “Avoiding Tax May Be Legal, but Can It Ever Be Ethical?”, *The Guardian* (23 April 2013), online: <[www.theguardian.com/sustainable-business/avoiding-tax-legal-but-ever-ethical](http://www.theguardian.com/sustainable-business/avoiding-tax-legal-but-ever-ethical)> [perma.cc/X633-U85L] (“Tax avoidance has been branded by some as an immoral and unethical practice that undermines the very integrity of the tax system.”); On the question of waste in military procurement represented by the outrageously expensive hammer, see: Sydney J Freedberg Jr, “The Myth of the \$600 Hammer”, *Government Executive* (7 December 1998), online: <[www.govexec.com/federal-news/1998/12/the-myth-of-the-600-hammer/5271/](http://www.govexec.com/federal-news/1998/12/the-myth-of-the-600-hammer/5271/)> [perma.cc/Y7MA-GAFH] (quoting Professor Steven Kelman of Harvard’s Kennedy School as saying “There never was a \$600 hammer... [it was] an accounting artifact.”).

<sup>72</sup> Torgler, *supra* note 53; Valerie Braithwaite, ed, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot, UK: Ashgate, 2003).

<sup>73</sup> Schuck, *supra* note 12 at 23–24.

Donaldson, on the other hand, responded to a similar argument made in a Congressional Joint Committee Report in two main ways. The Joint Committee’s view was that “ambiguity in tax laws can result in disparate treatment of similarly situated taxpayers” and lead individuals to believe that the tax system is unfair.<sup>74</sup>

Donaldson responds first that the problem of disparate treatment of similarly situated taxpayers, “if such a case ever occurs” can be remedied by recourse to the courts or the legislature.<sup>75</sup> However, as I discuss further below, this response loses weight if complexity has also undermined access to justice.

To the Joint Committee’s assertion that taxpayers may believe the complexity of the tax system creates opportunities for manipulation, in particular by the wealthy, Donaldson responds that both elements of the problem—that the wealthy will have the advantage of professional advice and that others will envy that advantage—are inevitable. Since the same problem will exist in a simpler tax system, this provides no compelling justification for simplification efforts. Here, Donaldson’s response admits no possibility of degrees. Even granting that it would be impossible to eliminate the advantage of professional advice and the perception of inequity that may result, it may still be possible to reduce both through a program of simplification.

Continuing along this line of thinking, the Joint Committee wrote that “taxpayers may become disillusioned with tax policy that appears to be inconsistent

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<sup>74</sup> US, Joint Committee on Taxation, 107th Cong, *Study of the Overall State of the Federal Tax System and Recommendations for Simplification, Pursuant to Section 8022(3)(B) of the Internal Revenue Code of 1986* (Doc No JCS-3-01) (Washington, DC: US Government Printing Office, 2001) at 109.

<sup>75</sup> Donaldson, *supra* note 55 at 691.



because of the uncertainty that emanates from complex tax laws.” While this is obviously speculative, Donaldson adds that it is “idealistic to believe that taxpayers as a whole understand (and care about) each of the core aspects of federal tax policy.”<sup>76</sup> He points out that Americans generally believe that they pay too much in taxes, that they may have some informed opinions on high-profile tax policy issues, but are unlikely to easily grasp or care about the basic tenets of tax policy. Moreover, “[e]ven if disillusionment was pervasive, there is no measureable harm that results.”<sup>77</sup> While more recent work on tax morale and tax compliance has shown the effects of perceptions of fairness that may not have been visible in the American data that Donaldson had examined,<sup>78</sup> a more complete response is offered below. There, I consider how the access to justice lens highlights a different vision of harm than the tax policy lens that Donaldson relies on.

##### 5) JEOPARDIZING THE INTEGRITY OF SELF-ASSESSMENT

Voluntary self-assessment is an often noted key feature of our tax system.<sup>79</sup> The argument is sometimes made that complexity creates a system in which taxpayers do not understand their obligations, and so compliance becomes difficult or impossible. Donaldson puts the argument this way:

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<sup>76</sup> *Ibid* at 692.

<sup>77</sup> *Ibid* at 693.

<sup>78</sup> Torgler, *supra* note 53.

<sup>79</sup> See, for example, *R v Jarvis*, 2002 SCC 73 at paras 49–50, stating that tax collection “relies primarily upon taxpayer self-assessment and self-reporting” and that “voluntary compliance and self-assessment comprise the essence of the [*Income Tax Act*’s] regulatory structure.”

Taxpayers do not necessarily intend to cheat the system; instead, frustrated taxpayers simply throw up their collective arms at a difficult rule, not even trying to understand its application. Such frustration in turn risks the integrity of the voluntary assessment system.<sup>80</sup>

Donaldson responds to the argument by pointing out that there is little data about taxpayer compliance, and so it is impossible to show any relationship between complexity and compliance. Donaldson's point here holds equally true in Canada, where we have no public measurements of compliance to use, even if we agreed on a measure of complexity. In Canada, we have no reason to believe that self-assessment is in jeopardy and it is, in my view, unhelpful to polemicize around tax complexity. The uncontroversial goal of having taxpayers understand their own obligations and the social choices implemented in the tax system gives us enough impetus to simplify.

#### B. LOOKING AT COMPLEXITY'S EFFECTS THROUGH THE ACCESS TO JUSTICE LENS

As codifying law reformers have appreciated for centuries, various forms of legal complexity make the law less accessible in a fairly direct and intuitive way. Still, the access to justice literature has not fully appreciated the effect of legal complexity on accessibility, generally preferring to focus on dispute resolution. This situation perhaps reflects an assumption that access to justice does not require accessible law, or may be a product of the fact that access to justice research has often been carried

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<sup>80</sup> Donaldson, *supra* note 55 at 693.

out in areas of law where the complexity of the substantive law seemed less important than the complexity and cost of dispute resolution procedures.

Scholars dealing with legal complexity generally and tax complexity specifically have usually preferred to frame the discussion in terms of economic costs and the traditional tax policy framework.<sup>81</sup> Thinking in terms of access to justice, however, reframes this discussion and sheds a different light on the priorities and values at stake. There may not be a measurable cost associated with reduced engagement or empowerment of taxpayers in the tax system. Moreover, we may find that reduced engagement and empowerment, to the extent that it is not accompanied by decreased compliance, allows more tax to be collected at lower cost to the tax authority. While traditional tax policy and economic analyses would ignore (or applaud) such hypothetical cases, the access to justice framework would still see a problem in the disengagement and disempowerment of legal subjects.

In this section, I argue that legal complexity generally and tax complexity specifically should be considered an access to justice issue. None of this is to say that simplicity is to be preferred at all costs or that complexity can never be justified. But it is to argue that complexity is a problem in the tax system that is worth taking seriously. While I leave the question of what, if anything, can be done about complexity for the next chapter, I hope here to persuade the reader that the access to

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<sup>81</sup> Hirsch, *supra* note 54; Schuck, *supra* note 12; Kaplow, *supra* note 58; Donaldson, *supra* note 55; Slemrod, *supra* note 52.

justice framework takes much of the weight away from the arguments against treating simplification as a worthwhile goal.

I) THE ACCESS TO JUSTICE CONSEQUENCES OF COMPLEXITY'S COSTS

The argument that complexity increases the costs associated with a legal system has direct access to justice implications. Starting with a narrow vision of access to justice focused only on dispute resolution, a more complex body of laws will reduce the pool of people who can effectively assist in resolving a dispute. Friends, family members, and even non-specialist professionals are less likely to be able to give good advice toward resolving a dispute the more complex the law governing the dispute is. Taking tax as the example, it is reasonable to assume that tax law's complexity is a reason that tax lawyers are so expensive, and, correspondingly, a reason that so few people can access professional assistance in resolving their disputes.<sup>82</sup>

Expanding our vision of access to justice slightly, we might apply the same analysis to compliance and transactional processes. Complexity not only reduces access to effective dispute resolution services, it also reduces access to effective assistance in complying with the law's requirements and planning our affairs. In tax, complexity introduces barriers to compliance and to effective estate and business planning—again, because it means effective assistance can only be given by specialists.

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<sup>82</sup> On the relationship between legal complexity and access to legal services (in the context of a debate around lawyers' potential obligation to provide services for free), see: Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (2007) 45 *Alta L Rev* 107; Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25 *Dal LJ* 335.

In discussing the possible loss of faith in the tax system due to the inequities created by complexity, Donaldson argued that these need not be of concern because taxpayers have the usual recourse to courts and legislature. This response, however, assumes access to justice. If complexity not only creates inequity in the usual tax policy sense, but also hinders the ability of individuals to exercise agency in dispute resolution and law reform processes, then pointing to these processes is an insufficient answer. As Schuck points out with his discussion of delegitimation costs, the problem is not only that inequities might be caused by complexity (though that problem has been long hypothesized), but that complexity might also undermine individuals' faith that those inequities can be remedied in the usual ways.<sup>83</sup>

Donaldson also points out that this purported disillusionment with the tax system seems to have no measurable harm.<sup>84</sup> He could find no decrease in compliance correlated with increased complexity. While he acknowledged the argument that “it is bad enough that complex laws inspire skepticism among taxpayers” without a link to compliance rates, he viewed this skepticism as a “minimal harm” when weighed against the overriding traditional goals of tax policy.<sup>85</sup> While this follows as an application of the traditional tax policy framework, in the access to justice framework, disillusionment, disengagement, and disempowerment are important harms in themselves.

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<sup>83</sup> Schuck, *supra* note 12 at 23–24.

<sup>84</sup> Donaldson, *supra* note 55 at 693. While the question of whether a harm exists is taken up here, the question of measurability is left to chapter 6.

<sup>85</sup> *Ibid.*

Donaldson's related argument that taxpayers have chosen not to care about tax law and policy also has a certain chicken-egg quality.<sup>86</sup> It may be true that taxpayers have, in general, not chosen to understand and care about the tax system. But, before using this fact to justify complexity, we might question whether complexity caused this situation. If it is desirable to have citizens engaged and empowered in all law-making and -applying processes that affect their lives (as the access to justice framework holds), then we should not be so quick to dismiss the possibility that more citizens would understand (and even care about) the tax system if it were more accessible.

## 2) MOVING FROM COMPLIANCE TO AGENCY

To the extent that legal complexity creates a situation where individuals are not able to and cannot be expected to understand or meaningfully influence dispute resolution processes, it poses an obvious access to justice problem on even the narrowest definition of access to justice. We may hope to alleviate the problem with the help of pro bono tax appeal clinics and the informal procedure, though we should be clear-eyed about the resources that would be required for this to be considered a full solution. A mix of public, quasi-public, and non-governmental actors can provide fast and low-cost dispute resolution, free or low-cost assistance in compliance, and even assistance in planning transactions. As discussed in Part I, some of these are provided in the Canadian tax system through the informal procedure tax appeal, pro bono tax appeal clinics, volunteer assistance in tax filing, and so on. If sufficient

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<sup>86</sup> *Ibid* at 692.

assistance in compliance and dispute resolution is provided, then we may bear a social cost, but the access to justice issues appear to have been resolved. Perhaps, as David Bradford writes, “The common man needs no more to understand the complicated tax law than to understand the complicated laws regulating banks.”<sup>87</sup>

However, if access to justice has the higher ambition of empowering citizens to make and remake law themselves,<sup>88</sup> to plan their own lives and decide the norms that will govern them, then legal complexity poses an even more difficult problem. It reduces individuals’ abilities to react to the law that is supposed to govern them by planning their affairs or engaging in law reform processes. What Schuck calls the “delegitimation cost” of complexity can be thought of as an access to justice problem in this framework. Moreover, it is not clear that the situation can be ameliorated by spending more social resources on free advice clinics or efficient dispute resolution. It may, in fact, require making the law accessible to people.

The traditional goals of tax policy, including compliance and efficiency of administration, might be met by programs that facilitate compliance and efficient dispute resolution. However, access to justice goals are not realized when these measures treat engagement and empowerment of the legal subject as unnecessary. Because tax plays an important role in structuring both our individual lives and society as a whole, giving people the chance to understand and take an active role in

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<sup>87</sup> Bradford, *Untangling the Income Tax*, *supra* note 2 at 4.

<sup>88</sup> Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 106–107 [Macdonald, “Scope, Scale and Ambitions”].

both planning their own lives within the system and shaping the system itself is a goal that takes on particular importance in tax law.<sup>89</sup>

Moreover, because the complexity of a legal system like the tax system forces most of the population into the role of legal subjects who comply at best and fail to comply at worst, it reinforces a way of thinking about law that is antithetical to the access to justice framework. The law, in this view, is about the successful projection of power from the government onto the population. Policy goals and their implementation in law are the exclusive preserve of the few who are able to understand, and there is little or no expectation that the subjects in the system can or should be able to do anything other than comply. They are not expected to exercise any agency within the system and cannot be expected to understand or meaningfully influence lawmaking processes.

In discussing governance costs, Schuck noted that complexity has the effect of making it more difficult and costly for lawmakers to agree on policy goals and to implement them. By the same token, complexity increases barriers to those policy- and law-making processes to citizens. Legal complexity makes it more difficult to evaluate whether the law is meeting its policy goals and to effectively argue for reform. It then effectively disempowers many and concentrates the power to make

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<sup>89</sup> I pause here to briefly note that a slightly different argument against simplification may still succeed. It may be argued that some areas, such as tax law, simply cannot be made accessible to more of the population without sacrificing their core policy goals. I consider this argument further in chapter 6 where I argue that simplification is possible even while holding to the importance of traditional tax policy goals.



laws in the hands of the few who have devoted extensive resources to understanding the complexity.

#### IV. COMPLEXITY MATTERS

It bears repeating that, while my focus in this project is on Canada's tax system, the challenges of legal complexity are not unique to tax law and my intention here was not to engage the debate around "tax exceptionalism."<sup>90</sup> Rather, my aim in this chapter was to flesh out the idea that codifiers throughout legal history have often understood intuitively: that legal complexity makes the law less accessible. And, moreover, that in the modern access to justice framework, we should take seriously the ways in which legal complexity may reduce access to justice.

In the tax system, complexity includes complication: the density, volume, and technicality of the rules; the interaction between the rules—which can seem Rube Goldberg-esque at best and inherently chaotic and unpredictable at worst; and the abstruse expression of those rules. It includes conceptual complexity, which may contribute to complication, but also exists independently. These elements of complexity combine to render the law inaccessible in obvious and intuitive ways, and contribute to a variety of access to justice issues. Complexity, especially as it arises in

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<sup>90</sup> For recent work on the debate around "tax exceptionalism" in the U.S. context, see: Steve R Johnson, "The Rise and Fall of Chevron in Tax: From the Early Days to King and Beyond" 2015 Pepp L Rev 19; James M Puckett, "Structural Tax Exceptionalism" (2014) 49 Ga L Rev 1067; Lawrence Zelenak, "Maybe Just a Little Bit Special, after All Forty-Fourth Annual Administrative-Law Symposium: Taking Administrative Law to Tax" (2013) 63 Duke LJ 1897; Kristin E Hickman, "The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference" (2005) 90 Minn L Rev 1537; Paul L Caron, "Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers" (1993) 13 Va Tax Rev 517.

the tax system, makes people less able to engage with and exercise agency in dispute resolution processes and various other sites in which tax law is made, interpreted, administered, and applied.

The traditional tax policy framework obscures these concerns under the rubric of administrability. However, the temptation to reduce complexity to the administrative and compliance costs of the legal system, which seems particularly strong in tax, must be resisted to fully appreciate the effects of complexity.<sup>91</sup> Thinking in terms only of compliance and enforcement costs misses the fact that complexity which does not add to these costs may still have the negative effect of putting up barriers to taxpayer engagement. Complexity makes taxpayers less able to understand the law, less willing to engage with it, and more reliant on the increasingly specialized class of professionals able to work within the system and on the administrative apparatus itself. Indeed, it may be possible for a change to increase the complexity of the system and put up barriers to engagement while reducing the administrative cost (to the extent that taxpayers on the margin no longer feel empowered to contest their assessments, for example). The access to justice framework, on the other hand, highlights the possibility that even cost-reducing complexity may have a negative effects.

In many common law jurisdictions, tax law takes some of the forms of legal complexity to extremes. Tax statutes become extremely technical and intricate. They

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<sup>91</sup> Slemrod, *supra* note 52. In part, this temptation has to do with the desire to find a metric for complexity, which is discussed further in chapter 6.

change frequently. Tax law pursues myriad conflicting policy objectives. Thus, tax law may be thought of as an extreme example of legal complexity, even when set against other complex areas of law such as tort law, trusts, or bankruptcy.<sup>92</sup>

However, these extremes are perhaps not the best explanation for the frequency of calls to simplify the tax system. It is certainly true that the *Income Tax Act* is longer and more difficult to read than the BC *Labour Relations Code* and that it is amended more often than the *Bankruptcy and Insolvency Act*.<sup>93</sup> However, as Donaldson argues, the repeated calls for simplification of the tax system (and not the bankruptcy system) likely have little to do with any empirical measurement of the differing complexity of various areas of law.<sup>94</sup> Rather, tax simplification becomes important to people because of tax law's pervasiveness and its importance.

As I discussed in Part I, tax is an area of law that nearly everyone directly interacts with at least annually. It shapes our lives daily and plays an important role in structuring our economy and society. Social and economic justice depend to a large extent on the tax system. So, perhaps the best explanation for the persistent attention to tax complexity is that individuals are regularly reminded of the difficulties it creates for access to social and economic justice.

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<sup>92</sup> Moreover, applying tax law in Canada will often require first understanding the way that the facts of the situation are treated by tort law, trust law, or bankruptcy law.

<sup>93</sup> *Labour Relations Code*, RSBC 1996 c 244; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA].

<sup>94</sup> See Donaldson, *supra* note 55 at 734–737, who argues that tax law is not more complex than other areas of law, but that “the voluminous cries for simplification” are caused by (1) the fact that tax law directly affects more people than other complex areas of law; (2) tax law relies on self-assessment; and (3) American federal tax law are “an unusual amalgamation of laws design to serve mutually exclusive objectives”.

At least two important questions have been left out of the discussion thus far. First, is it possible to simplify the tax system in a way that would render it more accessible? Or is it the nature of tax law that rendering it significantly more accessible would compromise its core policy goals? Second, if we were inclined to try to simplify would we ever know when we had succeeded? Given the complex nature of tax complexity, can it be meaningfully measured? The next chapter takes up these two questions, looks at the causes of complexity in the tax system, and puts forward a framework to guide simplification efforts without compromising core tax policy goals.

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## CHAPTER 6: TOWARD SIMPLIFICATION

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### I. TO PURSUE SIMPLICITY

I argued in chapter 5 that simplification is worth pursuing as part of an access to justice strategy. In the access to justice framework, the detrimental effects of complexity take on an increased importance and the arguments against pursuing simplification lose some of their weight. Several questions remain: Is legal simplification possible at a conceptual level? If so, is it possible practically and without undermining the policy goals of the law? Can we measure complexity or its detrimental effects so that we will know if simplification has succeeded? Given all of these questions, how can we move forward?

In this chapter, I answer these questions in turn. I argue that legal simplification is conceptually possible, though it must be acknowledged that the process will not be apolitical or free of value judgments. In practice, designing reforms to simplify the tax system may be challenging; however, the task is less difficult than some have argued. The issue of measurement is not trivial, but the work is already being done to establish and refine complexity metrics. And, while advocates of simplification must (and usually have) recognized that an equitable income tax entails some degree of complexity, I argue that it is possible to pursue simplicity in way that would reinforce, rather than undermine, the core goals of the tax system.

Answering all of these questions helps to establish the parameters for a framework that I suggest can be helpful in guiding and evaluating proposals for simplification. The framework breaks the forces driving complexity into three categories. The first is the legal culture generally and the culture of tax law in particular. Scholars sometimes blame a culture of legal formalism for the rise of legal complexity, and tax law provides the prime example.<sup>1</sup> While we should not expect a change in the culture of tax law to happen quickly, I look at several solutions that have been proposed and suggest that we may continue to take steps towards a simple, more accessible tax system.

The second driver of tax complexity is the pursuit of ideal tax system. Here I suggest that access to justice would not be well-served by attempting to gain simplicity at the cost of an equitable income tax. Policy makers are already weighing equity, efficiency, and administrability (which includes simplicity) in constructing rules that attempt to practically implement the theoretically ideal income tax system. While the access to justice lens would add some nuance to this conversation, the complexity in this category is the necessary complexity of an income tax. It is, then, worth identifying primarily for the purpose of focusing reform efforts elsewhere.

The third broad category of complexity drivers consists of the design choices made in the tax system that pull against the ideal income tax. These are parts of the

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<sup>1</sup> See, for example: Richard A Posner, *Reflections on Judging* (Cambridge, Mass: Harvard University Press, 2013); Laura E Little, “Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism” (2003) 37 UC Davis L Rev 925; and, in the tax context, Sol Picciotto, “Constructing Compliance: Game Playing, Tax Law, and the Regulatory State” (2007) 29:1 Law & Pol’y 11.

tax system that are intended to accomplish other (non-tax) policy goals, that are in place for the sake of administrative convenience or that exist for some other reason. I suggest that the access to justice lens has the power to reveal problems with these elements of the system that have not always been fully recognized and that access to justice or simplification-minded law reform advocates ought to focus their efforts here. While these design choices may, in some cases, be justified, a complete justification needs to reckon with the access to justice effects of these policies.

## II. THE POSSIBILITY OF SIMPLIFICATION

It is sometimes argued that simplification, either in law generally or in tax specifically, is impossible. These arguments can be grouped into two broad categories. First, there are those who argue that legal complexity is itself so complex and multifaceted that it resists simplification. Others argue that simplicity is at odds with more important goals of tax policy and so we can only simplify the tax system by sacrificing these other goals which are either fundamental or at least important enough to outweigh concerns about complexity. Responding to these arguments helps to set the stage for the framework that I propose in section IV of this chapter.

There is a third set of arguments that is sometimes made but which I do not address in detail here. Some have explained the complexity of tax law by noting the political impossibility of simplification, or the lack of a political constituency for simplification.<sup>2</sup> It is sometimes remarked that everyone is in favour of simplification

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<sup>2</sup> See: Steven A Dean, "Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification" (2005) 34 Hofstra L Rev 405 at 406; Edward J McCaffery, "The Holy Grail

in the abstract, but that concrete simplification proposals will be characterized as tax increases and fail to gain the required political support. Here, I limit the analysis to the conceptual and normative defences of tax complexity and leave aside the public choice or political science explanations. That is, the goal of this chapter is not to explain tax complexity from a political point of view, but rather to explore and evaluate its normative justifications and to use this evaluation to build a framework to help advocates who aim to counteract the complexification of tax law.

In Part A of this section, I argue that legal simplification—and tax simplification in particular—is possible. In particular, I respond to arguments to the contrary made by Professors R. George Wright and Samuel A. Donaldson. In Part B, I discuss the argument that a progressive income tax necessarily implies a complex system of tax law. While there is some truth to this argument, it does not foreclose the possibility of simplification, and it needs to be acknowledged that complexity itself runs contrary to the goals of a progressive income tax. Finally, in Part C, I respond to a third possible argument, which I call the “saturation hypothesis.” While it might be argued that the tax system is already so complex that any marginal change

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of Tax Simplification” (1990) 1990 Wis L Rev 1267 at 1268; Deborah H Schenk, “Simplification for Individual Taxpayers: Problems and Proposals” (1989) 45 Tax L Rev 121 at 123–124; Paul R McDaniel, “Federal Income Tax Simplification: The Political Process” (1978) 34 Tax L Rev 27 at 76. The perspective of Canadian tax drafters was provided by David Dodge and Victor Peters in William J Strain, David A Dodge & Victor Peters, “Tax Simplification: The Elusive Goal” (1988) 40 Can Tax Found 4:1 at 4:61–4:62 (“The standard that most taxpayers seem to adopt, and understandably so, is that when a shortcoming in the law is costing them money, a change that corrects the defect is justifiable no matter how great the consequent increase in complexity.”).



in its level of complexity is unlikely to matter, I contend that this possibility should not entirely dissuade us from pursuing simplicity.

#### A. THE CONCEPT AND PRACTICE OF LEGAL SIMPLIFICATION

In a provocative paper, R. George Wright declared that “[t]he quest for real simplification in the law remains hopeless.”<sup>3</sup> By hopeless, Wright did not merely mean that practical barriers to simplification are difficult to overcome. He wrote:

Our point is not that just simplifying a law is politically difficult or undesirable. It is, instead, that it is conceptually impossible. By way of an extremely loose analogy, some things can be readily “simplified” in the sense of being compressed, and other things cannot. It is thus much easier, for example to compact a cubic foot of household trash than a cubic foot of water. Our inability to just compress or simplify the law goes beyond practical difficulties to a more conceptual level.<sup>4</sup>

Wright gives several reasons to believe that law is more like water (which cannot be easily compacted) than like household trash (which can). The first is that, as I discussed in the last chapter, we can only define complexity with great difficulty. When legal complexity is defined, it seems to comprise “any number of more or less separate and independent kinds of complexity.”<sup>5</sup> We have no way of measuring or

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<sup>3</sup> R George Wright, “The Illusion of Simplicity: An Explanation of Why the Law Can’t Just Be Less Complex” (1999) 27 Fla St UL Rev 715 at 744.

<sup>4</sup> *Ibid* at 737.

<sup>5</sup> *Ibid* at 716.

comparing these different kinds of complexity. Attempted simplifications usually transmute complexity from one form to another or to move it to another part of the legal or political process. To say that we have truly simplified would require weighing these different, independent and uncorrelated forms of complexity, which requires “highly contestable value judgments.”<sup>6</sup> Even where law seems to have been simplified, “a description of the law as simple can often be translated into a description marking the law as complex.”<sup>7</sup>

Wright’s arguments here can be answered in two ways. The first is to understand the bounds on his argument. He does not appear to argue that no law can be simpler than any other, but rather that simplification cannot be accomplished *without changing the law*. While Wright’s paper did not explicitly acknowledge this limitation, the illustrations and examples he used implicitly acknowledge it. To illustrate the difficulty of defining complexity, he used several examples, including games and irrational numbers. Considering the complexity of checkers and chess, Wright wrote:

It seems evident that the number of exceptions and distinctions built into a set of legal rules need not be a function of the sheer number of rules. Consider a variant of the game of checkers with an enormous number of pieces, but in which no functional or operational distinctions are drawn among the pieces. Each

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at 744.

player has, let us say, hundreds of identical pieces, moving in one single invariant fashion. Surely, we would not see this game as extreme in its complexity.

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The number of elements constituting a legal rule or system, thus, need not be strongly correlated with the degree of differentiation among those elements. A game of checkers, as modified above to provide for hundreds of identical checkers on both sides, would, in this respect, be numerically far more complex than an ordinary game of chess. Chess, on the other hand, would still be more complex than any version of checkers with respect to differentiation among kinds of pieces.<sup>8</sup>

Wright's point about the difficulty of measuring and comparing different types of complexity is well-taken; however, he is clearly not arguing that chess and checkers (as it is normally played) are equally complex. Accordingly, if we can reform our legal system away from chess and towards checkers (or, in the case of tax law, reform away from Go or Taikyoku Shogi and towards chess)<sup>9</sup>, we will have simplified.

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<sup>8</sup> *Ibid* at 724.

<sup>9</sup> Go is an ancient Chinese game that is generally considered more complex than chess. Google recently made news when its Go-playing computer program beat the world's top-ranked human player: "Go (game)", (21 July 2017), online: *Wikipedia* <en.wikipedia.org/wiki/Go\_(game)> [perma.cc/UWF4-9Z2L]; Paul Mozur, "Google's AlphaGo Defeats Chinese Go Master in Win for A.I.", *The New York Times* (23 May 2017), online: <www.nytimes.com/2017/05/23/business/google-deepmind-alphago-go-champion-defeat.html> [perma.cc/Q58X-SM6Z]. Taikyoku Shogi is the largest of several variants of Shogi. Two players who each start with 402 pieces play it on a 36 x 36 board. There are 209 different pieces and 253 different sets of moves: "Taikyoku Shogi", (24 September 2016), online: *Wikipedia*

Wright also discussed the complexity of the number  $\pi$ .<sup>10</sup> It may be expressed either as the ratio between a circle's circumference and diameter or as 3.14159... with an endless succession of non-repeating digits. Verbally, the first formulation seems simpler and more concise. However, for the purposes of making calculations, the numerical expression is more useful and therefore simpler. Again, Wright's point about the difficulty of calling one expression more complex than the other is well made. However, if our purposes could be equally well-served—or perhaps better served—with a rational number like  $22/7$  (or, better yet, an integer like 3), then it seems uncontroversial that simplification is possible.

Turning to a legal example, Wright used the hearsay rule (as it existed in the U.S. at the time) as an example of a rule that is often considered complex.<sup>11</sup> The rule contains many exceptions, is complex in its operation, and is difficult to memorize.

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<[en.wikipedia.org/wiki/Taikyoku\\_shogi](http://en.wikipedia.org/wiki/Taikyoku_shogi)> [[perma.cc/9YMB-XVHN](https://perma.cc/9YMB-XVHN)]. Of these larger Shogi variants, Mike Vanier, a computer scientist at the California Institute of Technology, writes: “It is thought that the really huge games ... were never really played to any significant extent ... and were devised merely so that the creators could have the fun of inventing enormous games, amazing their friends and confounding their enemies.” Mike Vanier, “GNU Shogi manual: Shogi variants”, online: <[users.cms.caltech.edu/~mvanier/hacking/gnushogi/gnushogi\\_17.html](http://users.cms.caltech.edu/~mvanier/hacking/gnushogi/gnushogi_17.html)> [[perma.cc/9V4C-4PWR](https://perma.cc/9V4C-4PWR)]. Looking at contemporary games, Magic: The Gathering, “a famously complicated trading card game,” has attracted attention for similar reasons: Alex Churchill, Stella Biderman & Austin Herrick, “Magic: The Gathering is Turing Complete” (2019), online: <[arxiv.org/pdf/1904.09828.pdf](https://arxiv.org/pdf/1904.09828.pdf)> [[perma.cc/H8GC-UH2P](https://perma.cc/H8GC-UH2P)]; see also Krishnendu Chatterjee & Rasmus Ibsen-Jensen, “The Complexity of Deciding Legality of a Single Step of Magic: The Gathering” in *Proceedings of the Twenty-second European Conference on Artificial Intelligence* (Amsterdam: IOS Press, 2016) 1432.

<sup>10</sup> Wright, *supra* note 3 at 730, 734. The terminology, of course, is unfortunate, as  $\pi$  is not a complex number in the mathematical sense. Again, complexity here is used in an everyday, rather than a precise or discipline-specific, way.

<sup>11</sup> *Ibid* at 737–738. The complexity of the hearsay rule in the U.S., with its many exceptions, can be seen in its codification in the *Federal Rules of Evidence*: FRE §§ 801–807. For a recent review of hearsay law in Canada, see: *R v Bradshaw*, 2017 SCC 865.

So, if our complexity metrics include the number of exceptions or the difficulty of application, the hearsay rule is complex. Wright points out, however, that it seems simple in other respects. It does not involve a complex hierarchy or organization, it could be thought of as one general rule with a single (particularly long) exception, and the purposes of both the rule and its exceptions are clear and easily grasped. To use the terminology from chapter 5, it contains some complication, but little conceptual complexity.

Once again, Wright's point is well-taken. The hearsay rule is complex from some perspectives and simple from others. The metrics we choose to measure complexity may be imperfect, subjective, or open to manipulation. However, none of this is to say that a different rule in place of the current hearsay rule might not be simpler (or more complex!). Removing the hearsay rule altogether (to the effect that hearsay is generally admissible evidence) would seem to remove any complexity in the rule. It may be argued that removing the hearsay rule would only shift the complexity to the trier of fact, who would be forced to evaluate the probative value of hearsay in every case, may substantially complicate civil dispute resolution generally by opening up the pool of potential witnesses, or that complexity would develop in other evidentiary rules to compensate. This objection does hold the same strength, however, if the hearsay rule is modified by removing all of the exceptions (to the effect that hearsay is never admissible evidence). The main objection to this rule is not that it adds complexity elsewhere, but that fairness requires some exceptions to the hearsay rule to allow necessary and reliable evidence. While the question of whether

the hearsay rule is simple or complex is a matter of perspective and value judgments, we may still obtain broad agreement that some potential variations of the rule would be simpler or more complex.

In discussions of tax reform, it often seems that simplicity would be desirable, but is practically impossible to reach. In evaluating simplification-oriented proposals, Samuel Donaldson discussed the American Alternative Minimum Tax (AMT), which has been altered several times over its history and adds significant complexity to the American tax system.<sup>12</sup> In Donaldson's recounting of its "epic saga", he explains that the AMT was introduced because of a concern that wealthy taxpayers were making excessive use of "tax preference items" to reduce their tax liability.<sup>13</sup> To correct the inequity, the AMT was introduced to impose an additional tax liability on taxpayers who claimed these tax preference items above a minimum threshold. The AMT increased complexity by forcing taxpayers to perform additional computations and plan for the application of this additional tax. Donaldson puts it, "simplicity took a back seat to equity, but Congress was apparently happy to make the sacrifice."

The alternative solution that is sometimes proposed is a limit on the availability of these tax preference items, perhaps with phaseout provisions or ceilings.<sup>14</sup> However, as Donaldson points out, a reform that repealed the AMT and tailored each individual tax preference item in this way would be a complicated

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<sup>12</sup> Samuel A Donaldson, "The Easy Case against Tax Simplification" (2002) 22 Va Tax Rev 645 at 705-713.

<sup>13</sup> *Ibid* at 705-706. The "tax preference items" in question appear to be a subset of tax expenditures that were particularly vulnerable to abuse by high-income taxpayers.

<sup>14</sup> *Ibid* at 706.

reform and may add as much complexity as it removed.<sup>15</sup> As such, the maintenance of the AMT, complex as it is, may seem the simplest solution available.

However, in Donaldson's account of the story the most obvious simplifying solution—simply removing the problematic “tax preference items”—is not considered at all. It is in this way that complexity becomes inevitable, and legislative design becomes a matter of choosing which form of complexity to implement or choosing to live with complexity over inequity. These may be justifiable—or politically necessary—choices, but it needs to be acknowledged that a solution is available to both simplify the system and better meet the goal of equity.

Similarly, Donaldson considered a proposal to change the treatment of capital gains in the American tax system. The system he considered (in 2002) was a hybrid system including both exclusions and lower tax rates applicable to capital gains, while the proposed reform would have simplified by removing preferential tax rates and instead permitting a deduction of some fixed percentage of the net capital gain. Donaldson argued that the proposed reform would not have been as simple as it may have seemed. It would also have had significant policy implications, particularly regarding equity. Again, however, the discussion starts from the position that preferential treatment of capital gains must be retained.<sup>16</sup> And so, with the solution that would (at least arguably) best serve both equity and simplicity removed from

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<sup>15</sup> *Ibid* at 713, n 269. Donaldson notes elsewhere that income-based phase-outs are complicated, but generally justified to enforce vertical equity (at 722-732).

<sup>16</sup> *Ibid* at 714.

consideration at the start of the analysis, the discussion becomes about how best to balance and manage the complexity and inequity that results.

However, while some reforms may be uncontroversially simplifying (playing checkers rather than chess), this will not always be the case, and, Wright would argue, will rarely be the case in practice. In cases where we seem to simplify, as Wright says, “we often only succeed in shifting inescapable complexities forward or backward in time, or to a different stage of the law making and law enforcement process.”<sup>17</sup> If we are forced to choose between types or locations of complexity, the choice is “deeply political” and involves “highly contestable value judgments.”<sup>18</sup>

To the extent that Wright is correct, I propose to use access to justice to guide these value judgments. As I argued in chapter 5, we can expect that legal simplification will, in general, improve the ability of individuals to exercise agency in the system. However, when faced with difficult questions about whether a particular proposed reform will simplify or will merely transmute or move complexity around, it will be helpful to remember that simplicity itself is not our goal. Simplicity (to the extent that we can accurately measure it) is a lead measure, a factor that is expected to drive the performance of our main goal, access to justice.<sup>19</sup> When called to choose between forms or locations of complexity, the access to justice framework would have us

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<sup>17</sup> Wright, *supra* note 3 at 716.

<sup>18</sup> *Ibid.*

<sup>19</sup> On “lead” and “lag” measures in the performance measurement literature, see: Karen Anderson & Rodney McAdam, “A Critique of Benchmarking and Performance Measurement: Lead or Lag?” (2004) 11:5 Benchmarking 465.



choose the path that we can either show or reasonably expect to lead to increased engagement and empowerment of individuals in the system.

## B. THE POSSIBILITY OF A SIMPLER INCOME TAX

A common argument in favour of the tax system's complexity is that the policy goals of the tax system require complexity. In particular, horizontal equity is thought to require complication. Due to the diversity of human situations and affairs, accurately and fairly measuring each individual's income requires a set of detailed, dense, technical rules. While I have more to say about the necessary complexity of an income tax in Part IV below, in this section I briefly explain and respond to this line of thinking. I acknowledge that an income tax entails some necessary complexity. However, I argue that this does not make simplification impossible. Moreover, complexity itself—and complication in particular—undermines the goals of an income tax system in important ways.

### I) AN INCOME TAX IS NECESSARILY COMPLEX

In response to calls for simplicity, it is often said that an income tax is a necessarily complex tax. To illustrate, a contrast with a poll tax is used.<sup>20</sup> A poll tax would impose the same tax liability on each individual, and would be a simple tax. The system's designers would need only to determine who should be included in the group of taxpayers and the amount of revenue to be collected. The remaining

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<sup>20</sup> J Clifton Fleming Jr, "Some Cautions Regarding Tax Simplification" in Chris Evans, Richard Krever & Peter Mellor, eds, *Tax Simplification* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015) 227 at 228.

difficulty would be in collecting the tax from each taxpayer. We choose to rely on an income tax rather than a poll tax because a poll tax is unfair.<sup>21</sup>

Looked at in this way, it seems that much of the complexity of tax law is introduced with the ability to pay norm and the choice of income as the tax base. While the principle of taxation based on ability to pay has been subject to criticism, the consensus has been that a fair and progressive tax system should take ability to pay as its conceptual underpinning.<sup>22</sup> Moreover, while arguments for a different base—perhaps consumption or wealth—are sometimes mounted, the consensus holds that fair taxation based on ability to pay necessarily entails a progressive income tax.

That is, we choose complexity—the conceptual complexity of income, in particular—because it serves fairness. An income tax is more equitable than a poll tax, and we sacrifice simplicity for the sake of equity. A poll tax would be much simpler, and, indeed sales taxes and real property taxes are also seen to be simpler than income taxes. However, our commitment to equity and the idea of ability to pay as the fair

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<sup>21</sup> For a critique of the view that fairness requires a differential taxation of individuals, see: Jeffery A Schoenblum, “Tax Fairness or Unfairness?: A Consideration of the Philosophical Bases for Unequal Taxation of Individuals” (1995) 12:2 Am J Tax Pol’y 221.

<sup>22</sup> For a review of arguments against ability to pay, see: Stephen Utz, “Ability to Pay” (2001) 23 Whittier L Rev 867. Some see taxation based on the level of benefits received from the government as both more efficient and more equitable, but impractical in a modern welfare state like Canada: Richard M Bird & J Scott Wilkie, “Tax Policy Objectives” in Heather Kerr, Kenneth J McKenzie & Jack M Mintz, eds, *Tax Policy in Canada* (Toronto: Canadian Tax Foundation, 2012) 2:1. Some have questioned the conceptual coherence of the ability to pay norm: Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002); Deborah A Geier, “Time to Bring Back the ‘Benefit’ Norm?” (2004) 33 Tax Notes Int’l 899. Others have continued to defend it: Joseph M Dodge, “Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles” (2004) 58 Tax L Rev 399.

basis of taxation lead us to choose a more complex tax.<sup>23</sup> We are left to choose between the conceptual complexity of income and the enactment of complicated rules to flesh out the concept; however as Boris Bittker wrote, “[i]ncome taxation entails a high level of irreducible complexity. In my opinion, the price is worth paying; but there is in any event no likelihood that the income tax will be repealed in the interest of achieving simplicity.”<sup>24</sup>

## 2) WE SHOULD EXPECT INCREASING COMPLEXITY

The choice of an income tax cannot fully explain the complexity of the *Income Tax Act*. At the very least, it fails to explain why tax law becomes continuously more complex. Canada’s first income tax was expressed in a relatively brief statute: the *Income War Tax Act, 1917*.<sup>25</sup> To explain the increasing complexity of tax law, some scholars point to the increasing complexity of society, of the economy, and of human

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<sup>23</sup> While some argue that a progressive rate structure is to blame for complexity in the tax system, the complexity added by increasing tax brackets is minor compared to the other features discussed here. For more, see: Neil Brooks, “Flattening the Claims of the Flat Taxers” (1998) 21:2 Dal LJ 287 at 313–322.

<sup>24</sup> Boris I Bittker, “Tax Reform and Tax Simplification” (1974) 29 U Miami L Rev 1 at 2 [Bittker, “Tax Reform and Tax Simplification”].

<sup>25</sup> *Income War Tax Act, SC 1917, c 28 [IWTA]*. The *IWTA*, in fact, has fewer words than the Nova Scotia *Sale of Goods Act, RSNS 1989, c 408*, which was first introduced in the same era (though closely modelled after the *Sale of Goods Act, 1893 (UK)*, 56 & 57 Vict, c 71) and remains substantially the same as it then was. To be clear, however, the *IWTA* was, in some ways, already complex. For example, s 3, which defines “income”, includes a 395-word sentence, conceptually difficult terms such as “interest”, “profits”, and “principal place of business”, a distinction between income from life insurance policies and proceeds from life insurance policies, a list of exemptions and deductions, and two anti-avoidance rules. Still, I am not aware of anyone making the argument that the *IWTA* was equal in complexity to our current *ITA*.

affairs.<sup>26</sup> As the world has become more complex, the calculation of income has become more complex, and the income tax laws have evolved to reflect this new complexity. As technology progresses, society evolves, and human diversity flourishes, we should expect the calculation of income to become increasingly complex as well.

However, it should not be assumed that all, or even most, of the increase in complication between the *IWTA* and the current *ITA* is the result of drafting rules to apply the concept of income in an increasingly complex social and economic context. Certainly some of it falls into Posner's category of external complexity that the legal system cannot avoid and with which it must simply cope.<sup>27</sup> However, as I explore further in Part IV, much of the tax system's complexity comes from its own culture and processes, and the choices made in the structural design of the system.

### 3) COMPLEXITY AS AN UNFAITHFUL SERVANT OF EQUITY

To the extent that the complexity of society and the goal of an equitable tax system account for most or all of tax complexity, we may be tempted to give up hoping for a simpler tax system. This complexity can only be removed at the cost of fairness; a price we should be hesitant to pay. Moreover, we cannot and should not expect or hope for the economy or human affairs to become simpler, and so to the extent that tax complexity simply reflects economic and social complexity, its continued growth is assured.

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<sup>26</sup> Frank H Pedersen, "A Contemporary Approach to Tax Complexity: Polycentrism in an Increasingly International Tax Environment" in Chris Evans, Richard Krever & Peter Mellor, eds, *Tax Simplification* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015) 9.

<sup>27</sup> See Posner, *supra* note 1 at 55-56, and the discussion in chapter 5, section II.C.

While it is common and understandable to view tax complexity as serving equity by laying out detailed rules to more precisely measure income, the reality is more fraught than a simple trade-off between equity and simplicity for several reasons. First, complexity itself has distributive implications, as discussed in chapter 5. Tax complexity favours those with more education and those who can afford professional tax advice. That is, even if more complex rules are intended to serve equity, complexity itself is regressive.<sup>28</sup>

As Edward McCaffery points out, complexity can backfire on equity in two related ways.<sup>29</sup> First, taxpayers with greater knowledge (or access to knowledge) will be able to reduce their tax liability by understanding or managing the complexity of the law. While this situation is arguably unavoidable and not caused by complexity, complexity will exacerbate the advantage of the knowledgeable.

Second, complexity can be expected to change the odds of the “tax lottery”, aggravating the inequity that may exist between honest and dishonest taxpayers who are otherwise similarly situated.<sup>30</sup> The thinking here is that some taxpayers, rather

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<sup>28</sup> See also: Werner Z Hirsch, “Reducing Law’s Uncertainty and Complexity” (1973) 21 UCLA L Rev 1233 at 1246–1247; Peter H Schuck, “Legal Complexity: Some Causes, Consequences, and Cures” (1992) 42:1 Duke LJ 1 at 19; McCaffery, *supra* note 2 at 1285–1287.

<sup>29</sup> McCaffery, *supra* note 2 at 1285–1287, 1289–1291.

<sup>30</sup> *Ibid* at 1289–1290. Playing the “tax lottery” refers to knowingly misreporting one’s tax situation in the hope that the tax administrator will not discover it. James S Eustice, “Tax Complexity and the Tax Practitioner” (1989) 45 Tax L Rev 7:

The tax lottery is the “take-a-chance school”: (1) Very few returns will be audited, yours may not be. (2) Even if it is audited, the agent may not understand it, or miss it altogether. (3) Even if he sees it, you may be able to talk him out of it. (4) If you can't talk him out of it, you may be able to settle it higher up. (5) Even if you can't settle it, you can litigate (the government

than reporting honestly and in good faith, will weigh the benefits of taking a dishonest filing position against the potential costs (including interest and penalties) and the odds of getting caught. Complexity plays into these dynamics in several ways. While increased complication may be the result of efforts to provide appropriate and equitable distinctions between taxpayers, it increases the number of potential filing positions—the number of possible moves for the game-player to consider. Complication also increases the number of these potential filing positions that are, even if not correct, at least defensible enough to avoid the imposition of gross negligence penalties.<sup>31</sup> Complexity also makes audits more complex and expensive. All else being equal, then, increases in complexity should be expected to reduce the chances of an audit and to reduce the chances of an auditor finding a dishonest claim. Complexity is not the cause of the tax lottery, but increased tax complexity “favours the gambler at each step in the game.”<sup>32</sup>

Further, while some of tax law’s complexity can be defended as being in the service of equity, much of it cannot. Below, I expand on this idea, arguing that there is complexity in the tax system that is not attributable to the system’s attempts to more accurately measure income and collect tax equitably. Much of the law’s complication stems from a set of policies collectively called “tax expenditures”, which exist in the

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lawyer may not understand it, the judge may not understand it, and, even if you lose, you have only borrowed at 7%).

<sup>31</sup> *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss 163(2), 163(3) [ITA] provide for the imposition of penalties on taxpayers who “knowingly, or under circumstances amount to gross negligence” make false statements or omissions in their tax filings. In case of an appeal, the burden of proof lies on the Crown.

<sup>32</sup> McCaffery, *supra* note 2 at 1290.

tax system but are intended to advance other (non-tax) social policies. Some complexity arises in the tax system in areas where we have sacrificed both equity and simplicity for administrative or practical reasons. Again, I do not claim that none of these choices or policies can be defended; however, their defence requires acknowledging the effects that added complexity has, including access to justice effects.

### C. RESPONDING TO THE SATURATION HYPOTHESIS

If we have accepted that complexity is linked to access to justice and that complexity can be added to or removed from the tax system, there is yet one more challenge to address before being convinced that simplification is worth pursuing. I call this challenge the complexity saturation hypothesis. Simply put, the hypothesis is that the tax system is so complex that marginal increases or decreases in complexity will make little or no difference to the accessibility of the system. In this section, I will explain the hypothesis further and argue that, while it might affect how we approach simplification, it should not cause us to give up altogether.

It would be most convenient to assume that the relationship between complexity and accessibility is linear (or at least locally linear), so that a marginal decrease in complexity results in an increase in accessibility, and vice versa. We might then graph access to justice and complexity as shown in figure 1, and be convinced that simplification is worth pursuing for the access to justice benefits that will result.

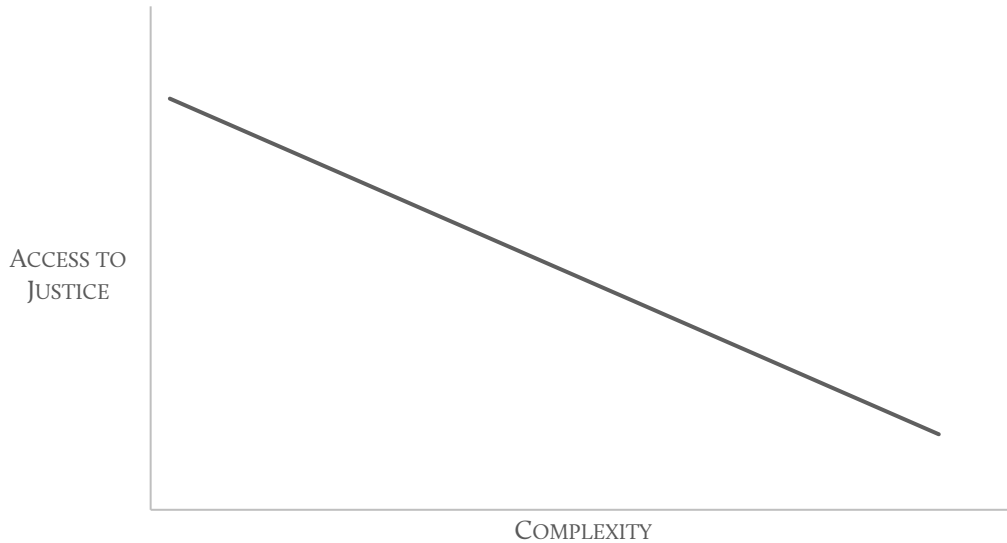


Figure 1: Access to Justice vs. Complexity (Linear Hypothesis)

However, the story represented by the saturation hypothesis has at least some intuitive appeal. In this narrative, there may have been a time when increases in tax complexity made a noticeable difference in access to justice, but that time is well behind us now. Complexity has made the tax system so inaccessible that further complexity has no effect on access to justice and marginal simplifications will, likewise, not be noticeable. Access to justice and complexity might then be graphed as shown in figure 2, with the assumption being that our tax system currently sits in the part of the graph where the line is nearly horizontal.



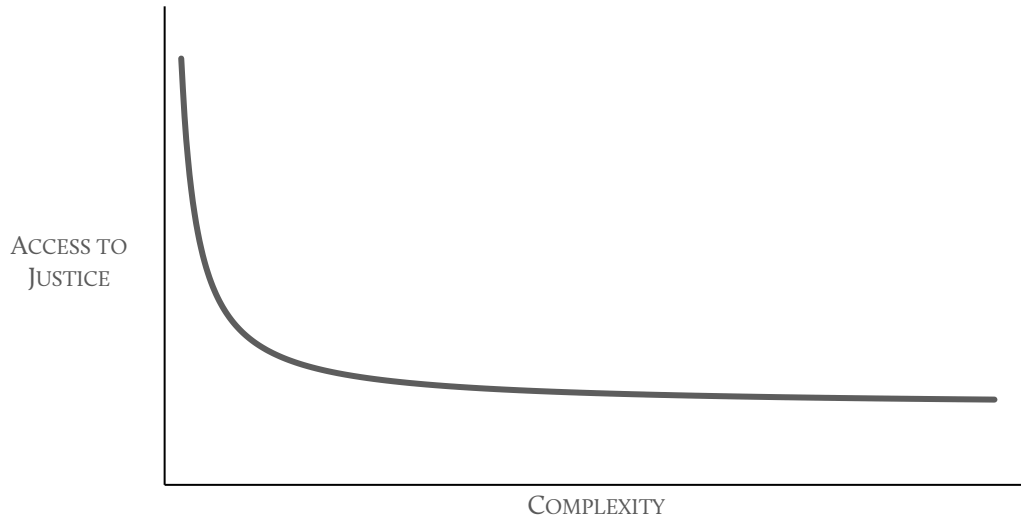


Figure 2: Access to Justice vs. Complexity (Saturation Hypothesis)

If the saturation hypothesis is correct, it would be tempting to conclude that there is no need to be concerned about further complexity and that simplification is not worth pursuing. If we are far along this curve to the right, whatever damage complexity can do to access to justice has already been done, and, absent a total overhaul of the system, any simplification that is realistically achievable will yield negligible benefits. However, before declaring the simplification has no value, several responses need to be considered.

The first response is that both of these competing descriptions of the relationship between access to justice and complexity are drastic simplifications. Both access to justice and complexity are multi-factored and complex. Representing their relationship in a two-dimensional graph misses much of the nuance, and might even mislead. If we were to break down different types of complexity, different individuals or groups that access to justice seeks to empower, and different sites applying or

making law to which access may be improved, we would be sure to see a more detailed and nuanced picture.

Second, if even the two-dimensional model can be considered a useful heuristic and the saturation hypothesis presents a compelling narrative, the case for simplification in the access to justice framework has not been entirely destroyed. The saturation hypothesis is not that complexity has beneficial access to justice effects, only that the access to justice benefits resulting from marginal simplification will be meagre. While this might affect how the costs and benefits of simplification are weighed, it is not to say that simplification is entirely worthless. For example, we may be hesitant to pursue simplification that will incur significant administrative costs or remove equity from the tax system because we expect the access to justice benefits to be small. However, simplification that has low costs or that furthers the other goals of the tax system should still be pursued. Moreover, if we are able to simplify—to move to the left on the curve in figure 2—each simplifying step increases the access to justice gains that can be realized by taking next step and moves the system closer to the point where small reductions in complexity can yield more significant gains.

To add slightly more nuance while retaining a two-dimensional model, the relationship between access to justice and complexity might have many plateaus, as shown in figure 3.

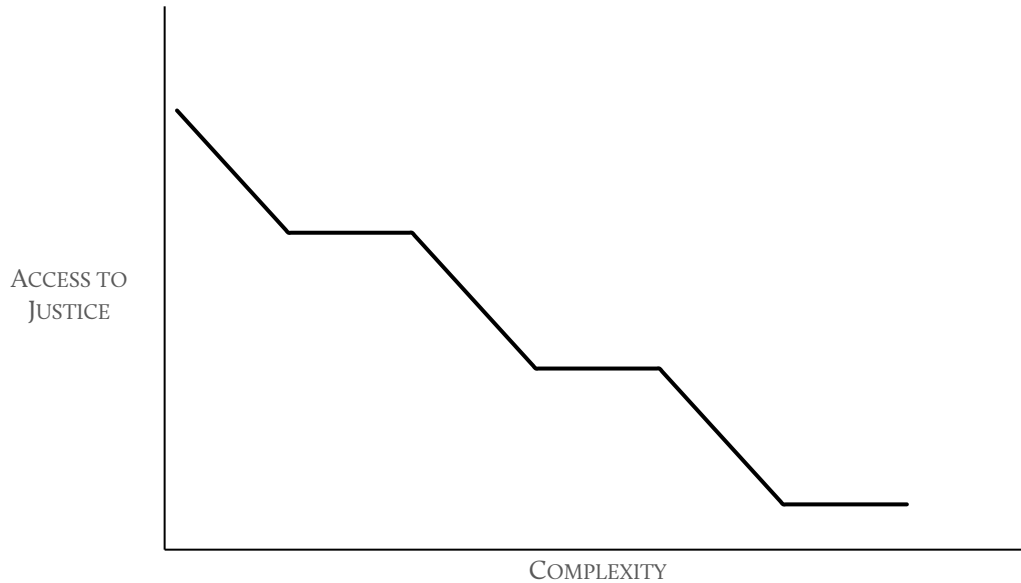


Figure 3: Access to Justice vs. Complexity ("Many Plateaus" Hypothesis)

We may now sit in a plateau in which only specialized tax professionals (lawyers, accountants, economists) can effectively engage with the system. However, a significant increase in complexity could impede access further, for example by restricting even these specialists to their own sub-specialties. On the other hand, a series of marginal decreases in complexity might significantly improve access to justice, for example by empowering non-specialist lawyers, accountants, and others to more effectively engage in the system.

While the complexity saturation hypothesis has some intuitive appeal—could one more bit of complication really matter at this point?—it should not totally destroy the impetus to pursue simplification. It may affect the types of simplification we choose to pursue and the trade-offs we are willing to accept as we do so. Still, there is reason to conclude that pursuing simplification and resisting further complexity in the tax system is a worthy goal.

### III. MEASURING TAX COMPLEXITY

If it is granted that complexity is problematic and that simplification might improve access to justice, the question of metrics then presents itself. Tax complexity is itself so complex and multi-faceted that it may be difficult to know whether simplification efforts have been successful. In this section, I examine several ways of measuring tax complexity that have been suggested.

The drive to simplify has led a number of authors and groups to put forward ways of measuring complexity. Some efforts have focused on the readability of tax statutes, forms, or guides. As I did in the opening of chapter 5, some have taken the sheer volume of law—in numbers of pages or of words—to stand for its complexity. Others have focused on the time or expense of administering and complying with the tax laws. In the UK, the recently-constituted Office of Tax Simplification has developed a complexity index that combines several different factors into its model of complexity.

#### A. READABILITY

Readability analyses cannot fully capture the complexity of the tax system. At best, they capture one element of complication. Moreover, the methodologies used in readability analyses have significant limitations, as most rely on easy to count elements such as word length and sentence length. They ignore conceptual difficulty of the material being read, other elements of writing that affect readability, including

matters of style and semantics, and they ignore elements related to the presentation of the material such as headings, print size and format.<sup>33</sup>

Even accepting these limitations, the results of readability studies in the tax field have often been worrying. For example, in the 1970s Boris Bittker referred to a readability analysis of Form 1040, the main personal income tax return form in the United States. The analysis found that “a taxpayer would have to read at the college graduate level to understand these instructions.”<sup>34</sup> As for tax statutes, anyone who has taught the introductory tax course in a North American law school will readily acknowledge that even many university graduates at first find them incomprehensible. An empirical study published in 1992 found that on the 100-point Flesch readability scale (100 being the most readable), a sampling of sections drawn from New Zealand’s taxation statutes had a mean score below 2, indicating that they are very difficult to read and putting them out of reach of most of the population.<sup>35</sup> In fact, 39 of the 42 sections analysed in the study scored zero on the readability scale,

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<sup>33</sup> For more detail on the methodology and limitations with particular application to tax laws, see: Lin Mei Tan & Greg Tower, “The Readability of Tax Laws: An Empirical Study in New Zealand” (1992) 9:3 *Austl Tax Forum* 355 at 361–363; Simon R James, Alan Lewis & Frances Allison, *The Comprehensibility of Taxation: a Study of Taxation and Communications* (Aldershot, UK: Avebury, 1987) at 173–174.

<sup>34</sup> Bittker, “Tax Reform and Tax Simplification”, *supra* note 24, n 7. Subsequent to Bittker’s writing, the IRS introduced the 1040EZ form, a simplified tax return that can be used by American taxpayers meeting certain conditions, see: US, Internal Revenue Service, “About Form 1040EZ”, (26 August 2017), online: <[www.irs.gov/forms-pubs/about-form-1040ez](http://www.irs.gov/forms-pubs/about-form-1040ez)> [perma.cc/775H-8EF8]; US, Internal Revenue Service, “Tax Topics - Topic 352 Which Form – 1040, 1040A, or 1040EZ?”, (29 November 2016), online: <[taxmap.irs.gov/taxmap2016/taxtp/Tt350\\_16-002.htm](http://taxmap.irs.gov/taxmap2016/taxtp/Tt350_16-002.htm)> [perma.cc/67LB-EW24].

<sup>35</sup> Tan & Tower, *supra* note 33 at 364. For more on the simplification that New Zealand has accomplished since that time, see: Adrian Sawyer, “Complexity of Tax Simplification: A New Zealand Perspective” in Simon James, Adrian Sawyer & Tamer Budak, eds, *The Complexity of Tax Simplification: Experiences from around the World* (Basingstoke, UK: Palgrave Macmillan, 2016) 110.

perhaps indicating that the scale itself does not fully capture the difficulty of reading tax statutes.

In chapter 7, I provide a readability analysis of materials in the Canadian tax system, together with a more detailed discussion the usefulness and limitations of readability studies. I find that the results in Canada are at least as bad as those in other jurisdictions.

## B. ADMINISTRATIVE AND COMPLIANCE COST

Joel Slemrod, among others, has argued that the most useful measure of tax complexity is the total resource cost of collecting the revenue.<sup>36</sup> This measure would include the budget of the tax collector and the full value of the time and resources spent complying with the tax system and any costs imposed on third parties in the collection process.<sup>37</sup> Slemrod offers the view that complexity in itself—as measured by the number of pages in the statute, the number of rules, or the difficulty of reading the rules—can safely be ignored to the degree that it imposes no economic cost.

As I explained in chapter 5, the access to justice framework that I use in this project cannot accept the compliance burden as an independent type of complexity (though conceptual complexity and complication may both cause compliance burdens in some cases). Similarly, the administrative cost of the tax system cannot be accepted

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<sup>36</sup> Joel Slemrod, “Why’d You Have to Go and Make Things So Complicated?” in Chris Evans, Richard Krever & Peter Mellor, eds, *Tax Simplification* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015) 1 at 1; Sidney I Roberts et al, “A Report on Complexity and the Income Tax” (1971) 27 *Tax L Rev* 325.

<sup>37</sup> Slemrod, *supra* note 36 at 1.

as a complete measure of either complexity or its impact on taxpayers. To restate, a requirement that taxpayers or the tax administration to perform a great number of relatively straightforward tasks is not complex. To the extent that it renders the system inaccessible, complexity may decrease the administrative costs as taxpayers engage less with the system. Thus, the administrative cost of the system is not necessarily reflective of complexity.

### C. A MULTI-FACETED INDEX

Recognizing the incompleteness of any one measure of complexity, the Office of Tax Simplification (OTS) in the U.K. has recently put forward its own complexity index.<sup>38</sup> The OTS's complexity index attempts to separately measure both "underlying complexity" and the "impact of complexity". Underlying complexity is defined as "the structural complexity of the tax measure, based on the policy, legislative and administrative complexity."<sup>39</sup> In measuring the impact of complexity, the OTS aims to measure the costs to both the taxpayer and the tax collector.<sup>40</sup>

In its attempt to measure underlying complexity, the OTS's complexity index takes into account six factors. The complexity of the policy is reflected in the index by

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<sup>38</sup> UK, Office of Tax Simplification, *The OTS Complexity Index* (London: Office of Tax Simplification, 2015), online: <[assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/438587/OTS\\_complexity\\_index\\_methodology\\_June\\_2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/438587/OTS_complexity_index_methodology_June_2015.pdf)> [perma.cc/85AS-L8A3]; see also John Whiting, Jeremy Sherwood & Gareth Jones, "The Office of Tax Simplification and Its Complexity Index" in Chris Evans, Richard Krever & Peter Mellor, eds, *Tax Simplification* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015) 235.

<sup>39</sup> UK, Office of Tax Simplification, *supra* note 38 at 4.

<sup>40</sup> *Ibid.*

counting the number of exemptions, reliefs, and special cases and the frequency of change. The complexity of the legislation is reflected by looking at a readability index and the number of pages of legislation. And, finally, the operational complexity is included by looking at the complexity of the administrator's guidance to taxpayers and the complexity of the information required to make a return.<sup>41</sup>

These measures are open to critique. In measuring change, for example, the index measures the number of changes to the legislation, but not the size of those changes, and does not take account of changes to either delegated legislation or administrative guidance. The use of easily countable features of the law, such as a readability index or the number of pages is liable to miss some issues of poor writing while perhaps over-emphasizing others. In looking at policy complexity, the frequency of change and the number of exemptions, reliefs, and special cases will give a sense of the complicatedness of the law, but might miss conceptual complexity. Conceptual difficulty may be partially captured under operational complexity (as the administration produces publications to clarify its interpretation of difficult concepts), but it then risks being obscured alongside issues around the accessibility and organization of administrative guidance. The index combines objective measures (the number of exemptions, the number of changes, the number of pages of legislation) with subjective measures (the complexity of administrative guidance and the complexity of information required to file a return are both subjectively graded on a scale from 1 to 5) and both approaches are bound to be imperfect.

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<sup>41</sup> *Ibid* at 6–8; see also Whiting, Sherwood & Jones, *supra* note 38 at 245–247.



For its part, the OTS acknowledges that the index functions as a “diagnostic tool rather than a rigorous academic analysis of complexity,” that the indicators they chose to measure are incomplete and imperfect, and that the index and its methodology require ongoing monitoring and maintenance.<sup>42</sup> Still, whatever its flaws, the OTS’s complexity index demonstrates that it is possible to measure the complexity of tax law in a pragmatic and useful way. The index allows for the comparison of the level of complexity of different taxes and of the different actual or proposed versions of the same tax. It covers most (if not all) of what is commonly understood as tax complexity and thus allows for monitoring of the complexity trade-offs discussed above. For example, it helps in evaluating whether a change to the law that reduced the volume of the legislation actually reduced complexity, or whether it merely displaced complexity by rendering the law less readable or by forcing the tax administrator to produce more complex guidance.

For present purposes, the key point is that measuring complexity is possible. As the OTS’s example shows, such an exercise requires to balancing the pragmatic need to have a reasonably simple measure against the desire to be comprehensive in capturing the facets of complexity and perfect in measuring each one. But, the exercise can be accomplished and the limitations of the measure can be identified and

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<sup>42</sup> UK, Office of Tax Simplification, *supra* note 38 at 2–3. Indeed, the OTS continues to develop and refine its thinking about the index, see: UK, Office of Tax Simplification, *The OTS Complexity Index* (London: Office of Tax Simplification, 2017), online: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/603479/OTS\_\_complexity\_index\_paper\_2017.pdf> [perma.cc/2N9W-4SML].

acknowledged. The difficulty of measuring complexity need not be fatal to the project of simplification.

#### IV. COUNTERACTING THE COMPLEXIFICATION OF TAX LAW

The challenges to simplification discussed above, both conceptual and practical, can be answered, but cannot be entirely dismissed. In this section, I suggest a framework for approaching simplification that takes into account each of these challenges and which, I argue, can be a useful pragmatic guide to focus simplification efforts. The framework is organized along three primary drivers of complexification in tax law. Looking at each in turn, I argue for ways in which the access to justice lens, and in particular the way that lens views complexity, might suggest courses of action to counteract this complexification.

##### A. COMPLEXITY-DRIVER #1: THE CULTURE AND PROCESSES OF TAX LAW

Some scholars have identified peculiar dynamics of tax law that contribute to ever-increasing complexity. After all, other areas of economic regulation have not seen the explosion of verbiage or of detail that characterizes statutes and regulations in tax law. In particular, the way that tax statutes are drafted, interpreted, and applied seems to reinforce and multiply intricacies of the system.

In his work, Schuck identified an American “legal cultural taste” for complexity. On this view, complication appeals to legal scholars, lawyers, and

lawmakers as a “craft value”.<sup>43</sup> At least in the tax field, Canadian jurists seem to have the same inclinations. Indeed, Canadian tax legal culture has no hint of the “rough justice” that is sometimes observed in U.S. tax law (at least at the collection stage) and which may moderate our inclinations toward formality and precision.<sup>44</sup>

In this section, I discuss two main drivers of complexity that fall under the heading of culture and processes. I begin by briefly discussing the complexity of the language used to express tax rules. Complex writing seems to be a feature of tax law, and perhaps Canadian tax law in particular. Next, I look at relationship between the legislative drafter, the judiciary, and the taxpayers that seems to contribute to complexity. This dynamic—which Rod Macdonald called the “vortex of legal precision”<sup>45</sup>—is powered by the strong economic incentive that taxpayers have to minimize their tax liability and the administration’s role in keeping those tax minimization schemes in check. The vortex of legal precision in most accounts mainly contributes to complication, but may add conceptual complexity in some cases as well.

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<sup>43</sup> Schuck, *supra* note 28 at 34–38; see also Paul’s discussion: Deborah L Paul, “The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve” (1997) 76 NCL Rev 151 at 180.

<sup>44</sup> On the U.S. “rough justice” approach, see Ann Mumford, *Taxing Culture: Towards a Theory of Tax Collection Law* (Aldershot: Ashgate, 2002). On its absence in Canada with regard to dispute settlement and collection issues, see generally: Colin Jackson, “Settlement and Compromise in Canadian Income Tax Law since Carter” in Kim Brooks, ed, *The Quest for Tax Reform Continues: The Royal Commission on Taxation Fifty Years Later* (Toronto: Carswell, 2013) 295; Colin Jackson, “The Case for a Canadian Offer-in-Compromise Program” (2015) 40:2 Queen’s LJ 643; See also Strain, Dodge & Peters, *supra* note 2 at 4:53 (discussing a particular statutory change that moved away from a “rough justice” approach and toward increased complexity).

<sup>45</sup> Roderick A Macdonald, *Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995) at 49.

## 1) A CULTURE OF COMPLEX LANGUAGE

Tax statutes are frequently unreadable. As Graeme Cooper wrote more than twenty years ago about the Australian tax system,

[N]o one could doubt that much of the income tax is poorly expressed. The obscurity of the usage is almost impenetrable. And this is no less true for tax specialists than it is for the lay reader, although the specialist has perhaps more help available in various forms.<sup>46</sup>

The use of extremely long sentences, the over-use of passive voice, and the use of unnecessarily difficult vocabulary are common complaints about legal writing.<sup>47</sup>

Taxation statutes are among the worst offenders.<sup>48</sup>

Consider an example chosen at random from the *ITA*. Subsection 110.6(19), which allows taxpayers to trigger a deemed disposition of property that was owned on a specific date, consists of a single 924-word sentence.<sup>49</sup> It references eight other

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<sup>46</sup> Graeme S Cooper, “A Rose Is a Flower Is a Plant’: Tax Simplification South of the Equator” (1995) 47 *Can Tax Found* 3:1 at 3:12.

<sup>47</sup> See generally: Reed Dickerson, *The Fundamentals of Legal Drafting*, 2nd ed (Boston: Little, Brown and Company, 1986) at 153–205; Robert C Dick, *Legal Drafting in Plain Language*, 3rd ed (Scarborough, ON: Carswell, 1995) at 60–162; Cheryl M Stephens, *Plain Language Legal Writing*, 5th ed (Vancouver: ASAP Legal, 1999) at 3.

<sup>48</sup> Robert D Brown, “Tax Simplification: Simple or Simplistic?” (1995) 47 *Can Tax Found* 5:1 at 5:5, writes that the tax statute’s “drafting style slows comprehension by the use of endless cross-references, and the unnecessary verbosity and repetition”; in New Zealand, Tan & Tower, *supra* note 33, found that over-use of the passive voice made the statutes even less readable than the Flesch readability score indicated.

<sup>49</sup> *ITA*, *supra* note 31, s 110.6(19). The French version is slightly longer at 954 words. On the convention that sections of a statute be written as a single sentence, see: Stanley E Edwards, “Drafting Fiscal Legislation” (1984) 32:4 *Can Tax J* 727; DJ Sherbaniuk, “Tax Simplification—Can Anything Be Done About It?” (1989) 40 *Can Tax Found* 3:1. The one-sentence convention was explained by Elmer Driedger

provisions scattered around the *ITA*, contains at least five other cross-references internal to itself (that is, between its own various paragraphs, subparagraphs, clauses, and subclauses), and does the difficult job of expressing arithmetic in legislative prose. To make matters worse, subsection 110.6(19) cannot be read without reference to subsection 110.6(20), which imposes limitations on its use.<sup>50</sup>

While there may be hope for the “plain language” movement to reach the tax statutes, many scholars are hesitant to be optimistic.<sup>51</sup> An anecdote from David Lloyd George’s time as Chancellor of the Exchequer in the early twentieth century explains the reason:

The Board of Inland Revenue had sent Lloyd George, who was then Chancellor of the Exchequer, a paper about Estate Duty liability on settled property.

Mr Lloyd George rejected this paper and demanded an explanation in words of one syllable. The Board sent a new paper - in words of one syllable; but the subject matter remained as complicated as before, and the monosyllables made it rather harder to understand.<sup>52</sup>

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as being intended to keep sections of a statute readable and on-topic: Elmer A Driedger, *The Composition of Legislation*, 2d ed (Ottawa: Department of Justice, 1976) at 77.

<sup>50</sup> *ITA*, *supra* note 31, s 110.6(20), which is itself a 479-word sentence (495 in the French version).

<sup>51</sup> Canada has seen optimism around the idea of plain language drafting in the reasonably recent past. See, for example: Ruth Sullivan, “The Promise of Plain Language Drafting” (2001) 47 McGill LJ 97. However, the project described by Sullivan appears not to have come to fruition.

<sup>52</sup> James, Lewis & Allison, *supra* note 33 at 174, quoting Alexander Johnston, *The Inland Revenue* (London: Allen & Unwin, 1965) at 56.

Clear expression ought to be a goal, but it can only take us so far when the rules that need expression are themselves complex.<sup>53</sup> While we should, of course, endeavour to draft well—“avoiding the passive voice, double negative, exceptions and provisos,”<sup>54</sup> using shorter sentences, clearer language, and so on—we cannot expect the complexity of the rules or of the underlying concepts to disappear no matter how clear their expression.

To date, there is no published work available examining this issue in Canadian tax law. In chapter 7, I begin to fill this gap with a readability analysis of various material related to Canada’s tax system. As I discuss there, it seems reasonably clear that many of these elements of Canada’s tax system, and the *Income Tax Act* in particular, could be written more accessibly.

## 2) THE VORTEX OF LEGAL PRECISION

On the standard account, income tax requires detailed rules to provide certainty. The drafter of the statute aims to draft rules that will appropriately calculate income in the particular circumstances of each taxpayer. Because of the diversity of human affairs, particularly in the increasingly complex globalized society discussed above, these rules necessarily become complicated.

Sol Picciotto discusses the legal complexity coming “from the attempt to draw up rules that are precise and that anticipate every contingency.” The result of this

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<sup>53</sup> Cooper, *supra* note 46 at 3:13, writes, “[a] complex system may be clearly expressed and yet remain a complex system. The complex rule remains.”

<sup>54</sup> *Ibid* at 3:22.

drafting approach is “a highly complex tax code.”<sup>55</sup> This formalist approach to tax law is one Picciotto contrasts with an approach based on more general, open-ended principles, one that is typically rejected in tax law out of a fear of indeterminacy.<sup>56</sup>

However, the link between a high volume of detailed rules and certainty is less straightforward than it may appear. In thinking about the problem of detailed legal rules for access to justice, Rod Macdonald described the problem as follows:

Not only will a proliferation of detailed legal rules not reduce litigation, it might actually exacerbate the problem. The more rules there are, the greater the tendency to be legalistic (that is, write a judgment referring only to narrow semantic points) rather than to reach solutions on the basis of the policy of the law and its overall systemic logic. As any decisionmaker will explain, it is superficially much easier to “decide” a case either way where there are a plethora of rules - the more detailed the better. While each rule has an ostensible target, each rule carries its exceptions, its counter rules and its capacity for interpretation. The greater the precision of the rules, the greater the chance that a decision can be taken without the judge ever

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<sup>55</sup> Picciotto, *supra* note 1 at 14.

<sup>56</sup> *Ibid*, citing Doreen McBarnet & Christopher Whelan, “The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control” (1991) 54:6 Mod L Rev 848 at 849 for their definition of formalism: “a narrow approach to legal control—the use of clearly defined, highly administrable rules, and an emphasis on uniformity, consistency, and predictability, on the legal form of transactions and relationships and on literal interpretation”; see also: Posner, *supra* note 1.

having to be explicit about why a particular result is reached.

The vortex of legal precision is aptly revealed in the constant thrust and parry of amendments to the *Income Tax Act* and the tax avoidance schemes conceived by sophisticated practitioners.<sup>57</sup>

These are similar sentiments to those of John Avery Jones, who wrote that “pursuit of certainty through more and more detail... is now amply proved not to work.” He explained:

Detail and certainty do not necessarily go together. We all agree with Adam Smith about certainty. The desire for it results in more and more detail hoping to answer every question. As the [Tax Law Review Committee of the Institute for Fiscal Studies] rightly says, “The possible permutations of facts are virtually infinite so that legislation cannot realistically aspire to answer every question. In this sense, complete immediate certainty is unattainable.”<sup>58</sup>

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<sup>57</sup> Macdonald, *supra* note 45 at 49.

<sup>58</sup> John Avery Jones, “Tax Law: Rules or Principles?” (1996) 17:3 *Fiscal Studies* 63 at 65, citing: Institute for Fiscal Studies, Tax Law Review Committee, *Interim Report on Tax Legislation* (1995). While certainty is a widely agreed on goal, not many contemporary tax scholars would go quite so far as Smith, who wrote:

The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation, some present or perquisite to himself. The uncertainty of



Detailed rules are drafted aiming for certainty, but doing so runs the risk of increasing the possibilities for clever avoidance of those rules.<sup>59</sup> These avoidance schemes, in turn, create disputes for the courts to resolve when the CRA finds out about them. Many of the schemes are effective in minimizing tax liability, based on the judges' reading of the detailed rules, and will thus require further amendments—more detailed rules—to try to bring the text of the statute into line with its policy goals. These new detailed rules, of course, are liable to simply restart the cycle from the beginning.

What is more, we have long passed the point where any particular actor in the system can take responsibility for this dynamic. Tax statutes were historically interpreted strictly against the Crown, on the logic that if the government wanted to interfere with private property rights, it ought to do so in clear language. And, moreover, at least since the *Duke of Westminster*, judges have announced that taxpayers are free—even encouraged—to arrange their affairs in ways that minimize their exposure to tax.<sup>60</sup> Strict interpretation forces the drafters of tax statutes to be more precise in their drafting.

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taxation encourages the insolence of favours the corruption of an order to men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty.

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 6th ed reprint, vol II (London: George Bell & Sons, 1896) at 352.

<sup>59</sup> Picciotto, *supra* note 1 at 14: “the formalist approach does not prevent avoidance, but shifts it to a new level, involving game playing and ‘creative compliance.’”

<sup>60</sup> *Inland Revenue Commissioners v Duke of Westminster*, [1936] AC 1 at 19 (HL).

The tax drafter’s approach to the problem was expressed by David Dodge and Victor Peters, then of the Department of Finance, when they said in 1988:

In the case of those who are deliberately attempting to reduce their tax burden, we make no apology whatsoever for the complexity of the rules. Indeed, the provisions are as complex as they are precisely because of such taxpayers, who strive to take advantage of every legal possibility, and, accordingly, force us to anticipate all such actions.<sup>61</sup>

That tax drafters need to anticipate and account for not only the real economic activity of each taxpayer but also the creativity of an industry of tax planners certainly leaves them with a difficult task. It seems, however, that the response of tax drafters to this problem is almost always to introduce further complication: to write more and be more precise, in order to include more potential situations. Rarely, if ever, can we identify what might be termed an “elegant” solution by mathematicians or computer scientists in our tax code.<sup>62</sup>

The absence of elegant solutions in tax may arise because tax policy makers need to communicate with particular human readers. As Stanley Edwards wrote,

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<sup>61</sup> Strain, Dodge & Peters, *supra* note 2 at 4:39-4:40 (discussing the complexity of the income splitting rules as they were at the time).

<sup>62</sup> For mathematicians, an elegant proof is one that is “unusually succinct” and therefore has an aesthetic appeal: “Mathematical Beauty”, (4 September 2017), online: *Wikipedia* <[en.wikipedia.org/wiki/Mathematical\\_beauty](http://en.wikipedia.org/wiki/Mathematical_beauty)> [perma.cc/5CKB-4ZU9]; similarly, elegant code is concise and readable while accomplishing the required function: THINKR, “14-Year-Old Prodigy Programmer Dreams in Code” (3 January 2013), online (video): *YouTube* <[www.youtube.com/watch?v=DBXZWB\\_dNsw](http://www.youtube.com/watch?v=DBXZWB_dNsw)> [perma.cc/58D7-VYZU].

“[a]ny legal contract or statute should be written so that a person of reasonable intelligence, reading it in good faith, can understand it. But it should also be written with such a degree of precision that a person of Machiavellian cleverness, reading it in bad faith, cannot misunderstand it.”<sup>63</sup> In the tax context, this need for precision is undergirded by an assumption that courts will—at least sometimes—rule in favour of the bad faith misunderstanding of the tax statute. Accordingly, as Dodge expressed, drafters must anticipate every possible move of the tax planner and draft precisely to guard against each one.

While this may appear to leave the blame at the feet of judges, we are now in an era in which courts call for a more balanced interpretation, considering text, context, and purpose.<sup>64</sup> Courts have abandoned the doctrine of strict interpretation of tax statutes. Even in this new interpretive era, however, the level of detail and precision in the tax rules seems to demand attention to the text, which almost always comes to dominate over the contextual and purposive analyses. As the Supreme Court wrote:

As a result of the Duke of Westminster principle that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes,

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<sup>63</sup> Edwards, *supra* note 49 at 728, paraphrasing *In re Castioni*, [1891] 1 QB 149 at 167 (Stephen J).

<sup>64</sup> *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 [*Canada Trustco*].

including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.<sup>65</sup>

Previously, the strict textual interpretation of tax statutes caused them to become more complicated; now the complication of our tax statutes causes them to be interpreted strictly according to their text. The interpretive doctrines have changed, the chicken and egg have switched places, but the effect remains largely the same.

To approach this problem from a different angle, I will briefly summarize two different proposed solutions. Neither proposal is put forward by its author as a recipe for fundamental reform of the tax system;<sup>66</sup> however, each is responding to this relationship between the legislature and courts that creates, in Macdonald's words, the "vortex of legal precision."<sup>67</sup>

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<sup>65</sup> *Ibid* at para 11.

<sup>66</sup> Indeed, while advocating for a GAAR in the UK, Freedman is explicit in saying that "GAARs are not the correct tools for fundamental tax reform": Judith Freedman, "Designing a General Anti-Abuse Rule: Striking a Balance" (2014) 20:3 Asia-Pacific Tax Bulletin 167 at 173.

<sup>67</sup> Macdonald, *supra* note 45 at 49.

a. *Legislative Articulation of Principles*

Before a general anti-avoidance rule (GAAR)<sup>68</sup> was introduced into U.K. tax law, Judith Freedman considered the Canadian and Australian examples and made recommendations that can shed some light on the current discussion.<sup>69</sup> Freedman suggested that a GAAR should be introduced in the U.K.. Along with expressly giving the judiciary the power to recharacterize transactions, Freedman suggested that Parliament should be explicit about the policy underlying the law. A GAAR would work best, in Freedman’s view, if judges were able to refer to a coherent framework of principles, articulated by the legislature, in making their decisions under the GAAR.

Freedman’s analysis is instructive for Canada in part because she considered our experience with the GAAR a warning rather than a model. In particular, she pointed to situations where the courts are asked to apply the GAAR, but the policy of the legislation is unclear.<sup>70</sup> The courts are asked to look for abusive avoidance, but the *ITA* provides no direction on the meaning of “abusive.”<sup>71</sup> Looking at the case law as it stood in 2007, Freedman concluded that Canada’s GAAR “takes us no further than ordinary purposive construction”—arguably it does not even take us that far—and thus a Canadian-style GAAR would do little work in the British tax system.

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<sup>68</sup> Canada’s GAAR, *ITA*, *supra* note 31, s 245, allows for the denial of a “tax benefit” that would result from a transaction or series of transactions, if that transaction or series of transactions is found to constitute a misuse or abuse of one or more tax provisions.

<sup>69</sup> Judith Freedman, “Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament” (2007) 123 Law Q Rev 53 [Freedman, “Interpreting Tax Statutes”].

<sup>70</sup> *Ibid* at 76.

<sup>71</sup> *Ibid* at 77.

The difficulty in Freedman’s proposal (one she acknowledges) lies in asking the legislature to articulate policy goals or principles that underlie the rules they pass as legislation. It seems that she imagined a gradual improvement on this front rather than a “thorough review of the underlying principles of tax law.” Significant for her proposal is the definition of “principles” that she drew from a project of the Australian government:

[A] principle is not just a less specific rule; it is a statement about the essence of all outcomes intended within its general field.

When a principle works, it does so because the essence it captures appeals to readers at other than an abstract intellectual level; it means something to readers because it relates to their understanding of the real world.<sup>72</sup>

Having the legislature articulate these principles or policies and allowing the judiciary to pursue them via a GAAR would, in Freedman’s view, “not create any greater uncertainty than exists at present, but would increase clarity, transparency and legitimacy.”<sup>73</sup>

*b. A Pragmatic and Dynamic Approach to Interpretation of Tax Statutes*

Looking at the question of the interpretation of tax statutes, Neil Brooks made a radical suggestion.<sup>74</sup> Brooks called our tax laws “a mess” and laid much of the

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<sup>72</sup> Greg Pinder, “The Coherent Principles Approach to Tax Law Design”, online: <[fofa.treasury.gov.au/content/downloads/coherent\\_principles.pdf](http://fofa.treasury.gov.au/content/downloads/coherent_principles.pdf)> [perma.cc/2S92-JD82].

<sup>73</sup> Freedman, “Interpreting Tax Statutes”, *supra* note 69 at 90.

<sup>74</sup> Neil Brooks, “The Responsibility of Judges in Interpreting Tax Legislation” in Graeme S Cooper, ed, *Tax Avoidance and the Rule of Law* (Amsterdam: IBFD Publications, 1997) 93. To be clear, Brooks calls

responsibility at the feet of judges. He proposed that judges act like pragmatic tax analysts in deciding cases. That is, judges should not concern themselves with determining the meaning of the words of the statute, the intention of the legislature, or the purpose of the provision. Rather, they ought to consider a range of “plausible, alternative policy options for each interpretive issue”<sup>75</sup>; reflect on the consequences of the options in terms of equity, neutrality, administrative practicality (the usual trio of tax policy goals) and any other relevant evaluative criteria; and then choose the option that best accords with tax principles.<sup>76</sup>

To make matters more clear, Brooks suggested that judges should choose the most sensible tax policy outcome even where it requires a strained interpretation of the words of the statute, and not only in cases where the words are ambiguous but also where they are specific. The proposal would have judges use their own policy judgment except in cases where “it is clear that the statute was designed to resolve the specific case in a way other than the judge thinks is sensible in terms of tax policies and principles.”<sup>77</sup> Brooks went on to argue that this approach better accords with democratic theory, better reflects the institutional competences of legislatures and courts, would lead to more certainty and predictability, better accounts for changing circumstances, and would lead to be a better, more coherent tax statute.<sup>78</sup>

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his own proposal one for “a pragmatic and dynamic approach to statutory interpretation” (at 101), but he suggests that “it is not particularly radical” (at 100). Given the history of Anglo-Canadian interpretation of tax statutes, I suggest that the change would be both difficult and significant.

<sup>75</sup> *Ibid* at 99.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* at 100.

<sup>78</sup> Brooks, *supra* note 74.

c. *Lessons to Draw from the Two Proposals*

My purpose here is not to endorse one or the other of these two proposals (though, in my view, they both have merit). Freedman proposed a way out of the “vortex of legal precision” that would begin with the legislature articulating the policies or principles behind the tax statute and empowering judges to act on those policies and principles. Brooks proposed a different escape from the vortex: he suggests that judges already have the power to dynamically and pragmatically interpret tax statutes and that they should rely on the policies and principles that tax policy analysts already agree upon (and that judges should undertake this exercise as a matter of course, not only in special cases where the GAAR is invoked).

For present purposes, there are two lessons to draw from looking at these proposals together. Each of these two proposals acknowledges that, to some degree, the complexity of tax law is not fully irreducible. It is not merely a function of our concern for equity or the choice of an income tax over some less fair tax. Rather, the specific processes by which tax statutes are drafted and interpreted have contributed to the law’s complexity, and these processes can be changed. Both Freedman and Brooks suggest that tax law needs special rules of interpretation,<sup>79</sup> but not those that have traditionally held sway in the common law world. Rather, these two proposals suggest that a set of law-making practices that reduces complexity without sacrificing other policy goals is possible. Indeed, while principles-based statutory drafting proposals have gained little traction in Canadian tax law, the “coherent principles”

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<sup>79</sup> Freedman, *supra* note 47 at 63; N Brooks, “Responsibility of Judges,” *supra* note 52.



approach developed in Australia and the traction that has been gained in Canada for principles-based regulation of capital markets offers some hope.<sup>80</sup>

However, each proposal, at least in the Canadian context, would require a significant shift in the culture of tax law. Purposive interpretation is already a concept with which Canadian tax law has some difficulty, as illustrated in the quotation from *Canada Trustco* above.<sup>81</sup> Each of these proposals would go significantly further, asking for a dramatic shift in direction in the way that tax law is made (even if change would be incremental). We should not expect either to come about soon or without significant and sustained effort on the part of their advocates.

## B. COMPLEXITY-DRIVER #2: THE PURSUIT OF THE IDEAL TAX SYSTEM

While it might be possible to reduce the tax system's reliance on intricate, detailed rules by shifting the cultures around the drafting and interpretation of those statutes, there remains a further objection. At least in part, the complexity of income tax law reflects a balance between the conceptual complexity of income and the complication that results from drafting rules to practically measure the income of individuals. Picciotto puts it this way:

[I]t has been suggested that that income tax law is different in kind even from other laws (even other taxes, such as sales or transaction taxes), because its concepts do not refer to

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<sup>80</sup> Pinder, *supra* note 72; Cristie L Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45:1 Am Bus LJ 1; Task Force to Modernize Securities Legislation in Canada, *Canada Steps Up* (Toronto: Task Force to Modernize Securities Legislation in Canada, 2006).

<sup>81</sup> *Canada Trustco*, *supra* note 64 at para 11.

something that exists in nature. This point is well taken for the central concept of income, which is almost entirely artificial.<sup>82</sup>

While there is indeterminacy inherent in all language, tax law has particular difficulty due to its reliance on artificial concepts. Or, in Freedman's words,

Much has been made ... of tax being created to operate in the real world, not that of make-belief. The true position, however, is that the tax system is often not based on *economic* reality... Some taxes, of which capital gains tax is a good example, are based on legal concepts of property or contract and are of their essence a matter of legal form rather than economic substance. Other areas of taxation are based on business or accounting concepts, but these may be modified for tax purposes. "Reality" is an unhelpful notion in this context.<sup>83</sup>

It would be, of course, still beneficial to draft rules as simply and clearly as possible, to reduce the drive toward over-precision, to find the elegant solution. However, as Freedman nicely captures, much of tax law relies on inaccessible concepts, which will remain inaccessible even if the baroque quality of the rules and their ornate expression are removed.

As I discuss below, it may be possible to remove some of the complex concepts from the tax system. When, as Freedman points out, the tax system relies on difficult

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<sup>82</sup> Picciotto, *supra* note 1 at 15 [footnote omitted]; on a similar note, see McCaffery, *supra* note 2, n 29 ("Measurement evokes the eternally open-ended question of defining 'income.'").

<sup>83</sup> Freedman, "Interpreting Tax Statutes", *supra* note 69 at 73.

concepts imported from property law, contract law, business, or accounting, we may wonder whether this conceptual complexity is either necessary or helpful. The capital gains tax is a good example, and, as many have pointed out over a century of debate, it need not be so.<sup>84</sup>

However, there is simply no avoiding that an income tax system needs to give some content to the concept of income. Income may be considered a complex concept, and developing a practical system of tax law around it often imports both complication and further conceptual complexity. Will the system distinguish between income from labour and income from capital? Does income include gifts and inheritances? How will the system handle non-cash benefits? How will mixed business and personal expenses be treated? While the Schanz-Haig-Simons concept of income offers clear answers to some of these questions,<sup>85</sup> others are more difficult.<sup>86</sup> In drafting rules to respond to each of these questions and many others, it is often observed that simplicity and fairness pull against each other.<sup>87</sup>

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<sup>84</sup> For a helpful review of the debate around the preferential treatment of capital gains, see: Walter J Blum, "A Handy Summary of the Capital Gains Arguments" (1957) 35 *Taxes* 247.

<sup>85</sup> Henry C Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (Chicago: University of Chicago Press, 1938) at 50, put the definition as follows: "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end of the period in question." The idea is credited to Simons as well as Robert Haig and Georg von Schanz. See: Georg von Schanz, "Der Einkommensbegriff und die Einkommensteuergesetze" (1896) 13 *Finanz-Archiv* 1; Robert M Haig, "The Concept of Income: Economic and Legal Aspects" in Robert M Haig, ed, *The Federal Income Tax* (New York: Columbia University Press, 1921).

<sup>86</sup> Though the Schanz-Haig-Simons definition of income and the policy goals of equity, neutrality, and administrability can still guide policy makers in crafting their answers: Kim Brooks, "Delimiting the Concept of Income: The Taxation of In-Kind Benefits" (2003) 49 *McGill LJ* 255.

<sup>87</sup> See, for example, Jeffrey Partlow, "The Necessity of Complexity in the Tax System" (2013) 13 *Wyo L Rev* 303.

From a pragmatic point of view, advocates of simplicity and access to justice can simply leave alone rules around the measurement of income and focus their efforts elsewhere. Canada's tax system, including both the *Income Tax Act* and the administrative guidance, contains rules to deal with in-kind benefits in general as well as some specific examples like holiday gifts that employers give to employees.<sup>88</sup> It contains rules to deal with expenses that may be considered both personal and work-related, such as travel, meal, and entertainment expenses.<sup>89</sup> In these examples, and many others, the rules attempt to balance competing concerns: equity requires that income be measured as accurately as possible; neutrality requires that the system attend to behavioural consequences of the rules; and administrability requires that the system be reasonably easy to administer and comply with.

While I argue that advocates of access to justice and simplicity in tax should focus elsewhere, two points are worth making. First, the culture change discussed above would have an impact here. While the concept of income brings some inherent complexity into the system, it would still be possible to express both the rules and the underlying policies more clearly. Second, and connected to the first, the proposed shift from a blinkered focus on compliance and administrative cost to a broader concern for engagement and empowerment would still be welcome. While the concept of income remains difficult, at least at the margins, the goal of access to

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<sup>88</sup> *ITA*, *supra* note 31, s 6(1)(a); Canada Revenue Agency, Guide T4130(E) Rev. 18, "Employers' Guide: Taxable Benefits and Allowances" (2018), online: <[www.canada.ca/content/dam/cra-arc/formspubs/pub/t4130/t4130-18e.pdf](http://www.canada.ca/content/dam/cra-arc/formspubs/pub/t4130/t4130-18e.pdf)> [perma.cc/4CLE-5YNN].

<sup>89</sup> *ITA*, *supra* note 31, ss 8(1)(h), 8(4), 67, 67.1.

justice lens requires the system be designed and implemented in a way that not just minimizes the paperwork that participants need to complete, but that also facilitates understanding the concept and engaging in meaningful ways with the processes that produce and administer the rules.

### C. COMPLEXITY-DRIVER #3: SPECIFIC DESIGN CHOICES IN THE STRUCTURE OF THE SYSTEM

Many complexity-generating choices are made in pursuance of an equitable tax system, as discussed above. However, this third category is populated by choices that add complexity for some other reason. The Department of Finance's annual *Tax Expenditure Report* provides a helpful list of many of these.<sup>90</sup> In this section, I explain briefly how the list of tax expenditures can be a useful guide for simplification-minded reform advocates. A more detailed example of the type of work this might lead to is provided in chapter 8. I also note that not all of the complexity-generating structural design choices in the tax system are found in the *Tax Expenditure Report*, and provide some examples of those that are not.

#### 1) TAX EXPENDITURES

The tax expenditure concept was developed by Stanley Surrey, then Assistant Secretary of the U.S. Treasury, in 1967.<sup>91</sup> Surrey's insight was that the U.S. tax system

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<sup>90</sup> Canada, Department of Finance, *Report on Federal Tax Expenditures: Concepts, Estimates and Evaluations 2019* (Ottawa: Department of Finance, 2019), online: <[www.fin.gc.ca/taxexp-depfisc/2019/taxexp-depfisc19-eng.pdf](http://www.fin.gc.ca/taxexp-depfisc/2019/taxexp-depfisc19-eng.pdf)> [perma.cc/F8CR-CLCR] [Canada, Department of Finance, *Tax Expenditure Report 2019*].

<sup>91</sup> Stanley S Surrey, *Pathways to Tax Reform: The Concept of Tax Expenditures* (Cambridge, Mass: Harvard University Press, 1973) at 3.

contained many provisions—“deliberate departures from accepted concepts of net income and ... various special exemptions, deductions and credits”<sup>92</sup>—that would be better thought of as government spending than as tax provisions. The concept has now been well recognized and much discussed, and Canada’s Department of Finance produces an annual report on federal tax expenditures that lists and explains the expenditures, and, where possible, estimates their cost.<sup>93</sup>

In the United States, the use of tax expenditures has been called, “the single biggest cause of complexity” in the federal income tax system.<sup>94</sup> Considering the subject, Surrey wrote that “[a]n income tax is a complex tax, but we should not fault it as a tax because of the complexities forced on it when it is required also to carry out a whole host of expenditure programs.”<sup>95</sup> Tax expenditures are prevalent in Canada as well. The government’s most recent *Report on Federal Tax Expenditures* lists over 150 tax expenditures.<sup>96</sup> The choice to use the tax system not only to raise revenue but also to deliver a wide variety of government programs adds complexity by increasing the number of goals that the system aims to meet and by adding qualification and limitation rules for the various expenditures.

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<sup>92</sup> *Ibid.*

<sup>93</sup> Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 90.

<sup>94</sup> McDaniel, *supra* note 2 at 48.

<sup>95</sup> Surrey, *supra* note 91 at 35.

<sup>96</sup> Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 90. The list includes both corporate and personal income tax expenditures as well as those in the goods and services tax. In addition to the list of tax expenditures, the report lists a number of “tax measures other than tax expenditures” and “refundable tax credits classified as transfer payments.” Some of these might be classified as tax expenditures, such as the non-taxation of gambling and lottery winnings and the film and video production tax credit.

It is not entirely clear, however, that removing all of the tax expenditures from the tax system is a good way to reduce complexity. It could reduce the complexity of the tax system, certainly, but, assuming that those government spending programs would continue, the complexity associated with those expenditures would be moved elsewhere.<sup>97</sup> This move would force those qualifying for these expenditures to deal with the same complexity in a place other than their tax return, and thus perhaps increasing both compliance and administrative costs. In other words, the tax system is likely to be the most efficient way to deliver at least some of these expenditures.

However, as many have noted over the years, subjecting tax expenditures to the same critical scrutiny as other government spending has the potential to reduce the number of tax expenditures and thus simplify the tax system.<sup>98</sup> Still, while those aiming to simplify the system are wise to target particular tax expenditures that do not withstand scrutiny, the complexity caused by the *concept* of the tax expenditure—that which arises from the fact that we pursue diverse policy goals in addition to the trio of goals of the technical tax system—will and perhaps should remain.<sup>99</sup>

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<sup>97</sup> To the extent that tax expenditures would not be continued, then simplification may be accomplished. For example, while it is inconceivable that at this point Parliament would choose to tax gains from the sales of principal residences, it strikes me as equally unlikely that, if the principal residence exemption had never existed, Parliament would start a new subsidy program for homeowners costing nearly \$6 billion per year (see Canada, Department of Finance, *Tax Expenditure Report 2019*, *ibid*, at 33, 180).

<sup>98</sup> This line of argument is at least as old as the label “tax expenditure”: see Surrey, *supra* note 91; McDaniel, *supra* note 2.

<sup>99</sup> For the argument that Canada’s use of tax expenditures should be curtailed see: Neil Brooks, “The Case against Boutique Tax Credits and Similar Tax Expenditures” (2016) 64:1 Can Tax J 65.

In chapter 8, I examine one of these tax expenditures and argue that it cannot be justified. While some tax expenditures can be attacked on the basis of their high cost,<sup>100</sup> chapter 8 examines the taxation of capital gains on realization, a tax expenditure for which the Department of Finance has no estimated cost.<sup>101</sup> Thus, chapter 8 works as an example of the way in which the access to justice framing, and, in particular, framing complexity as an access to justice issue, can help illuminate debates around tax expenditures.

A similar chapter might have examined preferential treatment of capital gains. As is commonly recognized, an ideal Schanz-Haig-Simons income tax would fully include capital gains income.<sup>102</sup> According to the Department of Finance, the goals of the capital gains preference are encouraging or attracting investment, encouraging savings, and supporting competitiveness.<sup>103</sup> While arguments are made in favour of the capital gains preference on both equity and economic efficiency grounds,<sup>104</sup> we must also recognize that the capital gains preference is an enduring source of tax

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<sup>100</sup> For example, the non-taxation of benefits from private health and dental plans has an estimated annual cost around \$3 billion, the principal residence exemption has an estimated annual cost near \$6 billion, and the partial inclusion of capital gains has an estimated cost of \$8.25 billion in personal income tax and nearly \$9 billion in corporate income tax in 2020: Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 90 at 33–34.

<sup>101</sup> This is not to say it is costless; rather, there is simply no data available on the beneficiaries of tax expenditure: *Ibid* at 34, 255, 321.

<sup>102</sup> See generally, Canada, *Report of the Royal Commission on Taxation* (Ottawa: Queen's Printer, 1966) [Canada, *Carter Commission Report*].

<sup>103</sup> Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 90 at 200.

<sup>104</sup> There is ample literature arguing the merits of the preferential treatment of capital gains. For concise summaries of the main arguments in favour and against, see Blum, *supra* note 84.



planning schemes, which lead to litigation, anti-avoidance rules, more creative tax plans, and so on, in the cycle described above.<sup>105</sup>

## 2) OTHER STRUCTURAL CHOICES

It is worth pointing out that not every complexity-generating structural choice in the tax system shows up on the annual *Tax Expenditure Report*. While that report is a helpful guide to elements of the tax system that deviate from the ideal Schanz-Haig-Simons income tax (which the *Tax Expenditure Report* refers to as the “benchmark tax system”),<sup>106</sup> it also focuses on those tax measure which are, in effect, government spending. Other structural choices may be worth examining, but do not fall under the rubric of tax expenditures.

There are no doubt reasons that these design choices were made, but they deserve periodic re-evaluation. For example, the *Income Tax Act* posits a fundamental distinction between income from employment and income from business. It does so to reduce employees’ compliance burden by allowing them to use cash accounting and to make administration of the system easier through the withholding of tax by the employer and the limitation of deductions for employees. However, the distinction between employment and self-employment remains conceptually difficult,

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<sup>105</sup> See Robert Couzin, “Simplification and Reform” (1988) 26 Osgoode Hall LJ 433 at 438–441 for a discussion of the complications arising from the capital gains preference. As Couzin notes, the recommendation put forward in Canada, *Carter Commission Report*, *supra* note 102 was for a simplified system involving full integration and taxation of capital gains. However, the half taxation of capital gains introduced in the 1972 reform seemed to introduce even more complexity than the full exemption (Couzin at 440).

<sup>106</sup> Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 90 at 43–45.

and the list of exemptions to the denial of deductions for employees creates significant complication.<sup>107</sup> Moreover, as the labour market continues to shift toward precarious employment and self-employment,<sup>108</sup> the costs and benefits of the current structure may need reassessment.

Other examples in this category might include the differential treatment of individuals, corporations, partnerships, trusts, and cooperatives, or the distinctions and varying rules governing income from scholarships, research grants, and prizes. Similarly, to the extent that there is any dispute about whether a particular tax measure, such as the taxation of capital gains on realization, the partial inclusion of capital gains, or the registered retirement savings plan provisions is truly a tax expenditure, it may be considered under this category. Again, for present purposes, it is not necessary to say that any of these measures have no value or function; my claim is only that a proper cost-benefit analysis of these tax provisions must account for the access to justice costs of complexity in a more robust way than has usually been the case in the past.

## V. GUIDED BY ACCESS TO JUSTICE

Even those sympathetic to the case made in chapter 5 may have been left unsure of how to proceed. That is, even if legal complexity is an access to justice issue, there are significant questions to be answered about the process of simplification. Is it

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<sup>107</sup> *ITA*, *supra* note 31, s 8.

<sup>108</sup> See generally Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen's University Press, 2006).

possible to simplify a legal system that aims to apply to a large and diverse population and to measure, if not influence, all of their economic activity? In the tax system, much of the complexity seems to arise from attempts to make the system more equitable, and surely access to justice (as we have broadly defined it to include access to social justice) cannot be advanced by making the tax system less equitable. This chapter represents an attempt to answer these challenges and to build a framework for simplification that responds to them.

As others have argued before, we ought to be suspicious of strategies that aim for certainty or equity in tax law by adding more precision or complication. Such reforms are often ineffective in meeting their goals and sometimes backfire—creating more inequity or uncertainty. At the very least, justifications of these proposals should account for the fact that adding complexity to the tax system impedes the effective agency of taxpayers.

The complexity of the tax system—the intricacy of its rules, their baroque expression, and the difficulty of the underlying concepts—all reduce the ability of taxpayers to engage with the system and encourage the understanding of tax law as the exclusive domain of a privileged few. Just as designers of a tax system sometimes trade simplicity for equity or certainty, designers sometimes add complexity to the tax system for the purpose of reducing the administrative cost. These trade-offs may be justified, but a framework that confuses complexity with either the cost to the administrator of enforcing the tax or the cost to taxpayers of fulfilling their obligations obscures the trade-off between complexity and administrative cost.

The framework above suggests several things. First, some of what we considered complexity in the tax system is connected more to the culture and processes of taxation (particularly in anglo-American legal cultures) than it is to the goals of a tax system. While we should not expect to break out of the “vortex of legal precision” quickly or easily, it may help to realize that the approaches to statutory interpretation that created this vicious cycle have been disavowed by the courts. Though momentum keeps the cycle going, nothing in particular continues to drive it, and so we may, over time, hope to introduce friction and countervailing forces to slow and then reverse the process. Legal educators, in particular, can train future judges to decide cases in line with the underlying policies and future legislative drafters to write laws clearly and with the understanding that judges will interpret in accordance with the policy.

Second, there is some complexity that is inherent in the computation of income we may consider normatively desirable. Drafting and applying these rules involves difficult trade-offs and sometimes competing considerations of equity, neutrality, and administrability. In evaluating these trade-offs, I have argued that the access to justice lens would have us consider the engagement or empowerment of taxpayers rather than mere “tax compliance”. In general, however, access to justice advocates should avoid targeting for simplification rules that are about calculating income in accordance with the Schanz-Haig-Simons ideal.

Third, I have attempted to demonstrate above that there is a significant amount of complexity in the tax system which is analytically distinct from the

normatively desirable complexity. That is, even if the ideal tax system would retain a high level of complexity, much of the complexity of our current tax system comes from sources other than the ideal and could be eliminated without sacrificing the Schanz-Haig-Simons norms. More immediate simplicity gains are perhaps available in this third category. The efforts of those seeking simplicity in income tax, I suggest, would be most fruitfully directed at the critical examination of the third type of complexity I have identified. These are choices made in the design of the tax system that add complexity to the system for reasons other than a commitment to equity and the Schanz-Haig-Simons ideal. There are no doubt reasons that these choices were made, but they deserve periodic re-evaluation.

The tax system contains complicating distinctions that play no role in bringing the system closer to the ideal—between debt and equity, between various forms of human association (partnership, corporation, and so on), between capital gains and income. Here, we should be looking for ways that social change, technological change, or change elsewhere in the tax system has changed cost/benefit analysis around the choices that we made 20, 40, or 100 years ago. In carrying out this re-evaluation and considering the costs of benefits of any of these distinctions, the access to justice effects of complexity need to be considered.

A word of caution is in order, however. Any significant change must nevertheless receive careful consideration for at least three reasons. First, as noted above, these deviations from the ideal were often designed with sound purposes in mind, and, while it is possible that those underlying purposes have changed, it is also

possible that they have not. Second, the theory of the second best comes into play.<sup>109</sup> That is, moving one element in the system toward the ideal may, in fact, be a worse situation for the system as a whole, and so the consequences of any particular change need to be closely considered. Third, significant changes in the tax system are likely to entail significant transition costs, the added complexity of transition rules, and for a time, the complexity and cost of two systems being in place simultaneously.<sup>110</sup>

Nevertheless, complexity, as I have presented it here, needs to be resisted where possible. While it may be a “necessary evil” to some degree,<sup>111</sup> the complexity of the tax system has potentially significant consequences for access to justice. To the degree that simplification is possible it may have the effect of reducing barriers, and empowering taxpayers to engage (not just comply) with the law.

In the next part of this dissertation, I aim to make this more concrete. Chapters 2 through 4 worked toward making the case for a broad view of access to justice. Chapters 5 and 6 have suggested that this access to justice framing allows for a

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<sup>109</sup> RG Lipsey & Kelvin Lancaster, “The General Theory of Second Best” (1956) 24:1 Rev Econ Stud 11.

<sup>110</sup> There is, for example, a body of literature considering the difficulties entailed in a transition to a consumption tax: Michael J Graetz, “Implementing a Progressive Consumption Tax” (1979) 92:8 Harvard Law Review 1575; Avishai Shachar, “From Income to Consumption Tax: Criteria for Rules of Transition” (1984) 97:7 Harvard Law Review 1581; Shounak Sarkar & George R Zodrow, “Transitional Issues in Moving to a Direct Consumption Tax” (1993) 46:3 Nat’l Tax J 359; Howard E Abrams, “Rethinking Tax Transitions: A Reply to Dr. Shachar” (1984) 98 Harv L Rev 1809; Daniel S Goldberg, “The Aches and Pains of Transition to a Consumption Tax: Can We Get There from Here” (2007) 26:3 Va Tax Rev 447. Sheldon D Pollack, “Tax Complexity, Reform, and the Illusions of Tax Simplification” (1993) 2 Geo Mason Indep L Rev 319 at 355; Transition costs also form part of the argument in favour of maintaining the corporate tax, see: Kim Brooks, “Learning to Live with an Imperfect Tax: A Defence of the Corporate Tax” (2003) 36 UBC L Rev 621 at 651ff.

<sup>111</sup> Michael Walpole, “Tax Complexity: A Necessary Evil?” in Chris Evans, Richard Krever & Peter Mellor, eds, *Tax Simplification* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015) 181.

fresh consideration of legal complexity in general and tax complexity in particular. Having put forward these frameworks, I turn in Chapters 7 and 8 to applying them with the aim of demonstrating the analytical usefulness of the access to justice framework and the pragmatic usefulness of my framework for tax complexity.

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## CHAPTER 7: READABILITY IN THE CANADIAN TAX SYSTEM

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### I. INTRODUCTION

In chapters 5 and 6, I argued that the complexity of tax law—described in the broad categories of complication and conceptual complexity—is an access to justice issue. Like most other access to justice issues in tax law, little empirical work has been done to measure the size or scope of the problem, or to indicate directions to look for possible solutions. This chapter aims to take a small step toward filling this gap.

One element of complication, as discussed in chapter 6, is the complicated expression used in tax materials. I suggested in chapter 6 that Canada’s tax laws were unreadable and that the culture of complex language, which permeates the common law legal tradition, is particularly strong in tax law. Indeed, it will come as no surprise to anyone in a common law jurisdiction that this chapter’s analysis concludes that the *Income Tax Act* is unreadable.<sup>1</sup>

Studies done in other common law jurisdictions have often found that tax laws are extremely difficult to read.<sup>2</sup> Some jurisdictions have begun taking this work

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<sup>1</sup> *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA]; See, for example, Graeme S Cooper, “A Rose Is a Flower Is a Plant’: Tax Simplification South of the Equator” (1995) 47 *Can Tax Found* 3:1, observing that tax statutes are unreadable, and that “this is no less true for tax specialists than it is for the lay reader, although the specialist has perhaps more help available in various forms.”

<sup>2</sup> Boris I Bittker, “Tax Reform and Tax Simplification” (1974) 29 *U Miami L Rev* 1, n 7 [Bittker, “Tax Reform and Tax Simplification”]; Lin Mei Tan & Greg Tower, “The Readability of Tax Laws: An



seriously, tracking legislative readability and making it a goal of tax reform initiatives.<sup>3</sup> In 1992, New Zealand, began the process of gradually rewriting its tax laws with the goal of improving readability.<sup>4</sup> In 1993, the Australian federal government established the Tax Law Improvement Project to simplify its income tax legislation in several ways, including drafting with simpler English.<sup>5</sup> In the U.K., the Office of Tax Simplification was created in 2010 and made a permanent, independent office of HM Treasury in 2015.<sup>6</sup> As part of its work offering independent advice to the U.K. government on tax simplification, it developed a “complexity index”, which includes readability measurement.<sup>7</sup>

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Empirical Study in New Zealand” (1992) 9:3 *Austl Tax Forum* 355 (evaluating the readability of the pre-reform tax legislation in New Zealand); David Smith & Grant Richardson, “The Readability of Australia’s Taxation Laws and Supplementary Materials: An Empirical Investigation” (1999) 20:3 *Fiscal Studies* 321 [Smith & Richardson, “Readability of Australia’s Tax Laws”] (comparing the pre- and post-reform legislation in Australia).

<sup>3</sup> See, for example, Simon James, Adrian Sawyer & Ian Wallschutzky, “The Complexities of Tax Simplification: Progress in Australia, New Zealand and the United Kingdom” (1997) 14 *Austl Tax Forum* 29.

<sup>4</sup> For updates on the progress of New Zealand’s efforts, see: Maryann Richardson & Adrian Sawyer, “Complexity in the Expression of New Zealand’s Tax Laws: An Empirical Analysis” (1997) 14 *Austl Tax Forum* 325; Caroline Pau, Adrian Sawyer & Andrew Maples, “Complexity of New Zealand’s Tax Laws: An Empirical Study” (2007) 22 *Austl Tax Forum* 59; Kathryn Saw & Adrian Sawyer, “Complexity of New Zealand’s Income Tax Legislation: the Final Installment” (2010) 25 *Austl Tax Forum* 213. It is worth noting that simplification may be easier to achieve in New Zealand for a number of reasons related to its constitutional and social structure, see Adrian Sawyer, “Complexity of Tax Simplification: A New Zealand Perspective” in Simon James, Adrian Sawyer & Tamer Budak, eds, *The Complexity of Tax Simplification: Experiences from around the World* (Basingstoke, UK: Palgrave Macmillan, 2016) 110.

<sup>5</sup> Smith & Richardson, “Readability of Australia’s Tax Laws”, *supra* note 2 at 322.

<sup>6</sup> UK, Office of Tax Simplification, “Our Governance”, online: <[www.gov.uk/government/organisations/office-of-tax-simplification/about/our-governance](http://www.gov.uk/government/organisations/office-of-tax-simplification/about/our-governance)> [perma.cc/W7QS-VVXV].

<sup>7</sup> UK, Office of Tax Simplification, *The OTS Complexity Index* (London: Office of Tax Simplification, 2017), online:

In Canada, however, I am aware of no empirical research about the readability of tax materials. While experience indicates that the *Income Tax Act* is thoroughly unreadable, and indeed, more difficult to read than other legislation governing economic relationships, we still lack quantifiable measurements to confirm the size and scope of the readability problem.<sup>8</sup> Of course, it may be argued that few people even attempt to read the *Income Tax Act*,<sup>9</sup> and so the readability of the technical guidance and the public guidance put out by the Canada Revenue Agency (“CRA”) is what matters. The CRA’s guidance is generally considered easier to read, but again the readability of the CRA’s efforts in this area has not been measured. This chapter aims to fill these gaps and put the discussion of the readability in the Canadian tax system on firmer empirical ground. I use several different readability formulas to facilitate comparisons with the readability studies that have been done in other jurisdictions and to compensate for the acknowledged weaknesses of readability formulas in general. I use these readability formulas to evaluate samples from Canadian tax statutes, technical guidance published by the CRA such as Interpretation Bulletins and Tax Folios, and publications aimed a more general audience, such as the CRA’s website and tax guides.

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<assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/603479/OTS\_\_complexity\_index\_paper\_2017.pdf> [perma.cc/2NgW-4SML].

<sup>8</sup> *ITA*, *supra* note 1.

<sup>9</sup> The assumption that drafting style and choices are unimportant because the audience for tax legislation is tax experts rather than taxpayers or judges seems to be common among legislative drafters in the U.S.: Shu-Yi Oei & Leigh Z Osofsky, “Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels” (2018) 3 *Iowa L Rev* 1291.

This chapter proceeds in three main sections. In Part II, I explain the methodology used in the readability analysis. I explain the readability metrics I apply in this study and how I chose the text to be analyzed. In Part III, I present and discuss the results. I find some agreement among the readability metrics, including strong agreement about the relative readability of the different materials and the main cause of the difficulty being syntactic rather than semantic. However, there is disagreement about the level of readability of particular texts. The statutory provisions sampled score at the very bottom of the readability metrics, and the *Income Tax Act* appears to be even less readable than the other statutes I examined. On the other hand, the technical and popular guidance appears more readable. While the limitations of readability analyses must be acknowledged, the results of my study offer a preliminary indication that the CRA is reasonably successful in explaining its interpretations of the law to a broader audience. In Part IV, I examine criticisms of readability formulas like the ones I use here. In my view, these criticisms must be taken seriously and tax scholars who use readability formulas ought to pay attention to the debate about their validity and usefulness. However, I suggest that cautious use can be made of readability formulas in Canadian tax law for the moment. In the final section of the paper, I offer some conclusions and directions for future research in this area.

## II. METHODOLOGY

### A. READABILITY METRICS

To facilitate comparisons between this study and readability analyses done in other jurisdictions, I use several different readability formulas: the Flesch Reading

Ease formula, the Flesch-Kincaid Grade Level formula, the Gunning-Fog Index, and the New Dale-Chall Readability formula. Using different formulas helps to identify cases in which the readability scores are affected by the particularities of an individual formula. These formulas take a common approach, make similar assumptions, and are vulnerable to similar criticisms. I discuss the debate surrounding these formulas and their use in the tax context in particular in part IV below.<sup>10</sup>

The readability formulas used here each assume that there are two main barriers to readability: syntactic difficulty and semantic difficulty. Syntactic difficulty—the ways in which sentence structure reduces readability—is difficult to measure directly. Each of the formulas applied here assumes that sentence length can be used as a fair proxy for syntactic difficulty. The three formulas each use a different proxy for semantic difficulty—the ways in which vocabulary reduces readability.

They also differ in the relative weight that they assign to semantic and syntactic difficulty. Having measured these two factors (via an easily accessible proxy), and weighed them, each formula produces a score that can be translated into either a narrative description of the readability of the text (“easy”, “fair”, “difficult”, and so on) or the grade level of an American student that could be expected to be able to read the text.

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<sup>10</sup> For a brief review of arguments and evidence for and against readability measurements, see: Mostafa Zamanian & Pooneh Heydari, “Readability of Texts: State of the Art” (2012) 2:1 Theory and Practice in Language Studies 43; For the most recent and forceful criticism of these readability formulas and the idea of measuring readability in general, see: Alan Bailin & Ann Grafstein, *Readability: Text and Context* (London: Palgrave Macmillan UK, 2016) [Bailin & Grafstein, *Readability*], which builds on their earlier work: Alan Bailin & Ann Grafstein, “The Linguistic Assumptions Underlying Readability Formulae: A Critique” (2001) 21:3 Language & Communication 285 [Bailin & Grafstein, “Linguistic Assumptions”].

## 1) FLESCH READING EASE AND FLESCH-KINCAID

In the 1940s, Rudolph Flesch was concerned with developing the practical, objective measurement of the readability of written materials. Flesch reported his results and proposed a formula in his Ph.D. dissertation.<sup>11</sup> He then simplified the formula to make it easier to apply.<sup>12</sup> Like other readability formulas discussed here, the Flesch Reading Ease formula uses proxies for the difficulty of the vocabulary used and the difficulty of the syntax. The formula includes the average word length in syllables and the average sentence length in words.

$$\text{Flesch Reading Ease Score} = 206.835 - 84.6wl - 1.015sl$$

where:

wl = average word length in syllables

sl = average sentence length in words

The result should be a score “between 0 (practically unreadable) and 100 (easy for any literate person).”<sup>13</sup> The scores correspond to difficulty levels in the table below:

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<sup>11</sup> Rudolph Flesch, *Marks of Readable Style: A Study in Adult Education* (New York: Columbia University, 1943).

<sup>12</sup> Rudolph Flesch, “A New Readability Yardstick” (1948) 32:3 *J Applied Psychology* 221 [Flesch, “New Readability Yardstick”].

<sup>13</sup> *Ibid* at 229.

| Reading Ease Score | Description of Style |
|--------------------|----------------------|
| 0 to 30            | Very difficult       |
| 30 to 50           | Difficult            |
| 50 to 60           | Fairly Difficult     |
| 60 to 70           | Standard             |
| 70 to 70           | Fairly Easy          |
| 80 to 90           | Easy                 |
| 90 to 100          | Very Easy            |

Table 1: Flesch Reading Ease Scores<sup>14</sup>

Flesch’s work on readability has been used in several legal contexts. The Internal Revenue Service, among others, has applied the Flesch Reading Ease formula in studying the U.S. tax system.<sup>15</sup> It has also been used in evaluating the pre-reform tax system of New Zealand, and to measure the progress of New Zealand’s reforms.<sup>16</sup> The state of Florida requires that insurance contracts be readable, which includes, among other things, a minimum score of 45 on a Flesch Reading Ease test.<sup>17</sup>

The Flesch-Kincaid readability measurement was derived by J. Peter Kincaid and his colleagues for the U.S. Navy in the 1970s.<sup>18</sup> It uses the same variables as the Flesch Reading Ease formula, but was intended to be easier to apply and results in a

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<sup>14</sup> *Ibid* at 230.

<sup>15</sup> Bruce S Koch & Stewart S Karlinsky, “The Effect of Federal Income Tax Law Reading Complexity on Students’ Task Performance” (1984) 2 *Issues in Accounting Education* 98 at 99; Bobbie Cook Martindale, Bruce S Koch & Stewart S Karlinsky, “Tax Law Complexity: The Impact of Style” (1992) 29:4 *J Business Communication* 383; Robert P Strauss & Skye Toor, *The Readability of the US Federal Income Tax System: Some First Results* (Paper Presented at the National Tax Association, 107th Research Conference, 2014).

<sup>16</sup> Tan & Tower, *supra* note 2; Richardson & Sawyer, *supra* note 4; Pau, Sawyer & Maples, *supra* note 4; Saw & Sawyer, *supra* note 4; Smith & Richardson, “Readability of Australia’s Tax Laws”, *supra* note 2.

<sup>17</sup> Fla Stat Ann tit XXXVII § 627.4145(1)(a) (2018).

<sup>18</sup> JP Kincaid et al, US Navy Technical Training Command Research Branch Report 8-75, “Derivation of New Readability Formulas (Automated Readability Index, Fog Count and Flesch Reading Ease Formula) for Navy Enlisted Personnel” (February 1975).

U.S. grade level score rather than a reading ease score between 0 and 100. While Kincaid's test was inspired by Rudolph Flesch's work, it is worth noting that the two metrics are not equivalent. The Flesch-Kincaid formula puts a much higher relative weight on sentence length, and so it is reasonable to expect that the long sentences often used by statutes will cause those statutes to have lower scores on the Flesch-Kincaid metric than they do on the Flesch Reading Ease formula.

$$\text{Flesch-Kincaid Grade Level Score} = 11.8wl + 0.39sl$$

where:

wl = average word length in syllables

sl = average sentence length in words

## 2) GUNNING FOG READABILITY INDEX

Robert Gunning, an American business-writing consultant, developed the Gunning Fog Index in 1952.<sup>19</sup> Like the Flesch test, it uses the average sentence length as a proxy for syntactic difficulty. Rather than counting syllables, however, the Fog Index counts words of three or more syllables in its effort to measure the difficulty of vocabulary. The Fog Index is currently being used by the U.K. Office of Tax Simplification in its complexity measurement scheme.<sup>20</sup>

$$\text{Fog Index} = 0.4 [sl + 100(\text{rate of complex words})]$$

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<sup>19</sup> Robert Gunning, *The Technique of Clear Writing* (New York: McGraw-Hill, 1952).

<sup>20</sup> UK, Office of Tax Simplification, *supra* note 7 at 8–9.

Where:

sl is the average sentence length in words;

“complex words” are words with three or more syllables, but not including proper nouns, familiar jargon, and compound words and not counting common suffixes (such as -es, -ed, or -ing) as syllables.

The Fog Index is intended to directly give the U.S. grade level difficulty of the text. A text with a score of 6 could be read by a sixth-grade student, a text with a score of 13 could be read by a first-year university student, and a score of 17 would correspond to the reading level of someone with a bachelor’s degree.

Gunning suggested counting complete thoughts rather than grammatical sentences.<sup>21</sup> Where a sentence contained two or more complete thoughts linked by commas or semi-colons, he would count them as several sentences. Some later uses of the Fog Index have taken to counting sentences in a way that is consistent with the other formulas used in this study.<sup>22</sup> Others have taken to counting major punctuation marks, including colons and semi-colons in addition to periods, question marks, and

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<sup>21</sup> Gunning, *supra* note 19 at 37.

<sup>22</sup> For example, William H DuBay, *Smart Language: Readers, Readability, and the Grading of Text* (Costa Mesa, CA: Impact Information, 2007) at 60 mentions only sentence length in his discussion of Gunning Fog. Similarly, [www.readabilityformulas.com](http://www.readabilityformulas.com) uses whole sentences in its calculation of Gunning-Fog scores. On the other hand, [gunning-fog-index.com](http://gunning-fog-index.com) counts colons and semi-colons in addition to periods, question marks, and exclamation points.



exclamation points.<sup>23</sup> In the *Income Tax Act*, however, semicolons are usually used to separate parts of a list rather than to link complete thoughts together. Accordingly, I have counted sentences for the purpose of the Fog Index in the same way they are counted for the Flesch Reading Ease score.

### 3) NEW DALE-CHALL READABILITY FORMULA

Jeanne Chall and Edgar Dale published their original formula in 1948.<sup>24</sup> Like the other readability metrics previously discussed, the average length of sentences is a factor in the formula. An innovation in Dale and Chall's work was to develop a list of familiar words. Applying the formula requires counting the number of unfamiliar words—those that are not on the list—to act as a proxy for semantic difficulty.

In 1995, Jeanne Chall published a revised version of the formula defending it against criticism and expanding the list of familiar words to 3,000 words known by 80% of grade 4 students in an American sample. The list of familiar words is taken to include possessives, plurals, and common suffixes (such as -d, -ed, -ied, -ing, -er, -ier, and -iest) added to words on the list as well as compound and hyphenated words if both components are on the list.<sup>25</sup> However, less common suffixes (such as -tion, -ation, -ment, -ly, and -y) are not included. For example, “happiest” is counted as familiar because “happy” is on the list; however, “happily” would be counted as unfamiliar.

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<sup>23</sup> For example, [gunning-fog-index.com](http://gunning-fog-index.com) counts colons and semi-colons in addition to periods, question marks, and exclamation points.

<sup>24</sup> Jeanne S Chall & Edgar Dale, *Readability Revisited: The New Dale-Chall Readability Formula* (Cambridge, Mass: Brookline Books, 1995) at 1.

<sup>25</sup> *Ibid* at 13-14.

Raw Score =  $0.0496sl + 15.79(\text{rate of unfamiliar words})$

Where:

sl = average sentence length in words;

unfamiliar words are those not found in the list of 3,000 familiar words.

If (unfamiliar words/words) is greater than 5%, then:

Dale-Chall Score = Raw Score + 3.6365,

Otherwise:

Dale-Chall Score = Raw Score

The Dale-Chall Score can then be translated into a U.S. grade level using the table below:

| Dale-Chall Score | U.S. Grade Level                       |
|------------------|--|
| 4.9 and below    | Grade 4 and below                      |
| 5.0 to 5.9       | Grades 5-6                             |
| 6.0 to 6.9       | Grades 7-8                             |
| 7.0 to 7.9       | Grades 9-10                            |
| 8.9 to 8.9       | Grades 11-12                           |
| 9.0 to 9.9       | Grades 13-15 (College)                 |
| 10 and above     | Grades 16 and above (College Graduate) |

Table 2: Dale-Chall Readability Scores

**B. SAMPLE**

**1) PERIODIC SAMPLING**

Readability formulas generally suggest systematically taking small samples to analyze. For example, Dale and Chall suggest selecting 100-word samples beginning

with the first word in a sentence. For long works, they suggest selecting one sample every 50 pages. For shorter works, they recommend between two and five samples, including samples at the beginning, middle, and end. However, Dale and Chall recommend against using the very beginning or very end, which they say tend not to reflect the overall difficulty.<sup>26</sup> Similarly, Flesch suggests taking 100-word samples (“unless you want to test a whole piece of writing”).<sup>27</sup> He also suggests using a regimented scheme—“every third paragraph or every other page” or something similar—rather than trying to choose good or typical examples. The formula can then be applied to these samples to gain an appreciation of the readability of the entire text.

For the purposes of tax law, however, this sampling method presents some difficulty. Recall from chapter 6, for example, that subsection 110.6(19) contains 924 words, and it becomes obvious that 100-word samples of the *Income Tax Act* may not capture even a single complete sentence.<sup>28</sup> To compensate, I use larger samples where necessary and include only complete sentences. The samples chosen are at least 500 words. When starting a new sample, I went forward in the statute to the beginning of the next sentence to begin the sample. Rather than stopping after 500 words (which still may not capture a full sentence) I allowed the sample to continue to the end of a sentence. The *Income Tax Act* is more than 3200 pages long,<sup>29</sup> and so I took a sample

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<sup>26</sup> *Ibid* at 7.

<sup>27</sup> Flesch, “New Readability Yardstick”, *supra* note 12 at 228.

<sup>28</sup> *ITA*, *supra* note 1, s 110.6(19). See the discussion in chapter 6, section IV.A.

<sup>29</sup> Samples were taken using the pagination of the consolidated statute as it appeared on 25 May 2018 (online: <laws.justice.gc.ca/PDF/1-3.3.pdf>).

every 100 pages, which allowed me to take 32 samples totalling more than 22000 words.

For the sake of comparison, I also took samples of the *Bankruptcy and Insolvency Act* and the *Canada Labour Code*.<sup>30</sup> Again, I took samples of at least 500 words and included only complete sentences, but I sampled more frequently in the shorter statutes. In the *Bankruptcy and Insolvency Act*, I sampled every 30 pages, allowing me to take 9 samples which total 5383 words.<sup>31</sup> In the *Canada Labour Code*, I sampled every 25 pages, allowing me to take 10 samples which total 5322 words.<sup>32</sup>

In general, I accepted the statutes as they are punctuated; however, I made an exception for sections that contain multiple definitions. For example, section 2 of the *Bankruptcy and Insolvency Act* defines 48 terms. It begins as follows:

In this Act,

**affidavit** includes statutory declaration and solemn affirmation;

**application**, with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion;

**assignment** means an assignment filed with the official receiver;<sup>33</sup>

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<sup>30</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]; *Canada Labour Code*, RSC 1985, c L-2.

<sup>31</sup> Samples were taken using the pagination of the consolidated statute as it appeared on 25 May 2018 (online: <laws-lois.justice.gc.ca/PDF/B-3.pdf>).

<sup>32</sup> Samples were taken using the pagination of the consolidated statute as it appeared on 6 June 2018 (online: <laws.justice.gc.ca/PDF/L-2.pdf>).

<sup>33</sup> *BIA*, *supra* note 30, s 2 [emphasis in original; repealed definitions and French equivalent terms omitted].

Each of these definitions, and the other 45 contained in section 2, form a complete thought on their own and could be punctuated as a sentence. For the purposes of the readability analyses, I treat each of these as a sentence. Thus, the section of the *Bankruptcy and Insolvency Act* quoted above would be counted as 38 words and 3 sentences, rather than 38 words without a full sentence.

## 2) PURPOSIVE SAMPLING

In addition to the periodic sampling of statutes, I took purposive samples of various tax materials for two reasons. First, I was concerned that periodic sampling might overstate the difficulty of reading the *Income Tax Act*. The *Income Tax Act* contains many provisions that apply only to corporations, trusts, or partnerships. Many of these can be quite technical and difficult to understand. It also contains a number of transitional provisions. To return to the example of subsection 110.6(19), while it is extremely long and difficult to read, as a transitional provision it is of no consequence to most taxpayers most of the time.

Second, I wanted a method of sampling other material implicated in the tax system as well. While the *Income Tax Act* is usually considered the primary and most authoritative source of law in Canada's tax system, individual taxpayers may have cause to look at other statutes as well. Moreover, individual taxpayers are much more likely to read the CRA's website or published tax guides than the *Income Tax Act*. Even their professional advisors may be more likely to base their advice on a reading of technical guidance like Interpretation Bulletins and Tax Folios than a close reading of the *Income Tax Act*.

To create the purposive sample, I imagined the concerns of two hypothetical individual taxpayers, and constructed a sample using the sources that would answer those concerns. The two taxpayers are described below. In constructing this sample, I also made further adjustments to more easily form complete sentences. For example, the full answer to a taxpayer's question about pension plan contributions might be found in paragraph 8(1)(m), which reads:

8 (1) In computing a taxpayer's income for a taxation year from an office or employment there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:

...

(m) the amount in respect of contributions to registered pension plans that, by reason of subsection 147.2(4), is deductible in computing the taxpayer's income for the year;

Several things need to be highlighted. First, the text of paragraph (m) does not form a complete thought without the opening words of subsection 8(1). Second, the ellipses account for the removal of paragraphs (a) through (l.2). Third, subsection 8(1) is punctuated as a single sentence that ends ten paragraphs later following paragraph 8(1)(s). For the purposes of the readability analysis with the purposive sample, I would take paragraph 8(1)(m), as it appears above, as a sentence. That is, I would include the

opening words of subsection 8(1), ignore the other elements in the list, and replace the final semicolon with a period. The sample would then read:

In computing a taxpayer's income for a taxation year from an office or employment there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto: the amount in respect of contributions to registered pension plans that, by reason of subsection 147.2(4), is deductible in computing the taxpayer's income for the year.

While subsection 8(1) is punctuated as a single sentence and runs to more than 3000 words, in this analysis I assume the taxpayer whose question can be answered with reference to paragraph 8(1)(m) will be satisfied if the 71-word sentence constructed above is readable.

In applying the readability formulas to the samples, I used several electronic tools. Microsoft Word was used to count the number of words in each sample. The syllable and sentence counting functions of WordCalc.com were used to assist in counting these elements.<sup>34</sup> Two readability checking websites were also used to assist in counting the number of unfamiliar words (for the Dale-Chall formula) or complex

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<sup>34</sup> "Syllable Counter & Word Count - WordCalc.com", online: <[www.wordcalc.com/](http://www.wordcalc.com/)> [perma.cc/4]FU-HEXD].

words (for the Fog Index).<sup>35</sup> In some cases, I checked and corrected the results manually to verify the accuracy of the automated tools; however, manual counting was time-consuming and so not done in all cases.

*a. Hypothetical Taxpayer #1*

The first hypothetical taxpayer is an employed musician. To simplify the problem, I (perhaps unrealistically) assume that she is clearly an employee and has no self-employment income. However, her job requires her to provide her own instrument and she needs to know how to reflect the cost of the instrument in her income. This taxpayer also buys a house, making use of the Home Buyer's Plan, and later sells it. To simplify, I assume that the house is clearly a capital asset.

On the level of legislation, the answers to her questions about the expenses associated with her instrument rely primarily on paragraphs 8(1)(p) and 8(1)(q) of the *Income Tax Act*.<sup>36</sup> Because capital expenses are dealt with in the next hypothetical, I assume that her instrument is rented and so there is no need to look at claiming capital cost allowance. Technical guidance is provided in Interpretation Bulletin IT-525R.<sup>37</sup> Finally, popular guidance is available on the CRA's website and in the published guide on employment expenses.<sup>38</sup>

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<sup>35</sup> "The New Dale-Chall Readability Formula", online: <[www.readabilityformulas.com/free-dale-chall-test.php](http://www.readabilityformulas.com/free-dale-chall-test.php)> [perma.cc/TRM2-U88W]; Simon Bond, "Gunning Fog Index", online: <[gunning-fog-index.com/](http://gunning-fog-index.com/)> [perma.cc/18UV-XA8G].

<sup>36</sup> *ITA*, *supra* note 1, ss 8(1)(p), 8(1)(q).

<sup>37</sup> Canada Revenue Agency, Interpretation Bulletin IT-525R, "Performing Artists" (24 April 2002) [IT-525R].

<sup>38</sup> Canada Revenue Agency, "Musical Instrument Expenses", (4 January 2017), online: <[228](http://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-</a></p></div><div data-bbox=)



To deal with the purchase of the taxpayer’s home, the sample includes subsections 146.01(2)–146.01(4) which lay out the Home Buyer’s Plan. However, I have excluded subsections (5), (6), and (7), which deal with special circumstances including leaving Canada and death. I also assume that there are no underlying questions about the registered retirement savings plan that need to be answered.

To deal with questions related to the sale of her home, I sample the principal residence exemption contained in paragraph 40(2)(b).<sup>39</sup> Although that provision refers directly to subsections 110.6(19) and 110.6(21), I assume that the taxpayer (or the taxpayer’s advisor) will quickly decide to safely ignore those, and so the sample does not include the trail of transitional provisions and their references.<sup>40</sup> The sample includes the definition of “principal residence” in section 54 as well as paragraph 38(a), subsection 39(1), and paragraph 40(1)(a), which are required for any application of the principal residence exemption. I assume the other defined terms that may be relevant—such as “child”, “sister”, and “personal trust”—can all be ignored.

Technical guidance related to the principal residence exemption available in Tax Folio S1-F3-C2 was included in the sample. However, I could find no Interpretation Bulletin or Tax Folio related to the Home Buyer’s Plan. I sampled popular guidance from the CRA’s website for both the principal residence exemption

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return/completing-a-tax-return/deductions-credits-expenses/line-229-other-employment-expenses/employed-artists/musical-instrument-expenses.html> [perma.cc/6C5Q-4W6U]; Canada Revenue Agency, Guide T4044(e) rev 16, “Employment Expenses” (2016).

<sup>39</sup> *ITA*, *supra* note 1, s 40(2)(b).

<sup>40</sup> *Ibid*, ss 110.6(19), 110.6(21).

and the Home Buyer's Plan, and from the Guide on capital gains for the principal residence exemption.<sup>41</sup>

*b. Hypothetical Taxpayer #2*

The second hypothetical taxpayer runs a small unincorporated business from her home and makes a modest profit. She produces children's clothes, blankets, and stuffed animals to sell online and at local craft shows. This taxpayer has expenses associated with the business, including capital expenses, inventory expenses, business-use-of-home expenses, and other current expenses.

I assume that the business is located in Nova Scotia and that the taxpayer may have questions about the point-of-sale rebate that applies to children's clothes (including baby blankets). Accordingly, I include in the sample several provisions from the Nova Scotia *Sales Tax Act* and the *Excise Tax Act* that relate to this question.<sup>42</sup> In addition to the legislation, technical guidance is available in a GST/HST Info Sheet.<sup>43</sup>

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<sup>41</sup> Canada Revenue Agency, "Principal Residence and Other Real Estate", (22 June 2017), online: <[www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/personal-income/line-127-capital-gains/principal-residence-other-real-estate.html](http://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/personal-income/line-127-capital-gains/principal-residence-other-real-estate.html)> [perma.cc/]M8T-RKYB]; Canada Revenue Agency, "How to Participate in the Home Buyers' Plan (HBP)", (26 October 2016), online: <[www.canada.ca/en/revenue-agency/services/tax/individuals/topics/rrsps-related-plans/what-home-buyers-plan/participate-home-buyers-plan.html](http://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/rrsps-related-plans/what-home-buyers-plan/participate-home-buyers-plan.html)> [perma.cc/5AWX-D2SV]; Canada Revenue Agency, Guide T4037(E) rev 16, "Capital Gains" (2016).

<sup>42</sup> *Sales Tax Act*, SNS 1996, c 31, ss 12(a), 12(n), 12K, 12N; *Excise Tax Act*, RSC 1985, c E-15, s 165(2).

<sup>43</sup> Canada Revenue Agency, GST/HST Info Sheet GI-063, "Point-of-Sale Rebate on Children's Goods" (August 2014), online: <[www.canada.ca/en/revenue-agency/services/forms-publications/publications/gi-063/point-sale-rebate-on-childrens-goods.html](http://www.canada.ca/en/revenue-agency/services/forms-publications/publications/gi-063/point-sale-rebate-on-childrens-goods.html)> [perma.cc/8DV8-QTU9].

To answer questions about the treatment of her various expenses, I include subsection 9(1), which is a general provision on the calculation of business income.<sup>44</sup> I also include a series of provisions about the treatment of inventory,<sup>45</sup> though I ignore the regulations on the valuation of inventory and several of the special rules around the inventory of artistic endeavours, changes in use, and other special rules.<sup>46</sup> To respond to questions about the treatment of capital expenses, I include paragraph 20(1)(a), regulation 1100(1), and the definition of “undepreciated capital cost” laid out in subsection 13(21) in the sample.<sup>47</sup> Finally, because the business runs from her home, I include subsection 18(12) on the use of home expenses in a business.<sup>48</sup>

In the sample of technical guidance, I include the Interpretation Bulletin on inventory valuation and the chapters of the Income Tax Folios on “business use of home expenses” and capital cost allowance.<sup>49</sup> For popular guidance, I sampled the Guide on Business and Professional Income, which includes chapters on expenses and on the capital cost allowance.<sup>50</sup> I also included in the sample a page from the CRA’s

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<sup>44</sup> *ITA*, *supra* note 1, s 9(1).

<sup>45</sup> *Ibid*, ss 10(1), 10(2), 10(2.1), 10(3), 10(4), 10(5).

<sup>46</sup> For example, *ibid*, ss 10(6)ff, 10(12)ff.

<sup>47</sup> *Ibid*, ss 20(1)(a), 13(21); *Income Tax Regulations*, CRC c 945, s 1101(1).

<sup>48</sup> *ITA*, *supra* note 1, s 18(12).

<sup>49</sup> Canada Revenue Agency, Interpretation Bulletin IT-473R, “Inventory Valuation” (21 December 1998); Canada Revenue Agency, Income Tax Folio S4-F2-C2, “Business Use of Home Expenses” (2 November 2017); Canada Revenue Agency, Income Tax Folio S3-F4-C1, “General Discussion of Capital Cost Allowance” (25 April 2017).

<sup>50</sup> Canada Revenue Agency, Guide 4002E rev 16, “Business and Professional Income” (2016), chs 3–4.

website explaining business use of home expenses and two pages dealing with capital cost allowance.<sup>51</sup>

### III. RESULTS & DISCUSSION

#### A. PERIODIC SAMPLING

The results for the samples taken at regular intervals are presented in Table 3.

|                                      | Words | Flesch Reading Ease (0 – 100) | Flesch-Kincaid (Grade Level) | Gunning Fog Index (Grade Level) | Dale-Chall Score        |
|--------------------------------------|-------|-------------------------------|------------------------------|---------------------------------|-------------------------|
| <i>Income Tax Act</i>                | 22319 | -83.5                         | 66.0                         | 73.7                            | 15.1                    |
| <i>Bankruptcy and Insolvency Act</i> | 5383  | 10.1 (very difficult)         | 29.7                         | 35.6                            | 10.8 (college graduate) |
| <i>Canada Labour Code</i>            | 5322  | 28.4 (very difficult)         | 22.5                         | 28.3                            | 9.6 (college)           |

Table 3: Readability results for the *Income Tax Act*, the *Bankruptcy and Insolvency Act*, and the *Canada Labour Code* sampled at regular intervals

Both the Flesch-Kincaid analysis and the Gunning-Fog index produce results that are difficult to interpret. A grade level in the 30s might be taken to mean that

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<sup>51</sup> Canada Revenue Agency, “Business-Use-of-Home Expenses”, (22 February 2017), online: <[www.canada.ca/en/revenue-agency/services/tax/businesses/topics/sole-proprietorships-partnerships/report-business-income-expenses/completing-form-t2125/business-use-home-expenses.html](http://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/sole-proprietorships-partnerships/report-business-income-expenses/completing-form-t2125/business-use-home-expenses.html)> [perma.cc/7MYP-XLEQ]; Canada Revenue Agency, “How to Calculate the Deduction for Capital Cost Allowance (CCA)”, (3 January 2017), online: <[www.canada.ca/en/revenue-agency/services/tax/businesses/topics/sole-proprietorships-partnerships/report-business-income-expenses/claiming-capital-cost-allowance/calculate-deduction-capital-cost-allowance.html](http://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/sole-proprietorships-partnerships/report-business-income-expenses/claiming-capital-cost-allowance/calculate-deduction-capital-cost-allowance.html)> [perma.cc/2T7B-JBBP]; Canada Revenue Agency, “Basic Information about Capital Cost Allowance (CCA)”, (3 January 2017), online: <[www.canada.ca/en/revenue-agency/services/tax/businesses/topics/sole-proprietorships-partnerships/report-business-income-expenses/claiming-capital-cost-allowance/basic-information-about-capital-cost-allowance.html](http://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/sole-proprietorships-partnerships/report-business-income-expenses/claiming-capital-cost-allowance/basic-information-about-capital-cost-allowance.html)> [perma.cc/P86Q-92HB].

only professors or those with several advanced degrees should be expected to be able to read the *Bankruptcy and Insolvency Act*, but is probably better understood to mean that the metric simply could not be applied here.

Nonetheless, there are two striking results. First, the *Bankruptcy and Insolvency Act* does produce sensible results using both the original Flesch analysis and the Dale-Chall analysis. While the *Bankruptcy and Insolvency Act* scores as very difficult to read (on the Flesch Reading Ease scale) or at the level of a college graduate (based on its Dale-Chall score), it, unlike the *Income Tax Act*, is not so unreadable as to break the scales put forward by Flesch or Dale and Chall.

Second, on each of the readability measurements, the *Income Tax Act* is assessed as impossible to read and has a score indicating that it is much more difficult to read than the *Bankruptcy and Insolvency Act*. If it was difficult to interpret grade level scores in the 30s, it is impossible to make sense of grade levels in the 60s or 70s. Similarly, a score of -83.5 on the Flesch Reading Ease scale that runs from 0 to 100 only allows us to say that the *Income Tax Act* is virtually impossible to read. On the Dale-Chall scale, 10 and above is taken to be the level of college graduates, so a score of 15 puts the *Income Tax Act* well beyond what we might expect a typical college graduate to be able to read.

Looking more closely at the data, it becomes clear that it is the length of sentences in the *Income Tax Act* that drives these results. For two of the three proxies of semantic difficulty (average syllables per word in the Flesch and Flesch-Kincaid formulas, and the rate of difficult words in the Dale-Chall formula), the *Bankruptcy*

*and Insolvency Act* scores as more difficult than the *Income Tax Act*. On the other hand, all three formulas use the average sentence length as a proxy for syntactic difficulty, and the *Income Tax Act* uses much longer sentences. The samples of the *Bankruptcy and Insolvency Act* have an average sentence length of 72 words, compared to 165 words per sentence in the *Income Tax Act*. While both statutes obey the convention of one sentence per subsection,<sup>52</sup> the drafters of the *Bankruptcy and Insolvency Act* were able to use shorter sentences, which has a significant positive effect on the readability score.

As I explained above, there may be some concern that sampling the *Income Tax Act* at regular intervals is uncharitable and may overestimate how difficult the *Income Tax Act* is to read. After all, no one is expected to read the *Income Tax Act* cover-to-cover. It contains many provisions that only apply to corporations, trusts, or those offering life insurance, and there are many transitional provisions, which are difficult to read but no longer relevant to most taxpayers. We might expect that by looking at issues in tax law that individual taxpayers might face—and might try to resolve themselves—we would gain a better view of how people actually interact with the tax system and the readability measurements might show the *Income Tax Act* in a more favourable light. Unfortunately, the results for the purposive sample, presented in the section below, belie that expectation.

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<sup>52</sup> In general, it is true that both statutes observe this convention; however, the sample of the *Income Tax Act* included subsection 125(4), which contains two sentences.

## B. PURPOSIVE SAMPLING

As described above, the purposive sample is limited to provisions related to the computation of income that apply to individuals. This sample paints a slightly different picture than the one shown by sampling the full *Income Tax Act*, though not a more favourable one. It also allows a means to compare the *Income Tax Act* with the CRA’s publications, including Interpretation Bulletins, Tax Folios, Guides, and the CRA’s website. The results are presented in Tables 4 through 7.

|  | Words | Flesch Reading Ease<br>(0 – 100) | Flesch-Kincaid<br>(Grade Level) | Fog Index<br>(Grade Level) | Dale-Chall<br>Score        |
|--|-------|----------------------------------|---------------------------------|----------------------------|----------------------------|
| <b>Legislation and Regulations</b>             |       |                                  |                                 |                            |                            |
| <i>ITA</i> , s. 8(1)(p)                        | 162   | -97.6                            | 67.1                            | 72.5                       | 14.7                       |
| <i>ITA</i> , s. 8(1)(q)                        | 302   | -237.8                           | 121.5                           | 126.9                      | 21.7                       |
| <i>ITA</i> , s. 54, s.v. “principal residence” | 1069  | -1000.4                          | 418.4                           | 435.4                      | 59.0                       |
| <i>ITA</i> , s. 40(1)(a)                       | 306   | -218.5                           | 119.8                           | 128.5                      | 21.2                       |
| <i>ITA</i> , s. 40(2)(b)                       | 501   | -413.0                           | 195.3                           | 208.2                      | 30.5                       |
| <i>ITA</i> , s. 38(a)                          | 43    | 43.2<br>(difficult)              | 17.9                            | 26.50                      | 7.8<br>(grade 11-12)       |
| <i>ITA</i> , s. 146.01(2)-(4)                  | 1155  | -310.0                           | 152.1                           | 161.8                      | 25.9                       |
| <i>NS Sales Tax Act</i> , s. 12(a)             | 150   | -71.2                            | 60.5                            | 63.5                       | 13.7                       |
| <i>NS Sales Tax Act</i> , s. 12(n)             | 71    | 13.2<br>(very difficult)         | 29.1                            | 35.7                       | 10.5<br>(college graduate) |
| <i>NS Sales Tax Act</i> , s. 12N               | 54    | 42.4<br>(difficult)              | 20.8                            | 28.3                       | 10.4<br>(college graduate) |

|   | Words | Flesch Reading Ease (0 – 100) | Flesch-Kincaid (Grade Level) | Fog Index (Grade Level) | Dale-Chall Score        |
|---|-------|-------------------------------|------------------------------|-------------------------|-------------------------|
| <i>ETA</i> , s. 165(2)                                    | 56    | 33.7 (difficult)              | 22.5                         | 28.8                    | 10.1 (college graduate) |
| <i>ITA</i> s. 9(1)  | 28    | 48.5 (difficult)              | 13.5 (college student)       | 21.2                    | 6.7 (grade 7-8)         |
| <i>ITA</i> , ss. 10(1), (2), (2.1), (3), (4), (5)         | 549   | -10.1                         | 37.4                         | 44.6                    | 10.6 (college graduate) |
| <i>ITA</i> , s. 20(1)(a)                                  | 83    | -3.8                          | 34.4                         | 41.4                    | 10.0 (college graduate) |
| <i>ITR</i> , s. 1100(1)(a)(vii)                           | 95    | -26.7                         | 40.6                         | 44.7                    | 11.0 (college graduate) |
| <i>ITA</i> , s. 13(21), s.v. “undepreciated capital cost” | 779   | -699.8                        | 304.4                        | 318.0                   | 44.3                    |
| <i>ITA</i> , s. 18(12)                                    | 213   | -139.6                        | 85.7                         | 92.9                    | 17.6                    |
| Overall Score for Taxpayer 1                              | 4447  | -326.8                        | 159.3                        | 169.5                   | 26.4                    |
| Overall Score for Taxpayer 2                              | 2078  | -55.7                         | 55.4                         | 62.3                    | 13.0                    |
| Overall Score for <i>ITA</i> samples                      | 6099  | -210.7                        | 114.8                        | 123.8                   | 20.7                    |
| Overall Score   | 6525  | -170.7                        | 99.4                         | 107.9                   | 18.7                    |

Table 4: Readability results for purposively sampled legislation and regulations

|  | Words | Flesch Reading Ease (0 – 100) | Flesch-Kincaid (Grade Level) | Fog Index (Grade Level) | Dale-Chall Score |
|--|-------|-------------------------------|------------------------------|-------------------------|------------------|
| <b>Interpretation Bulletins, Tax Folios, GST/HST Info Sheets</b> |       |                               |                              |                         |                  |
| IT-525R (excerpts)   | 914   | 33.5 (difficult)              | 16.7 (college graduate)      | 22.3                    | 9.5 (college)    |



|                                    | Words | Flesch Reading Ease<br>(0 – 100) | Flesch-Kincaid<br>(Grade Level) | Fog Index<br>(Grade Level) | Dale-Chall<br>Score     |
|------------------------------------|-------|----------------------------------|---------------------------------|----------------------------|-------------------------|
| SI-F3-C2<br>(excerpts)             | 1582  | 46.8<br>(difficult)              | 15.1<br>(college)               | 22.4                       | 8.4<br>(grade<br>II-12) |
| GI-063                             | 2607  | 64.0<br>(standard)               | 10.2                            | 15.6<br>(college)          | 8.6<br>(grade<br>II-12) |
| IT-473R                            | 3073  | 44.4<br>(difficult)              | 16.6<br>(college<br>graduate)   | 23.2                       | 8.4<br>(grade<br>II-12) |
| S4-F2-C2<br>(excerpts)             | 1645  | 38.5<br>(difficult)              | 15.9<br>(college)               | 20.9                       | 8.8<br>(grade<br>II-12) |
| S3-F4-C1<br>(excerpts)             | 1247  | 52.8<br>(fairly<br>difficult)    | 12.5<br>(college)               | 18.4                       | 8.2<br>(grade<br>II-12) |
| Overall Score<br>for Taxpayer<br>1 | 2496  | 41.9<br>(difficult)              | 15.7<br>(college)               | 22.4                       | 8.8<br>(grade<br>II-12) |
| Overall Score<br>for Taxpayer<br>2 | 8572  | 51.7<br>(fairly<br>difficult)    | 13.4<br>(college)               | 19.2                       | 8.4<br>(grade<br>II-12) |
| Overall Score                      | 11068 | 49.6<br>(difficult)              | 13.9<br>(college)               | 19.9                       | 8.5<br>(grade<br>II-12) |

Table 5: Readability results for purposively sampled Technical Guidance published by the CRA

|                                       | Words | Flesch Reading Ease<br>(0 – 100) | Flesch-Kincaid<br>(Grade Level) | Fog Index<br>(Grade Level) | Dale-Chall<br>Score      |
|---------------------------------------|-------|----------------------------------|---------------------------------|----------------------------|--------------------------|
| <b>Guides</b>                         |       |                                  |                                 |                            |                          |
| T4044,<br>Chapter 6                   | 970   | 54.0<br>(fairly<br>difficult)    | 11.2                            | 15.7<br>(college)          | 8.8<br>(grade<br>II-12)  |
| T4037,<br>Chapter 6                   | 1355  | 58.2<br>(fairly<br>difficult)    | 11.6                            | 18.0                       | 7.42<br>(grade 9-<br>10) |
| T4002<br>Chapters 3 & 4<br>(excerpts) | 5309  | 68.3<br>(standard)               | 9.5                             | 15.0<br>(college)          | 7.37<br>(grade 9-<br>10) |

|                              | Words | Flesch Reading Ease (0 – 100) | Flesch-Kincaid (Grade Level) | Fog Index (Grade Level) | Dale-Chall Score  |
|------------------------------|-------|-------------------------------|------------------------------|-------------------------|-------------------|
| Overall Score for Taxpayer 1 | 2325  | 56.6 (fairly difficult)       | 11.4                         | 17.0                    | 8.0 (grade 11-12) |
| Overall Score for Taxpayer 2 | 5309  | 68.3 (standard)               | 9.5                          | 15.0 (college)          | 7.37 (grade 9-10) |
| Overall Score                | 7634  | 64.7 (standard)               | 10.1                         | 15.6 (college)          | 7.55 (grade 9-10) |

Table 6: Readability results for purposively sampled sections of tax guides published by the CRA

|   | Words | Flesch Reading Ease (0 – 100) | Flesch-Kincaid (Grade Level) | Fog Index (Grade Level) | Dale-Chall Score  |
|---|-------|-------------------------------|------------------------------|-------------------------|-------------------|
| <b>The CRA's Website</b>                                    |       |                               |                              |                         |                   |
| "Musical Instrument Expenses"                               | 376   | 52.3 (fairly difficult)       | 10.6                         | 16.4                    | 8.5 (grade 11-12) |
| "How to Participate in the Home Buyers' Plan (HBP)"         | 1756  | 69.4 (standard)               | 9.3                          | 14.9 (college)          | 7.6 (grade 9-10)  |
| "Business-Use-of-Home Expenses"                             | 417   | 68.3 (standard)               | 9.2                          | 13.9 (college)          | 7.4 (grade 9-10)  |
| "How to Calculate the Deduction for Capital Cost Allowance" | 676   | 55.1 (fairly difficult)       | 12.9 (college)               | 18.3                    | 8.0 (grade 11-12) |
| "Basic Info about Capital Cost Allowance"                   | 661   | 72.4 (fairly easy)            | 8.1                          | 12.8 (college)          | 7.4 (grade 9-10)  |
| Overall Score for Taxpayer 1                                | 2132  | 66.5 (standard)               | 9.5                          | 15.1 (college)          | 7.7 (grade 9-10)  |

|                              | Words | Flesch Reading Ease (0 – 100) | Flesch-Kincaid (Grade Level) | Fog Index (Grade Level) | Dale-Chall Score |
|------------------------------|-------|-------------------------------|------------------------------|-------------------------|------------------|
| Overall Score for Taxpayer 2 | 2463  | 61.2 (standard)               | 10.2                         | 14.6 (college)          | 7.8 (grade 9-10) |
| Overall Score                | 4595  | 63.7 (standard)               | 9.9                          | 14.9 (college)          | 7.8 (grade 9-10) |

Table 7: Readability results for purposively sampled sections of the CRA’s website

Rather than producing a more readable sample, my attempt to isolate provisions that might help individual taxpayers filing their tax returns seems to have produced a significantly less readable set of statutory provisions. While Flesch intended a Reading Ease scale between 0 and 100, with 0 indicating that the text is “practically unreadable”, 12 of the 17 pieces of legislation and regulation sampled have negative scores, including 10 of the 12 provisions sampled from the *Income Tax Act*. Of the five pieces of legislation with positive values for Flesch Reading Ease, four have reading in scores in the “difficult” range and the fifth is “very difficult.” On the whole, more than 6000 words were sampled from the *Income Tax Act*, and these have a Flesch Reading Ease score below -200, far below what the scale was intended to measure.

Looking at the other readability metrics, again, most of the legislation sampled scores outside of the intended range. Only subsection 9(1) returns a sensible grade level in the Flesch-Kincaid formula and none of the legislation does so using the Fog Index. Looking at the Dale-Chall metric, paragraph 38(a) of the *Income Tax Act* has a score of 8, putting it in the grade 11–12 range and subsection 9(1)’s score of about 6.7

puts it at a grade 7–8 level. Six other provisions had a Dale-Chall score between 10 and 11, which indicates the reading level of a college graduate.

On the other hand, the CRA’s publications are comparatively readable. The technical guidance that explains the CRA’s position on the law to an audience mainly consisting of tax professionals—Interpretation Bulletins, Tax Folios, and so on—is rated as “difficult” by the Flesch Reading Ease Formula, at a college reading level by the Flesch-Kincaid analysis, and at a grade 11 or 12 level by the Dale-Chall formula. Both the guides and the CRA’s website, which are aimed at facilitating taxpayer compliance, are even more accessibly written, scoring as “standard” on the Flesch Reading Ease metric, and in the grade 9–10 range according to both the Flesch-Kincaid and Dale-Chall metrics.

On the Gunning Fog index, none of the legislation scored at a meaningful grade level. The technical guidance scores at a post-graduate level, and even the CRA’s website appears to be at a university level. Looking at the formula for the Fog Index, any text with an average sentence length of 40 words, even with no complex words, will have a Gunning Fog Index of 16. Accordingly, we can expect that legislation of the sort sampled here will have extremely high scores. The technical and popular guidance have more reasonable sentence lengths—between 20 and 30 words, on average—bringing those scores down to a sensible range.

However, an alternative interpretation of the index put forward by Simon Bond of [gunning-fog-index.com](http://gunning-fog-index.com) may be helpful. Bond takes the index to indicate an age rather than a grade level. He writes, “[a]n interpretation is that the text can be

understood by someone who left full-time education at a later age than the index.”<sup>53</sup> For example, Bond’s interpretation would take a score of 16 to mean a text at grade 10 or 11 level, rather than the level of someone with an undergraduate degree. On this view, the Gunning Fog index lines up more closely with the others, putting the technical guidance at a college level and the guides and website at an early high school level.

For the sake of comparison, Lin Mei Tan and Greg Tower sampled tax legislation in New Zealand and found a mean Flesch Reading Ease score below 2 in a study published in 1992.<sup>54</sup> However, the reform process in New Zealand appears to have had some success in improving the Flesch scores, as the average score increased to 42.8 in the most recent study by Kathryn Saw and Adrian Sawyer.<sup>55</sup>

The American Internal Revenue Code scores in a similar range, according to a recent presentation by Robert P. Strauss and Skye Toor.<sup>56</sup> Looking at Australia’s tax legislation, David Smith and Grant Richardson reported an average Flesch Reading Ease score of 46.4 for sections they sampled from the *Income Tax Assessment Act 1997*, a marginal improvement from that statute’s predecessor.<sup>57</sup> Smith and Richardson were using Flesch scores between 60 and 70 as a benchmark for acceptable readability and write that the improved readability was not “cause for celebration.”<sup>58</sup> To a

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<sup>53</sup> Bond, *supra* note 35.

<sup>54</sup> Tan & Tower, *supra* note 2 at 364.

<sup>55</sup> Saw & Sawyer, *supra* note 4 at 237.

<sup>56</sup> Strauss & Toor, *supra* note 15 at 13 (reporting a Flesch Reading Ease score of 39.4 for the Internal Revenue Code).

<sup>57</sup> Smith & Richardson, “Readability of Australia’s Tax Laws”, *supra* note 2 at 330.

<sup>58</sup> *Ibid* at 327, 330.

Canadian audience looking at the results of this study, however, legislation that scored as well as the Australian statute does would be a drastic improvement.

#### IV. CRITIQUES OF READABILITY FORMULAS AND AN ALTERNATIVE APPROACH

##### A. THE ASSUMPTIONS UNDERLYING CLASSIC READABILITY FORMULAS

In a recently published book, Professors Alan Bailin & Ann Grafstein review the development of classic readability measurements, including those discussed above and several others, and build on a critique of readability formulas they published in 2001.<sup>59</sup> Bailin and Grafstein argue that these scores and indices are based on faulty assumptions about what makes a text readable. While the readability formulas generally emphasize ease of use over strict scientific rigour, the problems inherent in these formulas may indicate that they should not be trusted even as a rough guide to readability.

All the traditional readability formulas, including those discussed above, rely on the concepts of semantic (vocabulary) and syntactic (sentence) complexity. Bailin and Grafstein argue that “both of these concepts can be problematic for predicting complexity.”<sup>60</sup> They raise several issues with the assumptions made in choosing proxies for semantic and syntactic complexity.

First is what they call the “increment issue”.<sup>61</sup> Readability formulas treat each difficult word as adding the same amount of complexity to the text. For example, in

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<sup>59</sup> Bailin & Grafstein, *Readability*, *supra* note 10; Bailin & Grafstein, “Linguistic Assumptions”, *supra* note 10.

<sup>60</sup> Bailin & Grafstein, *Readability*, *supra* note 10 at 53.

<sup>61</sup> *Ibid* at 55.

all of the measurement schemes outlined above, “consider” and “eurhythmic” are assumed to add the same amount of difficulty to the text.<sup>62</sup> The same critique is leveled at the use of average sentence length (or any other formal syntactic property, such as prepositional phrases or simple sentences): “Counts of formal properties do not translate into units of reading difficulty. If one text has an average sentence length of ten words and another of 15 words, this does not correlate to a difference of some function of five units’ difference of difficulty.”<sup>63</sup>

Second, Bailin and Grafstein view the variables used by readability formulas as problematic. Turning to vocabulary first, they write, “vocabulary varies according to geographical location, socioeconomic identity, and occupational and interest groups. No single list can accurately reflect these differences.”<sup>64</sup> A text reporting on a baseball, cricket, or rugby match may pose significant difficulty for someone unfamiliar with the terms used in those games.<sup>65</sup> This difficulty will have less to do with education or reading level than with interest, geographic location, and culture. Counting syllables or polysyllabic words will also fail to provide a reliable proxy. Words can be both infrequently used and polysyllabic, without hindering readability. To illustrate, Bailin and Grafstein point out that “unladylike” and “helplessness” may be both unfamiliar and polysyllabic, but a reader who is familiar with the structure of the English

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<sup>62</sup> Both words have three syllables and neither is on the Dale and Chall’s list of familiar words: Chall & Dale, *supra* note 24 at 16–29.

<sup>63</sup> Bailin & Grafstein, *Readability*, *supra* note 10 at 53–54.

<sup>64</sup> *Ibid* at 54.

<sup>65</sup> *Ibid* at 103–105.

language will understand them, even the first time they are encountered.<sup>66</sup> On the other hand, monosyllabic words like “curr” and “gyre” may be significantly more difficult.<sup>67</sup> The difficulty of vocabulary is important, of course, but on Bailin and Grafstein’s reading of the research, “there is no non-trivial set of words that could be assumed to be shared by all readers”<sup>68</sup> and word length is a poor measure as well.

Similarly, Bailin and Grafstein argue that the length of sentences cannot be used as even a rough measure of the difficulty of reading sentences. They argue that sentence construction is important to readability, but long sentences may not be syntactically difficult. To illustrate using Bailin and Grafstein’s example, the following sentence is long, but is neither syntactically complex nor difficult to understand:

“Billy left his homework at his aunt’s house and he could not hand it in at school the next day, but his aunt found it and scanned it and emailed it to his teacher.”<sup>69</sup>

There are certain sentence structures that have been shown to reduce readability, including “self-embedding”, “left-branching”, and “extraposition” structures.<sup>70</sup> Bailin and Grafstein argue that these structures reduce readability

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<sup>66</sup> *Ibid* at 105–106.

<sup>67</sup> *Ibid* at 100.

<sup>68</sup> *Ibid* at 178.

<sup>69</sup> Bailin & Grafstein, “Linguistic Assumptions”, *supra* note 10 at 55. Moreover, some sentences which appear to be syntactically complex may nevertheless be easily readable, a point that Bailin and Grafstein illustrate with an example from a Berenstain Bears children’s book: Bailin & Grafstein, *Readability*, *supra* note 10 at 67.

<sup>70</sup> Bailin & Grafstein, *Readability*, *supra* note 10 at 65–80. “Self-embedding” refers to grammatical structures in which “a clause or phrase is contained within another clause or phrase”, for example, “The salmon that the man that the dog chased smoked fell.” (at 69–70) “Left-branching” refers to a structure in which “all of the branches of a complex noun phrase are to the left of the verb”, for example, “The lawyer that the banker irritated filed a hefty lawsuit.” (at 71–72) “Extraposition” is “a structure in which



because they make it more difficult for the reader to make the necessary connections between different parts of a sentence. In practice, this problem is often caused by text intervening between the parts of a sentence that need to be linked. To illustrate, they use the following sentence from the *New York Times* about Barbara Walters's retirement: "After five decades in television, the woman who started her career on camera as a hawk for Alpo dog food and went on to cross the Bay of Pigs with Fidel Castro and to interview every American president (and first lady) since Richard M. Nixon is retiring."<sup>71</sup> The sentence is difficult to read, they suggest, because of the amount of text between the subject of the sentence ("the woman", Barbara Walters), and the verb phrase ("is retiring").

To conclude, Bailin and Grafstein argue that none of the classic readability formulas reflect a good theory of readability. Moreover, any readability formula will overlook the effects of background knowledge, coherence, organization, genre, and much more. In place of an attempt to measure readability, they suggest a "readability checker", similar to a word processor's grammar checking feature, may be possible. Such a feature could highlight potentially difficult vocabulary (perhaps based on word lists developed for particular audiences) and syntactic structures that have been shown to reduce readability.<sup>72</sup>

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part of a clausal or phrasal constituent is separated from the rest of that constituent", for example, "The woman arrived from France who was carrying a boa constrictor." (at 74-75)

<sup>71</sup> *Ibid* at 79, quoting Jonathan Mahler, "As Barbara Walters Retires, the Big TV Interview Signs Off, Too", *The New York Times* (15 May 2014), online: <[www.nytimes.com/2014/05/16/business/media/as-barbara-walters-retires-the-big-tv-interview-signs-off-too.html](http://www.nytimes.com/2014/05/16/business/media/as-barbara-walters-retires-the-big-tv-interview-signs-off-too.html)> [perma.cc/5KQN-2]SD].

<sup>72</sup> Bailin & Grafstein, *Readability*, *supra* note 10 at 191-193.

Advocates of readability formulas generally acknowledge that the formulas are intended to be practical, rough guides, and do not “provide insight into the complexities of what makes texts easy or difficult to read.”<sup>73</sup> For the moment, readability formulas continue to be used, including in the context of tax materials; however, tax scholars should be aware that questions have been raised about the validity of particular formulas and about the entire project of measuring readability.

#### B. BAILIN & GRAFSTEIN’S APPROACH APPLIED

While a comprehensive treatment of the results of Bailin and Grafstein’s proposed “readability checker” is beyond the scope of this study, a few observations can be made. As noted above, left-branching sentence structures have been shown to reduce readability.<sup>74</sup> Left-branching structures cause difficulty because, in general, English is a right-branching language, meaning that qualifications and exceptions normally follow the verb. However, statutory language “usually starts out with the qualifications and exceptions.”<sup>75</sup> Self-embedding structures have also been shown to reduce readability, and, as Martin Friedland noted, “the lawyer’s custom of ‘nesting’ clauses within clauses” is likely to impede comprehension.<sup>76</sup>

In other words, the flaws of readability analyses pointed out by Bailin and Grafstein are unlikely to cause these analyses to overstate the difficulty in

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<sup>73</sup> *Ibid* at 188.

<sup>74</sup> *Ibid* at 71–72.

<sup>75</sup> ML Friedland, Peter ES Jewett & Linda Jewett, *Access to the Law: A Study Conducted for the Law Reform Commission of Canada* (Toronto: Carswell/Methuen, 1975) at 67.

<sup>76</sup> *Ibid* at 69.

comprehending statutory language. Canadian statutory provisions are not only extremely long, they also make heavy use of left-branching and self-embedded sentence construction. While replacing polysyllabic words and shortening sentences may not be the best way to improve readability, Bailin and Grafstein's proposed readability checker would have plenty of work to do if applied to the *Income Tax Act*.

The first provision in the purposive sample can be used to illustrate. Using the methodology described above, the sample constructed using paragraph 8(1)(p) reads as follows:

In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto: (p) where the taxpayer was employed in the year as a musician and as a term of the employment was required to provide a musical instrument for a period in the year, an amount (not exceeding the taxpayer's income for the year from the employment, computed without reference to this paragraph) equal to the total of (i) amounts expended by the taxpayer before the end of the year for the maintenance, rental or insurance of the instrument for that period, except to the extent that the amounts are otherwise deducted in computing the taxpayer's income for any taxation

year, and (ii) such part, if any, of the capital cost to the taxpayer  
of the instrument as is allowed by regulation.<sup>77</sup>

In the case of our hypothetical employed musician, understanding and applying this sentence to her situation requires linking the verb phrase “may be deducted” with the object noun phrase “amounts expended... for the maintenance, rental or insurance of the instrument.” The construction of the sentence makes this linking difficult by interposing more than 80 words between “deducted” and “amounts.” Before reaching the phrase describing what may be deducted, the reader needs to read and understand (or, with some practice, decide to safely ignore) several qualifications: 1) amounts deducted must be applicable to *that source* (the source of income referred to in the opening words of subsection 8(1)); 2) the taxpayer must be employed *in the year* as a musician (the taxation year referred to in the opening words of subsection 8(1)); 3) the taxpayer must have been required to provide an instrument; and 4) the amount deducted cannot exceed the taxpayer’s income from the employment.

Putting all of these qualifications between two parts of the sentence that the reader needs to link makes it extremely difficult to read, as Bailin and Grafstein point out. However, the problem is far worse in the text as it appears in the *Income Tax Act* than it is in the sentence constructed for the purposes of sampling. In the statute, there are not 80 words between the verb and object, but the several pages occupied by paragraphs 8(1)(b) through (o.2).<sup>78</sup>

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<sup>77</sup> *ITA*, *supra* note 1, s 8(1)(p).

<sup>78</sup> In the consolidation used for sampling, subsection 8(1) begins on page 34 and paragraph 8(1)(p) appears on page 43.

It is worth noting, however, that the CRA is able to explain paragraph 8(1)(p) (as well as its relationship to subsection 8(2) and the capital cost allowance regulations) in a relatively readable narrative paragraph:

Artists who are employees are not allowed to make any deductions in computing income from an office or employment other than those provided in section 8. In particular, paragraph 8(1)(p) provides that an employee who is

- (a) employed in the year as a musician, and
- (b) required, as a term of the employment, to provide a musical instrument for a period in the year,

may deduct the following amounts related to the musical instrument. Where the instrument is owned by the musician, capital cost allowance (class 8 – 20% declining balance) may be claimed. In addition, amounts paid before the end of the year in respect of that period for the maintenance, rental and insurance of the instrument may be deducted in computing the musician's income from the employment. However, the total deduction for the year provided under paragraph 8(1)(p) for the maintenance, rental, insurance, and capital cost allowance for the instrument cannot exceed the taxpayer's income for the year, determined prior to any deduction under that paragraph, from employment in which the conditions under (a) and (b) above are met.

Consequently, the deduction under paragraph 8(1)(p) cannot create or increase a loss from such employment.<sup>79</sup>

While the Interpretation Bulletin could be more readable if it were rewritten in plainer terms rather than borrowing so directly from the statutory language, it is clearly an improvement. Furthermore, given how closely the Bulletin matches the statutory language, it seems that statutory drafting conventions are important barriers to more readable provisions.

### C. THE CONTINUED USE OF READABILITY FORMULAS

While this may be the first study to look empirically at the readability of Canadian tax law, the consideration of readability formulas is not entirely foreign to Canadian legal scholars. In 1975, Martin Friedland, who was then Dean of the University of Toronto's law faculty, led a study entitled *Access to the Law* for the Law Reform Commission of Canada.<sup>80</sup> In it, Friedland reported that he had initially intended to apply readability metrics to Canadian legislation, but ultimately decided against it.<sup>81</sup> He suggested that the value of readability studies in the legal context would be limited due to the way that legal prose—and statutory language in

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<sup>79</sup> IT-525R, *supra* note 37 at para 13.

<sup>80</sup> Friedland, Jewett & Jewett, *supra* note 75.

<sup>81</sup> *Ibid* at 66–67. Friedland bases this in part on the assessment of a colleague from the University of Toronto's Department of Psychology who notes some particular elements of legal language not well captured by readability formulas and notes that “The problem of comprehension of legal prose is not a matter of ‘readability’ in the usual sense of that term... Readability measures are usually directed at fairly straightforward accounts of fairly simple events; they are not well suited, as I perceive them, to coping with material that is intrinsically abstract and necessarily qualified.” (at 136-138).

particular—is constructed.<sup>82</sup> While Friedland and his colleagues acknowledged the need to make various sources of law comprehensible and accessible to the population, they abandoned their original idea of conducting any empirical readability analysis.

There are two drafting conventions in particular that might make it difficult to use the classic formulas to measure the readability of tax statutes. One the convention of one sentence per subsection. Canadian tax statutes are drafted using particularly long sentences, in part because, like other federal legislation, tax statutes conform to this convention.<sup>83</sup> Elmer Driedger explains that “There is no reason in law why a section should not contain two or more enactments, each punctuated as a sentence. This practice, however will tempt the draftsman to write text-book paragraphs and make the section difficult to read.”<sup>84</sup> The result, however, has been that some long and detailed provisions are punctuated as a single sentence, and so much of the *Income Tax Act* consists of sentences that are significantly longer than the designers of readability formulas expected.

In many cases, the use of long sentences may not pose a problem for the application of a formula because the assumption behind the formula’s use of sentence length holds. That is, Canadian tax law makes use of extraordinarily long sentences and the length of these sentences does, in fact, make tax law difficult to read. While, as Bailin and Grafstein point out, slightly longer and well-constructed sentences may

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<sup>82</sup> *Ibid* at 67.

<sup>83</sup> However, see *ITA*, *supra* note 1, s 125(4).

<sup>84</sup> Elmer A Driedger, *The Composition of Legislation*, 2d ed (Ottawa: Department of Justice, 1976) at 77.

be more readable than shorter sentences, the *Income Tax Act* does not have poor readability scores because its sentences are slightly long, though well-constructed.

However, in some cases the formulas may overestimate how difficult those long sentences are to read. In many cases, these sentences are subdivided in a way that aids comprehension. One example is where the sentence becomes lengthy because it contains a simple list, such as the list of allowable moving expenses in subsection 62(3).<sup>85</sup> In cases like these, sentence length may not be a reliable indicator of syntactic difficulty.

The second drafting convention that should mute our enthusiasm for readability formulas is that, in general, statutes are written with left-branching sentences—the exceptions and qualifications come first—as discussed above with the example of paragraph 8(1)(p). Because English is a right-branching language, a left-branching sentence can be made more readable by rearranging it, without making it any shorter. Still, in the case of tax legislation, left-branching and other difficult to read sentence structures seem likely to correlate highly with sentence length. It is, after all, those exceptions and qualifications that are causing both the increase in sentence length and the use of left-branching structures, nested clauses, and so on.

In spite of criticisms that have been raised regarding the use of readability formulas, those formulas continue to be widely used. In recent years, readability formulas like the ones applied here have been used to examine the readability of corporations' annual reports, the Bank of Canada's communications with the public,

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<sup>85</sup> *ITA*, *supra* note 1, s 62(3).



information security policies, academic journals, contractual terms, medical information, and many other pieces of writing.<sup>86</sup> While some, including Bailin and Grafstein, have criticized readability formulas, others have offered full or partial defences of their use.<sup>87</sup>

To be sure, criticisms of the formulas are compelling. As the results of this study illustrate, the scores that are returned can be difficult to interpret and are perhaps imprecise. The analysis of subsection 165(2) of the *Excise Tax Act*, shows that in some cases the formulas return quite different results, making it difficult to know whether we should consider that provision well within the reach of a university graduate, as the Dale-Chall formula indicates, beyond that person's reach, as the Gunning-Fog Index indicates, or simply "difficult", as the Flesch Reading Ease score indicates.

Moreover, writers who write to the formulas risk making their writing less readable as a result. In some cases, such writing has been shown to be

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<sup>86</sup> Sabri Zurel, *Readability of Annual Reports: A Comparison of American and French Annual Reports* (MA Thesis, Ghent, 2014), online: <[lib.ugent.be/fulltxt/RUG01/002/162/189/RUG01-002162189\\_2014\\_0001\\_AC.pdf](http://lib.ugent.be/fulltxt/RUG01/002/162/189/RUG01-002162189_2014_0001_AC.pdf)> [perma.cc/6NVJ-4SZY]; Alexandre Deslongchamps, "Readability and the Bank of Canada", (June 2018), online: <[www.banqueducanada.ca/2018/06/note-analytique-personnel-2018-20/](http://www.banqueducanada.ca/2018/06/note-analytique-personnel-2018-20/)> [perma.cc/N8S8-NW9B]; Yazeed Alkhurayyif & George R S Weir, "Evaluating readability as a factor in information security policies" (2017) Special Issue ICAST-17 International Journal of Trend in Research and Development 54; William Kodom Gyasi, "Taylor and Francis Journals under the Critical Lens of Readability Analysis" (2017) 6:2 AFRREV IJAH: An International Journal of Arts and Humanities 1; Daniela B Friedman & Laurie Hoffman-Goetz, "A Systematic Review of Readability and Comprehension Instruments Used for Print and Web-Based Cancer Information" (2006) 33:3 Health Education & Behavior 352.

<sup>87</sup> Friedman & Hoffman-Goetz, *supra* note 86; DuBay, *supra* note 22 at 5, writes "Readability formulas have benefited millions of readers throughout the world in many languages. They have also given writers greater confidence in reaching the widest possible audience. If there is anything wrong with the formulas, it is they are not used enough."

counterproductive and reduce reading comprehension. In other words, avoiding polysyllabic words and shortening sentences may produce a better readability score, but will not always produce a text that is easier to read.<sup>88</sup>

Nonetheless, having a rough and easy to apply metric to track seems to have aided in reform efforts in the U.K., Australia, and New Zealand. While the criticisms of readability formulas in general have significant weight and we cannot assume that a 20-word sentence is always significantly easier to read than a 30-word sentence, the results of this study indicate a different problem. Rather, the average sentence length of the randomly sampled sections of the *Income Tax Act* was 165 words. The purposive sample of *Income Tax Act* provisions had an average sentence length of 290 words. Even if sentence length is not always a strong predictor of readability, it surely must be the case that bringing the length of sentences in the *Income Tax Act* closer to those of the *Bankruptcy and Insolvency Act* provisions sampled (average of 72 words) or the *Canada Labour Code* (average 53 words) would make the *Income Tax Act* more readable.

The various proxies that are used for semantic difficulty may be problematic in assessing writing generally, but in the context of tax law, a few things can be said in their defence. First, the reader's level of interest matters much less in this context than it would in other kinds of writing. Similarly, geographic differences in vocabulary will have little effect. It may be the case that some monosyllabic words—

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<sup>88</sup> For a review of research on the problem of “writing to the formula”, see Rebekah George Benjamin, “Reconstructing Readability: Recent Developments and Recommendations in the Analysis of Text Difficulty” (2012) 24:1 *Educational Psychology Rev* 63 at 64.

such as “deem”—will cause difficulty while a polysyllabic word—such as “corporation”—will be easily understood by the intended audience. Still, it seems broadly true in the tax context that using shorter words, simpler words, and more common words will make the text easier to read.

Drafters of tax legislation, as well as administrative publications, will also appreciate that the vocabulary they use will inevitably remain somewhat difficult because it needs to capture difficult legal and economic concepts. If we are to use a readability formula as a benchmark, we should not aim for a Flesch Reading Ease score of 90 or a sixth-grade reading level on the Dale-Chall formula. The good news is, however, that what keeps the *Income Tax Act* from scoring in the same range as the *Bankruptcy and Insolvency Act* is the length of the sentences and not the number of polysyllabic words. Progress for Canadian tax legislation would look much like it did for New Zealand in the 1990s and early 2000s—moving the Flesch Reading Ease Score above zero.

Drafters of Canadian tax legislation would also do well to rethink some of the conventions of statutory drafting and to attempt to move the legislation more in line with the general conventions of English. Moving away from the left-branching sentence structures and the clauses nested within clauses that make it difficult to link parts of a sentence together would improve readability in a way that may not be reflected in an improved Flesch Reading Ease score. However, these reforms would be most effective if they were accompanied by a move toward shorter sentences, which would be reflected in improved readability scores.

## V. CONCLUSION

It will come as no surprise that Canada's *Income Tax Act* is unreadable to most people. With this empirically confirmed and set aside, there are nevertheless several striking conclusions that can be drawn and several interesting new questions that may be posed because of this study. Despite the flaws of readability metrics and the vagaries of the two sampling methods used here, these results help to advance the conversation about the readability of legal materials generally and tax materials in particular.

First, we may tentatively conclude that the *Income Tax Act* is particularly difficult to read, even among Canadian statutes. With reasonably large samples, the *Income Tax Act* scores significantly worse than the *Bankruptcy and Insolvency Act* on all the readability metrics used here. Small samples of other tax statutes—the *Excise Tax Act* and the Nova Scotia *Sales Tax Act*—also appear more readable than the *Income Tax Act*. Further investigation is warranted to confirm the comparison with larger samples. Elsewhere it has been noted that proponents of consumption taxes put forward their simplicity, in contrast with the inherently complex income tax, as a reason to prefer consumption taxes. However, consumption taxes come with their own complexity, and in some cases are implemented in unreadable statutes.<sup>89</sup>

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<sup>89</sup> Graeme S Cooper & Richard J Vann, "Implementing the Goods and Services Tax" (1999) 21 Sydney L Rev 337; Grant Richardson & David Smith, "The Readability of Australia's Goods and Services Tax Legislation: An Empirical Investigation" (2002) 30 Federal L Rev 475 [Richardson & Smith, "Readability of Australia's GST Legislation"].

Second, and similarly, it seems safe to conclude the income tax legislation of the U.S., Australia, and New Zealand is much more readable than Canada's *Income Tax Act*. Whether this is attributable to other jurisdictions paying more attention to readability in the recent past, to Canada's unique situations related to bilingualism or federal structure, or to some other cause, is worthy of further investigation.

Third, it is worth noting that while the readability metrics disagreed on the absolute level of readability in many cases, there was broad agreement on the relative difficulty of the materials examined. For example, in considering the discussion of capital cost allowance in Tax Folio S3-F4-C1, there is no way to choose between the classifications of "fairly difficult" (as the Flesch Reading Ease Score indicates), late high school level (as the Dale-Chall score indicates), and college level (as the Flesch-Kincaid score indicates). However, there is broad agreement that it is less difficult than the sampled excerpts of Tax Folio S4-F2-C2 dealing with business use of home expenses. Moreover, there is broad agreement that the technical guidance contained in Tax Folios and Interpretation Bulletins is significantly more readable than the statute itself and slightly less readable than the popular guidance provided in tax return guides and on the CRA's website. Aside from the easy-to-apply metrics, it appears that the more detailed and nuanced analysis suggested by Bailin and Grafstein would reach a similar conclusion.

Fourth, there is a need to explain why the purposive sample of the *Income Tax Act* performed worse than the periodic sample. I constructed the purposive sample to eliminate the effect of some of the more difficult and technical provisions of the

*Income Tax Act*, and, indeed, the sample was constrained to the types of provisions that are often covered in an introductory tax law class. Further, the construction of the purposive sample in some cases artificially created sentences in a way that made the sample more readable. Yet, this sample appeared to be significantly less readable than the *Income Tax Act* as a whole, as measured by the periodic sample.

Several hypotheses might be tested. Was the purposive sample too small, and so excessively influenced by the long sentences in the definitions of terms like principal residence and undepreciated capital cost? Was the sampling method in the periodic sample flawed? Would the results be different if the sample immediately started at the top of a page or went backward to find the beginning of a sentence, rather than going forward to find the beginning of the next sentence? Are the provisions related to the calculation of income—or perhaps the calculation of individuals' incomes—in fact less readable than the *Income Tax Act* as a whole?

I have suggested that classic readability formulas can continue to be helpful in this context, despite the criticisms they have received. Reforms that moved the readability of our tax provisions above zero on the Flesch Reading Ease metric—as was done in New Zealand—would undoubtedly be an improvement, and the tracking the Flesch score in any reform effort would be helpful. However, it is likely unrealistic to expect Canada's legislation to ever reach 60 on the scale and be classified as “standard.” Moreover, an attempt to move that high up the scale would risk “writing to the formula”,<sup>90</sup> rather than focusing on clear expression. For this reason, I suggest

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<sup>90</sup> Benjamin, *supra* note 88 at 64.

that it may be useful to track several readability formulas in an attempt to triangulate readability.<sup>91</sup> At least at present, these formulas may present a useful, if rough, way to track progress, but the focus of any legislative reform should be on the conventions that force drafters to use unnecessarily long and syntactically difficult sentences. To the extent that the metric takes precedence over these, it may be counterproductive.

Further, while readability in tax law is a goal worth pursuing, it is complicated by Canada's legal bilingualism. In contrast to the situation in the U.S., Australia, New Zealand, and the U.K., to simplify the language in Canada's *Income Tax Act* would require simplifying the writing in two languages. This task may be made more difficult by differences in style and structure between French and English, and the fact that what constitutes good, clear writing may differ between the two languages. Canada's *Income Tax Act* also accounts for both the common law and civil law traditions in a robust way.<sup>92</sup>

Readability is worth pursuing as an access to justice strategy for two key reasons. First, it would seem to make the law more accessible and therefore empower citizens within the tax system in a relatively intuitive and straightforward way. Second, to the extent that it is possible to communicate the same norms more clearly, doing so has no obvious disadvantages.

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<sup>91</sup> On the same idea, see: Friedman & Hoffman-Goetz, *supra* note 86.

<sup>92</sup> On the challenges entailed in legal bilingualism and bijuralism in Canada, see: Roderick A Macdonald, "Legal Bilingualism" (1996) 42 McGill LJ 119; Claire L'Heureux-Dube, "Bijuralism: A Supreme Court of Canada Justice's Perspective" (2001) 62 La L Rev 449; David G Duff, "The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation, and Canadian Bijuralism" (2003) 51:1 Can Tax J 1; Lionel A Levert, "Bilingual and Bijural Legislative Drafting: To Be or Not To Be?" (2004) 25:2 Statute L Rev 151.

However, it should be noted that readability, as one element of complication, is a relatively small piece of the overall complexity of the tax system. In evaluating the 1997 reforms to the Australian tax system, Richard Krever wrote that while the more readable language had appeared to be easier to understand, the underlying complexity remained: “by unveiling many of the inconsistencies, anomalies, overlaps and lacunae in the law, the plain English draft exposes the real causes of much of the former law’s complexity, namely its wholly irrational and inconsistent policy base.”<sup>93</sup> We cannot expect writing in simple language to result in a simple tax system, but we can hope that the causes of complexity are made plain.

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<sup>93</sup> Richard Krever, “Taming Complexity in Australian Income Tax” (2003) 25:4 Sydney L Rev 467 at 493.



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## CHAPTER 8: THE COMPLEXITY OF THE REALIZATION RULE

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### I. INTRODUCTION

In chapter 6, I suggested that there are some choices made in the design of the tax system that introduce significant complexity and I highlighted the associated access to justice problems. Many of the provisions that introduce complexity are classified as tax expenditures, designed to achieve non-tax policy goals, while others pursue goals internal to the tax system, such as facilitating administration, compliance, or collection. While these design choices may have been justified at the time they were made—perhaps on tax policy grounds as a necessary compromise of equity and efficiency for the sake of administrability—as times change and the tax system evolves, some will be ripe for reconsideration in light of both current circumstances and the access to justice concerns fleshed out in chapters 5 and 6. The rule that capital gains are taxed only on realization is one such element of Canada’s tax system.

The “realization principle” in Canadian tax law has long been thought to be acceptable because, while it causes the recognition of income to be postponed, the deferral is limited.<sup>1</sup> Moreover, it is commonly thought that concerns around valuation

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<sup>1</sup> Canada, *Report of the Royal Commission on Taxation* (Ottawa: Queen’s Printer, 1966) at 368–370 [Canada, *Carter Commission Report*].

and liquidity are sufficient to justify postponing taxation until realization.<sup>2</sup> In this chapter, I examine whether these concerns still justify the rule in the light of both changed circumstances and the complexity the realization rule creates.

In part II of this chapter, I explain that the taxation of capital gains on disposition does not accord with principles of an ideal tax system, and so falls in the third category of complexity drivers discussed in chapter 6. In part III, I explain that basing taxation on realization has generated significant complexity and the corresponding access to justice problems. In part IV, I argue that the administrability concerns that have been used to justify the rule have less and less force in the contemporary context. In part V, I respond to several key objections to moving away from the realization rule and toward a system of mark-to-market taxation.<sup>3</sup> I conclude by suggesting that, while a fully fleshed out proposal for mark-to-market taxation in Canada would be a much larger project, the evidence presented in this chapter shows that such a project is worth pursuing.

## II. THE TAXATION OF “REALIZED” GAINS

In chapter 6, I laid out a practical framework for the simplification of tax law. Some tax complexity is caused by the culture and processes of tax law, and we should

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<sup>2</sup> Canada, Department of Finance, *Report on Federal Tax Expenditures: Concepts, Estimates and Evaluations 2019* (Ottawa: Department of Finance, 2019) at 255, online: <[www.fin.gc.ca/taxexp-depfisc/2019/taxexp-depfisc19-eng.pdf](http://www.fin.gc.ca/taxexp-depfisc/2019/taxexp-depfisc19-eng.pdf)> [perma.cc/F8CR-CLCR] [Canada, Department of Finance, *Tax Expenditure Report 2019*], citing Canada, *Carter Commission Report*, *supra* note 1, vol 3.

<sup>3</sup> The alternative to taxation on realization is variously referred to in the literature as mark-to-market taxation, accrual taxation, and accretion taxation. In this chapter I use these terms interchangeably to refer to a system whereby taxpayers would include in their annual income calculations the change in market value of their appreciable capital assets.

expect that making changes to this culture and these processes will be a long and difficult process. The readability analyses in chapter 7 provide some data to aid in this effort. Some tax complexity is the result of pursuing the goals of the tax system, and I suggested that access to justice-oriented simplification advocates ought to focus their efforts elsewhere. The third category of tax complexity drivers consists of design choices made in the tax system for reasons other than the pursuit of the ideal tax system. This third category is where I suggested that simplification efforts might yield access to justice benefits. In this section, I explain that the realization rule fits cleanly in this third category.

The ideal Schanz-Haig-Simons concept of income includes any change in the taxpayer's net worth. Any increase or decrease in the value of assets a taxpayer holds would be reflected in her taxable income. Canada's tax system deviates from this ideal in several important ways. Gains from some assets are exempt from taxation. For example, gains that accrue to a principal residence are entirely exempt.<sup>4</sup> Other gains have limited exemptions, as in the case of the lifetime capital gains exemption and the tax-free savings account.<sup>5</sup> Where capital gains (distinguished from business gains or "adventures in the nature of trade") are included in taxable income, only half the value is included.<sup>6</sup> Further, increases or decreases in the value of these assets are only reflected in income when the property is subject to a disposition. While all of these are related, only the last is the subject of this chapter.

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<sup>4</sup> *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 40(2)(b) [ITA].

<sup>5</sup> *Ibid*, ss 110.6, 146.2.

<sup>6</sup> *Ibid*, s 38(a).

A simple example can illustrate what is sometimes called the realization rule or the realization principle. A taxpayer, Abigail, owns \$1000 worth of securities at the start of year 1. At the end of year 1, the securities are worth \$1100. In Schanz-Haig-Simons terms, Abigail has \$100 worth of income in year 1; however, for Canadian tax purposes, Abigail has no taxable income. The securities continue to appreciate, until finally, in year 10, Abigail sells the securities for \$2000. In year 10, for Canadian tax purposes, Abigail has a \$1000 capital gain from the disposition of the securities.<sup>7</sup> (Abigail will have a *taxable* capital gain of \$500, assuming that the securities are not held in a tax-free savings account or eligible for the lifetime capital gains exemption.)<sup>8</sup> While the ideal tax system would have included the appreciation of the securities in Abigail's income while she held them, Canada's tax system waits for a disposition.

While the realization rule has been defended as a subsidy to encourage investment and on the basis of moral or philosophical problems with taxation based on market prices,<sup>9</sup> the most common explanation is reflected in the Department of Finance's annual *Tax Expenditure Report*:

In general, capital gains are taxed on a realization basis, upon the disposition of property. This results in a tax expenditure because, under the benchmark tax system, capital gains (net of

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<sup>7</sup> *Ibid*, s 39(1).

<sup>8</sup> *Ibid*, s 38(a).

<sup>9</sup> David M Schizer, "Realization as Subsidy" (1998) 73 NYU L Rev 1549; Charles Delmotte, "The Right to Autonomy as a Moral Foundation for the Realization Principle in Income Taxation" in Monica Bhandari, ed, *Philosophical Foundations of Tax Law* (Oxford: Oxford University Press, 2017) 281; Ilan Benschalom & Kenda Stead, "Realization and Progressivity" (2011) 3 Colum J Tax L 43.

capital losses) would be included in income as they accrue...This measure recognizes that, in many cases, it is difficult to estimate with accuracy the value of unsold assets, and that taxing the accrued gains on assets that have not been sold would be administratively complex and could create significant liquidity problems for taxpayers.<sup>10</sup>

In other words, Canada declines to tax capital gains as they accrue for pragmatic reasons: the difficulty of valuing capital assets in the absence of an arm's length sale and the difficulty that taxpayers may face in accessing money to pay tax before they have sold a capital asset. In this case, the design of the tax system sacrifices both the efficiency and the equity of the ideal system for the sake of administrability.

The realization rule has attracted an avalanche of criticism in the American tax system.<sup>11</sup> The academic consensus against the realization rule is so strong that some discuss proposals for reform of the rule in terms of "saving" the income tax, while

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<sup>10</sup> Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 2 at 255, citing Canada, *Carter Commission Report*, *supra* note 1, vol 3.

<sup>11</sup> See, for example: William D Andrews, "The Achilles' Heel of the Comprehensive Income Tax" in Charles E Walker & Mark A Bloomfield, eds, *New Directions in Federal Tax Policy for the 1980s* (Cambridge, Mass: Ballinger, 1983); David J Shakow, "Taxation without Realization: a Proposal for Accrual Taxation" (1985) 134 U Pa L Rev 1111; Henry Ordower, "Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market" (1993) 13 Va Tax Rev 1; Joseph M Dodge, "A Combined Mark-to-Market and Pass-through Corporate-Shareholder Integration Proposal" (1994) 50 Tax L Rev 265; David A Weisbach, "A Partial Mark-to-Market Tax System" (1999) 53 Tax L Rev 95; Deborah H Schenk, "An Efficiency Approach to Reforming a Realization-Based Tax" (2003) 57 Tax L Rev 503; Timothy Hurley, "Robbing the Rich to Give to the Poor: Abolishing Realization and Adopting Mark-to-Market Taxation" (2008) 25 TM Cooley L Rev 529; David Elkins, "The Myth of Realization: Mark-to-Market Taxation of Publicly-Traded Securities" (2010) 10:5 Fla Tax Rev 375.

others advocate abandoning income tax altogether.<sup>12</sup> The realization rule is commonly attacked as both inequitable and non-neutral. The rule violates both horizontal and vertical equity by providing the benefit of tax deferral to a particular form of income that is mostly earned by high-income taxpayers.

To elaborate by building on the example above, Abigail pays no tax in year 1 despite having earned \$100 of income. Beatrice, who earns \$100 of employment income in year 1, will pay tax at her marginal rate. While Abigail will eventually pay tax on her gains when she sells the securities in year 10, she receives the benefits of deferring the tax for 9 years—including the ability to continue earning income from the securities and to borrow using them as collateral—with no immediate tax consequences. Thus, the realization rule violates horizontal equity by preferring Abigail’s income from capital gains over Beatrice’s employment income. Because capital gains income is more likely to be earned by high-income and high-net worth individuals than by low income or poor individuals, the rule violates vertical equity as well.

The realization rule also violates neutrality, creating economically inefficient incentives. The tax liability that will accompany the disposition of a capital asset creates a “lock-in effect.”<sup>13</sup> That is, the benefit of continuing to defer taxation will

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<sup>12</sup> Daniel Halperin, “Saving the Income Tax: An Agenda for Research” (1998) 24 Ohio NUL Rev 493; Clarissa Potter, “Mark-to-Market Taxation as the Way to Save the Income Tax - A Former Administrator” (1999) 33:3 Val U L Rev 879; William D Andrews, “A Consumption-Type or Cash Flow Personal Income Tax” (1973) 87 Harv L Rev 1113.

<sup>13</sup> Discussion of the lock-in effect is voluminous in the literature around both the capital gains preference and the realization rule. See, for example: Walter J Blum, “A Handy Summary of the Capital Gains Arguments” (1957) 35 Taxes 247 at 256–258; Carl S Shoup, “The White Paper: Accrual Accounting

cause taxpayers to hold less productive assets rather than selling them to buy more productive assets, at least until the difference between the assets justifies the tax liability that the disposition will create.

While the equity and neutrality repercussions of the realization rule are important, much of its criticism in the United States focuses on the complexity the rule creates. In 1960, Carl Shoup, a prominent American public finance economist, in collaboration with his colleagues and students, estimated that half of the U.S. *Internal Revenue Code*, as it then stood, could be eliminated with a transition to biannual accrual accounting.<sup>14</sup> While much of that legislative simplification assumed that the favoured treatment of capital gains would also be eliminated, significant simplification would still have been accomplished even if the distinction between capital gains and other income were retained.<sup>15</sup>

In drawing on the American literature, it is worth noting that there may be several important reasons the realization rule has attracted more attention in the U.S. than in Canada. One is the history of constitutional litigation around it, starting with *Eisner v Macomber*, in which the U.S. Supreme Court found that realization was a constitutional requirement of income tax.<sup>16</sup> In later cases, the Supreme Court stated

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for Capital Gains and Losses” (1970) 18:2 Can Tax J 96 at 98–99; Neil Brooks & Arthur Peltomaa, “The Case for Full Taxation of Capital Gains” (1979) 1 Can Tax’n 7 at 9–10; Yoseph M Edrey, “What Are Capital Gains and Losses Anyway” (2004) 24 Va Tax Rev 141 at 170–172; Mark L Louie, “Realizing Appreciation without Sale: Accrual Taxation of Capital Gains on Marketable Securities Note” (1981) 34 Stan L Rev 857 at 864; Schizer, *supra* note 9 at 1610–1611; Schenk, *supra* note 11; Hurley, *supra* note 11 at 550–551.

<sup>14</sup> Shoup, *supra* note 13 at 97–98.

<sup>15</sup> *Ibid* at 96–97, 101–102.

<sup>16</sup> *Eisner v Macomber*, 252 US 189 (1920).

that realization is a rule “founded on administrative convenience,”<sup>17</sup> leading to some doubt about whether it retains its constitutional status.<sup>18</sup>

In addition to the constitutional dimension, the realization requirement has larger significance in the U.S. tax system because death is not considered a realization event. Where capital assets are held until a taxpayer’s death, neither the taxpayer nor her estate ever pays tax on the accrued gain.<sup>19</sup> Further, because of the “stepped-up basis” rule, the taxpayer’s successor receives the asset with a cost base equal to the market value at the time of the inheritance,<sup>20</sup> and so the accrued gain on an asset that the taxpayer holds until death is never taxable. Indeed, one of the more moderate American reform proposals advocates for a system similar to Canada’s in which both giving away an asset and death are treated as realization events.<sup>21</sup>

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<sup>17</sup> *Helvering v Horst*, 311 US 112 at 116 (1940).

<sup>18</sup> Boris I Bittker, “Tax Reform and Tax Simplification” (1974) 29 U Miami L Rev 1 at 3 [Bittker, “Tax Reform and Tax Simplification”]; Ordower, *supra* note 11; Hurley, *supra* note 11 at 538–541.

<sup>19</sup> Unlike Canada’s federal tax system, the US has an estate tax, which applies on the transfer of the estate: IRC § 2001ff. However, there is a large exemption, which was made larger by the *Tax Cuts and Jobs Act*, Pub L No 115-97, 131 Stat 2054 (codified as amended in scattered sections of 26 USC (2017)). The effect is that estates in 2019 will only pay tax on values exceeding \$11.4 million: IRC § 2010(c)(3); US, Internal Revenue Service, “Estate Tax”, online: <[www.irs.gov/businesses/small-businesses-self-employed/estate-tax](http://www.irs.gov/businesses/small-businesses-self-employed/estate-tax)> [perma.cc/MDH3-57EC]. It has been estimated that the estate tax only affected the richest 0.2% of estates before this change, and only affects the richest 2,000 estates afterward: Chye-Ching Huang & Chloe Cho, “Ten Facts You Should Know About the Federal Estate Tax”, (30 October 2017), online: *Center on Budget and Policy Priorities* <[www.cbpp.org/research/federal-tax/ten-facts-you-should-know-about-the-federal-estate-tax](http://www.cbpp.org/research/federal-tax/ten-facts-you-should-know-about-the-federal-estate-tax)> [perma.cc/3RHS-TRYV]; Heather Long, “3,200 wealthy individuals wouldn’t pay estate tax next year under GOP plan”, *Washington Post* (5 November 2017), online: <[www.washingtonpost.com/news/wonk/wp/2017/11/05/3200-wealthy-individuals-wouldnt-pay-estate-tax-next-year-under-gop-plan/](http://www.washingtonpost.com/news/wonk/wp/2017/11/05/3200-wealthy-individuals-wouldnt-pay-estate-tax-next-year-under-gop-plan/)> [perma.cc/AG5]-PKU9].

<sup>20</sup> IRC § 1014(a).

<sup>21</sup> Jeffrey L Kwall, “When Should Asset Appreciation Be Taxed: The Case for a Disposition Standard of Realization” (2011) 86 Ind LJ 77.



Some of the American scholarship has suggested that in the absence of the realization rule, the justifications for both the corporate tax and the preferred treatment of capital gains would disappear, leading the way to much greater simplification.<sup>22</sup> Scholars discuss these reforms together because taxing capital gains on a mark-to-market basis would weaken some of the strongest policy justifications supporting both the corporate tax and the capital gains preference.

While the corporate tax system and the capital gains preference are both ripe for an access to justice-centred examination of the complexity that they create, in this chapter I examine the realization rule without assuming that these other reforms would be pursued as well. There are two related reasons for taking this approach. The first is to highlight the complexity created by the realization rule on its own, rather than conflating it with the complexity of capital gains taxes and corporate tax.

The second reason behind this approach is that there may be sufficient justification to retain both the corporate tax and the capital gains preference even with a move to accrual taxation. Certainly some of the arguments in favour of the capital gains preference would be weakened in the absence of the realization rule—arguments around the lock-in effect and income bunching, for example.<sup>23</sup> However, the Department of Finance’s stated objective for the partial inclusion of capital gains is providing “incentives to Canadians to save and invest” and keeping Canada’s

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<sup>22</sup> See, for example: Shoup, *supra* note 13; Bittker, “Tax Reform and Tax Simplification”, *supra* note 18 at 3.

<sup>23</sup> A reduced tax rate on income from capital gains is sometimes justified on the basis that the gain is earned over many years but taxed all at once on realization (resulting in a “bunching” effect), which is seen as “manifestly unfair under a system of progressive rates” (Blum, *supra* note 13 at 253).

treatment of capital gains broadly in line with that of other countries.<sup>24</sup> A much larger debate has been going on for a century about whether capital gains should receive preferential treatment, and while I suggested in chapter 6 that the access to justice lens on the tax system and on tax complexity in particular might shed new light on this debate, I do not propose to resolve it here. Rather, I assume for the purposes of this chapter that the Department of Finance’s stated goals for the preferential treatment of capital gains would be sufficient to maintain the status quo.

Similarly, one key argument in favour of the corporate tax—preventing the complete and unlimited deferral of gains held in a corporation<sup>25</sup>—would be removed with a change to accrual taxation. However, there are several other arguments to justify the corporate tax as well. These include tax justifications, such as the ability to pass the tax onto non-residents, and the fact that the corporate tax functions as a benefit tax and a tax on pure economic rents.<sup>26</sup> They also include other social objectives, including those related to corporate governance and limiting the power of corporations in society.<sup>27</sup> Again, corporation taxation, including the appropriate rates and design features related to integration with the personal income tax, is a subject

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<sup>24</sup> Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 2 at 202.

<sup>25</sup> Vern Krishna, *Fundamentals of Canadian Income Tax: Volume 2: Corporate Tax* (Toronto: Carswell, 2018) at 11–14; David G Duff & Geoffrey Loomer, *Taxation of Business Organizations in Canada* (Toronto: LexisNexis, 2015) at 223–226.

<sup>26</sup> Kim Brooks, “Learning to Live with an Imperfect Tax: A Defence of the Corporate Tax” (2003) 36 UBC L Rev 621; Richard Bird, Working Paper 96-2, “Why Tax Corporations” (December 1996), online: <publications.gc.ca/collections/Collection/F21-4-96-2E.pdf>.

<sup>27</sup> Reuven S Avi-Yonah, “Corporations, Society, and the State: A Defense of the Corporate Tax” (2004) 90:5 Va L Rev 1193; Steven A Bank, “Tax, Corporate Governance, and Norms” (2004) 61 Wash & Lee L Rev 1159.

about which much has been written. The access to justice lens might helpfully add to this debate. However, for the purposes of the present chapter, I assume that a move to accrual taxation would not necessarily lead to abandoning or radical simplification of the corporate tax (though some adjustments to the corporate tax rules would seem to follow naturally).

In Canada, the taxation only of realized gains has generally been accepted “on grounds of administrative convenience.”<sup>28</sup> The *Carter Report* expressed concern about the violation of equity that the realization rule creates, but argued that it would be acceptable so long as it were temporary.<sup>29</sup> For this reason, the *Report’s* authors argued for an expansive definition of disposition to limit the non-taxation of accrued gains.<sup>30</sup>

The Commissioners recognized that taxing the accrual of gains and losses would be closer to the Schanz-Haig-Simons ideal and would reduce complexity in the tax system, even going so far as to suggest tentative future moves toward mark-to-market taxation in some areas.<sup>31</sup> A reconsideration of the administrative concerns that prevented the Commissioners from fully endorsing mark-to-market taxation is the

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<sup>28</sup> Canada, *Carter Commission Report*, *supra* note 1, vol 3 at 368–370.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* (“It should include any form of transfer or alienation of title to property, including sales, exchanges, gifts and bequests of property, except transfers from one member of a family unit to another. It should include the termination of a contingent interest in property, and extend to involuntary disposals of property arising, for example, through expropriation, theft, damage or destruction.”). For a criticism of the Commission’s reasoning in this area, see Boris I Bittker, “Comprehensive Tax Base” (1967) *Can Tax Found* 36.

<sup>31</sup> Canada, *Carter Commission Report*, *supra* note 1, vol 3 at 378–380. This proposal was picked up, though not ultimately implemented: Canada, Department of Finance & Edgar J Benson, *Proposals for Tax Reform* (Ottawa: Queen’s Printer for Canada, 1969). See also Shoup, *supra* note 13.

subject of Part IV of this chapter. In the next section, I argue that the realization rule creates significant complexity and the associated negative effects on access to justice.

### III. THE COMPLEXITY CAUSED BY THE REALIZATION RULE AND ITS EFFECT ON ACCESS TO JUSTICE

Having established that the accrual taxation of capital gains is out of line with the Schanz-Haig-Simons ideal, I aim in this section to establish that the realization rule creates significant complexity, and therefore raises access to justice concerns. The onus is on those advocating reform to establish a compelling case, as the legislative change would be enormous and costly. Dispositions of property are referred to over 3,600 times in the *Income Tax Act*.<sup>32</sup> Indeed, exploring all of the ramifications and making a full case for such a change would be a book-length project of its own. For the purposes of the present chapter, this section uses a series of examples to illustrate how the realization rule causes significant complexity and therefore reduces access to justice in the Canadian tax system.

#### A. THE DEFINITION OF DISPOSITION

Any doubt that taxation on disposition creates significant complexity in the Canadian tax system can be resolved with a look at the definition of disposition. The English version contains more than 1,300 words,<sup>33</sup> references to 11 other provisions in the *Income Tax Act*, including a separate 300-word definition of disposition that

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<sup>32</sup> A search for “dispos” in the English text of the *ITA*, *supra* note 4, returns 3,662 results.

<sup>33</sup> *Ibid*, s 248(1) “disposition”.

applies in relation to interests in life insurance policies,<sup>34</sup> and several cross-references within its own various subparts. The first five paragraphs list events that will constitute dispositions, and the other nine detail exceptions or events that will not be considered dispositions of property.

In other words, the definition of disposition exemplifies several forms of complication. It is written in the typical unreadable style of the *Income Tax Act*.<sup>35</sup> It is detailed and has intricate interactions with other elements of the tax system. To use other terminology, it shows what Peter Schuck would refer to as density and technicality, and both what complexity theory would dismiss as mere complicatedness and what it would regard as complexity (in the systems theory sense).<sup>36</sup>

As is often the case with complication in the *Income Tax Act*, the complication here arises in part in the hope of giving guidance regarding the content and application of a complex concept. Detail is provided with the aim of providing certainty and stability. The history of the definition of disposition, however, belies that hope. In fact, it seems that the definition requires quite a bit of upkeep. In 2001,

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<sup>34</sup> *Ibid*, s 248(1) "disposition" (b.1), referring to s 148(9) "disposition".

<sup>35</sup> The definition of disposition scores as impossible to read on all of the metrics used in chapter 7: its Flesh Reading Ease score is -1280 (on a scale of 0 to 100 where 0 means impossible to read); its Flesh-Kincaid Grade Level score is 526; Gunning Fog Index (taken to mean a U.S. grade level) is 546; its Dale-Chall Readability Score is 74 (where 10 is the level of a college graduate).

<sup>36</sup> Peter H Schuck, "Legal Complexity: Some Causes, Consequences, and Cures" (1992) 42:1 Duke LJ 1; JB Ruhl & Harold Ruhl Jr, "The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society" (1996) 30 UC Davis L Rev 405; Richard A Posner, *Reflections on Judging* (Cambridge, Mass: Harvard University Press, 2013).

the definitions of “disposition of property” in subsection 13(21) and “disposition” in section 54 were repealed and a new, greatly expanded, definition of disposition was added to subsection 248(1). Since then, the definition has been amended five times in eight places.<sup>37</sup> One of those, subparagraph (f)(vi) of the definition, has been amended three times in that span. Two of those amending acts have come since 2010 and have included amendments to six different subparts of the definition, indicating that the vortex of legal precision here shows no sign of slowing down.

Taxing capital gains on a mark-to-market basis would not entirely eliminate the definition or its associated complexity. Dispositions of property would remain relevant in several other circumstances: for example, to trigger inclusions in employment income, for the special tax treatment of life insurance policies, and for the purposes of the capital cost allowance system. In the main, however, moving away from realization and toward accrual as the method of taxing capital gains would reduce the need for these detailed inclusions and exceptions. It would also reduce tax planners’ ability to use the realization rule to defer tax liability, consequently reducing the need to continue modifying and reinforcing the definition of a disposition.

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<sup>37</sup> *Budget Implementation Act, 2005*, SC 2005, c 30, ss 17(2), (3), (5), amending *ITA*, *supra* note 4, s 248(1) “disposition” (c) and repealing (g); *Budget and Statement Implementation Act, 2007*, SC 2007, c 35, s 123(1), replacing (f)(vi) in the definition of “disposition”; *Budget Implementation Act, 2008*, SC 2008, c 34, s 34(2), replacing (f)(vi) in the definition of “disposition”; *Technical Tax Amendments Act, 2012*, SC 2013, c 34, ss 358(9)-(12), amending (b)(i) in the definition of “disposition”, adding (b.1), amending (f)(i), repealing (f)(ii), and adding (n); *Economic Action Plan 2014 Act, No 2*, SC 2014, c 39, s 71(1), amending (f)(vi) in the definition of “disposition”.

## B. DEEMED DISPOSITIONS

The detail of the definition of disposition does not provide an exhaustive list of the situations in which the tax system will recognize a capital gain or loss. There are also a number of situations in which “deemed dispositions” will occur and have the same tax consequences as an actual disposition. A few examples are discussed here to demonstrate that under a mark-to-market taxation system, these complicated provisions could be removed or simplified. In general, the *Income Tax Act* provides for deemed dispositions in situations where the taxpayer has no actual disposition, but, for one reason or another, the legislator has decided to recognize the appreciation or depreciation of the property for tax purposes.

The deemed disposition on a change of use of the property is one example.<sup>38</sup> Where a taxpayer acquired property for a non-income producing purpose and subsequently starts to use the property to produce income, or vice versa, the taxpayer is deemed by subsection 45(1) to have disposed of the property and reacquired it at fair market value. The effect of this provision is to realize the gain or loss at the moment of the change in use and then provide a new capital cost for the new use of the property. In a system where gains and losses are recognized annually, there would be no need for this deemed disposition, the elections that allow taxpayers to avoid the deemed disposition in some cases,<sup>39</sup> or the exception that prevents the taxpayer from

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<sup>38</sup> *ITA*, *supra* note 4, s 45(1).

<sup>39</sup> *Ibid*, ss 45(2), (3). The related rule in s 13(7) for the purposes of capital cost allowance calculations would need to be retained.

making the election to avoid the deemed disposition.<sup>40</sup> While the section 45 deemed disposition is perhaps not the most complicated provision, it still requires more than 850 words spread over four sentences, contains several references to other rules in the *Income Tax Act* as well as its own various subparts, and contains considerable detail. As such, the opportunity to remove it from the *Income Tax Act* would reduce the overall complication of the income tax system.

To similar effect, the venerable 21-year deemed realization rule for trusts could be removed.<sup>41</sup> This deemed disposition triggers the taxation of accrued gains every 21 years for trusts, with the goal of preventing the indefinite deferral of tax. Exceptions are made for spousal trusts, joint partner trusts, and alter ego trusts, which have their own dates on which deemed dispositions will occur. Doing so would also remove this complicated network of rules from the *Income Tax Act*<sup>42</sup> and the associated opportunities for further planning and deferral.<sup>43</sup>

In 2013, the federal budget added a new deemed disposition rule to deal with situations of deferred tax liability. The “synthetic disposition rules”<sup>44</sup> apply to counteract a common strategy used to take advantage of the realization rule

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<sup>40</sup> *Ibid*, s 45(4).

<sup>41</sup> *Ibid*, s 104(4). It is worth noting that concerns with accrual taxation around liquidity and valuation (discussed further in part IV below) may be more severe in the case of trusts due to restrictions in the trust instrument: R Daren Baxter & Robert L Miedema, “Trusts - The 21-Year Rule” in *2013 Atlantic Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2013) 4:1. However, it can be expected that, after a move to accrual taxation, the practices of trust practitioners would change to compensate as it became known that funding a trust’s capital gains tax liability was an annual requirement.

<sup>42</sup> *ITA*, *supra* note 4, s 104(4) contains more than 1000 words, and requires other rules, such as s 104(5.8) to mitigate avoidance opportunities.

<sup>43</sup> Baxter & Miedema, *supra* note 41.

<sup>44</sup> *ITA*, *supra* note 4, s 80.6.



sometimes known as a “constructive sale.”<sup>45</sup> Using this strategy, a taxpayer who holds a security that has appreciated in value defers tax on the gain while no longer being exposed to the risk associated with holding the security by purchasing an offsetting position (for example, by selling the same security short).<sup>46</sup> This technique allows the taxpayer to continue to hold the investment, crystallize the accrued gain, and protect against the risk that the security will decrease in value. Under the new rules, the constructive sale will be considered a synthetic disposition if it eliminates “all or substantially all” of the risk associated with the investment and will trigger a deemed disposition with the associated tax liability. In a mark-to-market system, the constructive sale strategy (and the similar “straddle” strategy) would not be effective in deferring tax liability and rules to counteract them would not be needed.

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<sup>45</sup> On straddles and constructive sales, see: Elkins, *supra* note 11 at 389–391.

<sup>46</sup> The federal budget that proposed the synthetic disposition rules explains how they were intended to apply, Canada, Department of Finance, *Jobs Growth and Long-Term Prosperity: Economic Action Plan 2013* (Ottawa: Department of Finance, 2013) at 341–342:

This measure will apply where a taxpayer (or a person who does not deal at arm’s length with the taxpayer) enters into one or more agreements that have the effect of eliminating all or substantially all the taxpayer’s risk of loss and opportunity for gain or profit in respect of a property of the taxpayer. ...

This measure will apply regardless of the particular form of the agreement or agreements. For example, it could apply to a forward sale of property (whether or not combined with a secured loan), a put-call collar in respect of an underlying property, the issuance of certain indebtedness that is exchangeable for property, a total return swap in respect of property, or a securities borrowing to facilitate a short sale of property that is identical or economically similar to a property of the taxpayer (or a non-arm’s length person), depending on the circumstances. On the other hand, this measure will generally not apply, for example, to ordinary hedging transactions, which typically only involve managing the risk of loss. Nor will this measure generally affect the tax treatment of ordinary-course securities lending arrangements. Lastly, this measure will not apply to ordinary commercial leasing transactions.

Unlike some of the other deemed dispositions discussed here, the synthetic disposition rules are not an example of extreme complication. At about 200 words spread over two sentences, section 80.6 is relatively readable, by the standards of the *Income Tax Act*.<sup>47</sup> It contains a rule stated relatively clearly and a list of five exceptions. The two definitions that were added to support the rule are also relatively concise.<sup>48</sup>

However, they do tie into the more complicated rules around inter-corporate dividends<sup>49</sup> and those around the foreign tax deduction.<sup>50</sup> Moreover, while avoiding some complication, the synthetic disposition rules retain the conceptual complexity that is common to much of tax law. Understanding and applying section 80.6 requires an understanding of the legal concepts of property, tangible property (or corporeal property in the civil law), and lease, as well as complex tax concepts including disposition, capital gains, and income. Of course, none of these concepts will disappear from the tax system if the synthetic disposition rules are no longer needed. However, some simplification can be gained, with the attendant access to justice benefits, by removing the intricate interactions the rule creates and by removing one more place in which these complex concepts need to be considered.

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<sup>47</sup> While it is better than the average readability of the *Income Tax Act*, section 80.6 still does not score as readable using any of the metrics from chapter 7. Section 80.6 has a Flesh Reading Ease score of -23, a Flesh-Kincaid Grade Level Score of 41, a Gunning Fog Index of 50, and a Dale-Chall Readability Score of 11.8.

<sup>48</sup> *ITA*, *supra* note 4, ss 248(1) "synthetic disposition arrangement", "synthetic disposition period".

<sup>49</sup> See *ibid*, ss 112(8), (9), (9.1), which refer to ss 112(3.01)(b), 112(3.11)(b), 112(3.2)(a)(ii)(C)(1), 112(3.3)(a)(ii)(C)(1), 112(3.31)(b), 112(3.32)(b), 112(4.01)(b), 112(4.11)(b), 112 (4.21)(b), 112(4.22)(b), 112(5.1)(b), 112(5.21)(b), which in turn refer to a handful of other provisions.

<sup>50</sup> See *ibid*, ss 126(4.5), (4.6).

Moving to an accrual system for taxing capital gains would not eliminate all of the deemed dispositions. For example, while the deemed disposition in subsection 45(1) would no longer be needed, the similar deemed disposition on a change in use provided in subsection 13(7) would be required for the purposes of the capital cost allowance regime.<sup>51</sup> Nonetheless, moving to a mark-to-market system for the taxation of capital gains promises significant simplification in the area of deemed disposition rules.

### C. ROLLOVERS

Rollover rules are the other side of the coin from deemed dispositions and could similarly be simplified or removed. While deemed dispositions create a realization where none would otherwise exist, rollovers defer realization where a taxpayer has disposed of the asset in certain cases. For example, section 85 allows a rollover where a taxpayer disposes of property to a taxable Canadian corporation in exchange for consideration that includes shares of the corporation.<sup>52</sup> In this case, the taxpayer and the corporation can choose the value of the proceeds of disposition so long as it falls between the cost of the assets to the taxpayer and the fair market value.<sup>53</sup> This flexibility allows the parties to allocate any capital gain between them—if they choose the fair market value, the taxpayer who transferred assets could realize a

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<sup>51</sup> *Ibid*, s 13(7). While subsection 13(7) would not be removed, it would be simplified as the deemed disposition in s 111(4)(e) could be removed.

<sup>52</sup> *Ibid*, s 85; for more, see KA Siobhan Monaghan et al, *Taxation of Corporate Reorganizations*, 2d ed (Toronto: Carswell, 2012) at 99–133.

<sup>53</sup> For more detail on the rules regarding the “agreed amount”, see: Monaghan et al, *supra* note 52 at 108–118.

capital gain immediately; if they choose the cost, the corporation could realize a capital gain when it disposes of the assets later. Similarly, section 73 allows a rollover where individuals transfer property to their spouse or common-law partner.<sup>54</sup>

Rollover rules tend to be complicated. They are technical and difficult to navigate. Section 85, for example, contains more than 4,600 words spread over 9 sentences. It contains more than 25 references to other provisions, more than 80 references to its own various sub-parts, and uses 33 terms that are defined in various places in the *Income Tax Act*.<sup>55</sup> In an accrual taxation system for capital gains, section 85 would still apply to inventory and depreciable capital property, but could be simplified. Section 85.1, which provides a tax-deferred rollover on a share-for-share exchange, would not be needed at all.

#### D. STOP-LOSS RULES

There are a number of stop-loss rules spread throughout the Act.

Mechanically, they take one of two forms. Some rules simply deny the deduction of a

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<sup>54</sup> *ITA*, *supra* note 4, s 73.

<sup>55</sup> *Ibid*, s 85, making reference to ss 6(2), 8(1)(r), 8(1)(s), 8(7), 10.1(5) (twice), 10.1(6) (twice), 13, 20, 20(1)(a) (three times), 28, 28(1)(a)(i), 28(1)(c), 28(1.2) (twice), 84(3), 84(4), 84(4.1), 84.1, 126, 142.2(1), 150, 212.1, 251(5)(b). The defined terms referred to in s 85 include: “eligible derivative”, defined in s 10.1(5); “depreciable property” and “undepreciated capital cost”, defined in s 13(21); “cash method”, defined in s 28(1); “adjusted cost base” and “capital property”, defined in s 54; “Canadian resource property” and “foreign resource property”, defined in s 66(15); “eligible property”, defined in s 85(1.1); “wholly owned corporation”, defined in s 85(1.3); “Canadian corporation”, “paid-up capital”, and “taxable Canadian corporation”, defined in s 89(1); “Canadian partnership”, defined in s 102(1); “designated insurance property”, defined in s 138(12); “financial institution”, “mark-to-market property”, and “specified debt obligation” defined in s 142.2(1); “qualifying share”, defined in s 192(6); “assessment”, “common share”, “cost amount”, “farming”, “insurer”, “inventory”, “NISA Fund No 2”, “non-resident”, “passenger vehicle”, “preferred share”, “regulation”, and “taxable Canadian property”, defined in 248(1); “interest in real property”, defined in s 248(4); and “related persons”, defined in 251(2).

loss. This first type tends to be relatively simple, and these would generally need to be retained in a mark-to-market system. Other stop-loss rules defer the recognition of a loss for tax purposes until some future time.<sup>56</sup> Many of the rules of this second type would need to be revisited in a mark-to-market system for the taxation of capital gains. Happily, the policy rationale underlying many of these complex rules would disappear in such a system, and they could safely be removed from the system. This section is only concerned with stop-loss rules applying to capital losses, and does not engage in a full elaboration of these. However, a few examples are helpful to illustrate the potential for simplification.

An example of the first type of stop-loss rule is subparagraph 40(2)(g)(iii), which deems losses from personal-use property to be nil. These losses would continue to be denied on the theory that the depreciation of personal-use property represents the taxpayer's consumption and not an investment loss. Similarly, subparagraph 40(2)(g)(ii) denies losses from the disposition of a debt or other right to receive an amount unless it was obtained for the purpose of producing income or as consideration for the disposition of capital property to an arm's length person. Presumably, policy makers would choose to continue to deny these losses as the system moved from a disposition-based one to a mark-to-market system.

The second type of rule defers the recognition of a capital loss, quite often by denying the loss on the first disposition of the property and adjusting the cost base so

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<sup>56</sup> For a helpful discussion of stop-loss rules as they apply to transactions involving foreign affiliates, see: Jim Samuel, "Stopping the Losses: The Application of Stop-Loss Rules to Transactions Involving Foreign Affiliates" (2010) 58:4 Can Tax J 897.

that the loss is recognized at a future disposition. For example, subparagraph 40(2)(g)(i) deems “superficial losses” to be nil.<sup>57</sup> This rule exists to mitigate a tax planning opportunity created by the system’s failure to tax accrued gains. To take a simple example, a taxpayer might make use of a “wash sale” in a situation where an investment had decreased in value, but she wanted to continue holding it in the hope that it would appreciate in the future. The taxpayer would sell the investment to realize the loss for tax purposes, and then repurchase it shortly afterward.

In anticipation of this possibility, the tax reform that introduced capital gains taxation in Canada also introduced the superficial loss rules. Where a taxpayer realizes a loss from the disposition of property and purchases identical property in a period from 30 days before to 30 days after the realization of the loss, the loss qualifies as a superficial loss.<sup>58</sup> In these cases, the loss is deemed to be nil for tax purposes, and the cost base of the new property held by the taxpayer is adjusted accordingly (to treat the taxpayer as if she had continued holding the original property).<sup>59</sup>

While the goal that is accomplished by denying superficial losses might be relatively comprehensible, the rule is far from simple. Paragraph 40(2)(g), which denies superficial losses as well as several others, contains an 85-word parenthetical which refers to a handful of concepts developed in the *Income Tax Act* for the purposes of taxing Canadian resident corporations with foreign affiliates and includes

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<sup>57</sup> *ITA*, *supra* note 4, s 54 defines “superficial loss” to be a loss from a disposition of property where the taxpayer acquires identical property within a 60-day window centred on the disposition (subject to certain exceptions).

<sup>58</sup> *Ibid*, s 54 “superficial loss”.

<sup>59</sup> *Ibid*, ss 40(2)(g)(i), 53(1)(f).

a nested parenthetical statement. The definition of “superficial loss” contains 10 paragraphs. Two define superficial losses in most cases.<sup>60</sup> Six list exceptions, which refer to 15 other provisions scattered around the *Income Tax Act* as well as a term defined in paragraph 251.2(2).<sup>61</sup> The last two paragraphs are deeming rules that serve to supplement the definition of “identical properties” in subsection 248(12).<sup>62</sup>

So, while the superficial loss rules may not add conceptual complexity to the tax system, they are complicated and tangled up with complex concepts elsewhere in the *Income Tax Act*. The suspended loss rules on subsections 40(3.3)–(3.5) achieve a similar effect in similar situations where the taxpayer is a corporation, partnership or trust, and do so with perhaps more complication.<sup>63</sup> In a system where capital gains and losses are reflected in income as they accrue annually, there would be no reason to engage in this type of planning and no reason to have rules to combat it.

Subparagraph 40(2)(g)(iv) contains another stop-loss rule that would become obsolete, though the policy makers would need to consider whether there is some need to replace it in the new system. In this provision, a loss is denied where the realization event is the transfer to a tax-sheltered account such as an RRSP or TFSA. Again, the concern appears to be about the taxpayer’s ability to control the timing of

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<sup>60</sup> *Ibid*, ss 54 “superficial loss” (a), (b).

<sup>61</sup> *Ibid*, ss 54 “superficial loss” (c)–(h), referring to ss 40(2)(e.1), 40(3.4), 45(1), 48 (as it read in its application before 1993), 50, 69(5), 70, 104(4), 128.1, 132.3(3)(a), 132.3(3)(c), 138(11.3), 138.2(4), 142.5(2), 142.6, 144(4.1), 144(4.2), 149(10), and using the term “loss restriction event”, which is defined in s 251.2(2).

<sup>62</sup> *Ibid*, ss 54 “superficial loss” (i), (j).

<sup>63</sup> *Ibid*, ss 40(3.3)–(3.5). Taken together, these sections have a Flesh Reading Ease Score near -300 (on a scale where 100 is easily readable and 0 is virtually impossible to read). For more detail on the suspended loss rules, see Monaghan et al, *supra* note 52 at 46–50.

the disposition: in this case, to ensure that a loss is realized, but that anticipated future gains on the same capital asset are subject to the special tax treatment of the TFSA, RRSP, or other tax-sheltered account.

This type of sharp practice, for example in the use of TFSAs, may still be of concern to policy makers, as we should expect that taxpayers will want to move assets into a TFSA when they expect appreciation (to exempt the capital gains from tax) and move them out again when they expect depreciation (to take advantage of the capital losses). If policy makers are worried about these sheltered accounts becoming more powerful than they were intended to be, it would be simple enough to lower their limits or restrict the frequency of transactions into and out of these accounts. Indeed, it seems that the CRA has recently been moving to curb the aggressive use of TFSAs.<sup>64</sup> In general, it is not obvious that policy makers should be worried about taxpayers' ability to accurately predict whether their assets will go up or down in value, and in a system where capital gains and losses are taxed as they accrue, the taxpayer's ability to manipulate the timing of capital gains income inclusions is taken away.

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<sup>64</sup> Jamie Golombek, "The CRA is Cracking Down on Aggressive Manipulation of TFSAs and All Other Registered Plans", *Financial Post* (5 October 2018), online: <[business.financialpost.com/personal-finance/taxes/the-cra-is-cracking-down-on-aggressive-manipulation-of-tfsas](http://business.financialpost.com/personal-finance/taxes/the-cra-is-cracking-down-on-aggressive-manipulation-of-tfsas)> [perma.cc/X8YE-MP2A]; Jonathan Chevreau, "Why the CRA is targeting some TFSA accounts in court", *MoneySense* (27 August 2018), online: <[www.moneysense.ca/save/investing/cra-tfsa-accounts-court/](http://www.moneysense.ca/save/investing/cra-tfsa-accounts-court/)> [perma.cc/3P3C-9VfV]; Jamie Golombek, "TFSA advantage can lead to a tax of 100%", *Investment Executive* (22 October 2018), online: <[www.investmentexecutive.com/inside-track\\_/jamie-golombek/tfsa-advantage-can-lead-to-a-tax-of-100/](http://www.investmentexecutive.com/inside-track_/jamie-golombek/tfsa-advantage-can-lead-to-a-tax-of-100/)> [perma.cc/3RWQ-XV35]; Melissa Shin, "CRA Targets RRSP, TFSA Abuses in Long-Awaited Tax Document", (1 October 2018), online: *Advisor's Edge* <[www.advisor.ca/tax/tax-news/cra-targets-rrsp-tfsa-abuses-in-long-awaited-tax-document/](http://www.advisor.ca/tax/tax-news/cra-targets-rrsp-tfsa-abuses-in-long-awaited-tax-document/)> [perma.cc/65TZ-MCEA]; *Hunt v The Queen*, 2018 TCC 193; *Louie v The Queen*, 2018 TCC 225.



## E. COST BASE ADJUSTMENTS

Similarly, several of the cost base adjustments in section 53 are about altering the timing of a capital gain or loss realization. Like the stop-loss rules, some of these would become obsolete in a mark-to-market system, while others could be simplified (perhaps to become a straightforward gain or loss accrued with the capital asset). Indeed, as the cost base of a capital asset ceases to have relevance in the system, the long list of cost base adjustments would be either removed or simplified.

For example, where a superficial loss is denied under subparagraph 40(2)(g)(i), the loss is not permanently denied, but rather is added to the adjusted cost base of the identical replacement property by paragraph 53(1)(f). As the need for the superficial loss rule disappears, so does the need for the related cost base adjustment.

Paragraphs 40(2)(e.1) and 53(1)(f.1) have a similar structure. In general terms, paragraph 40(2)(e.1) denies the loss on a disposition of a debt where the debtor, the transferor, and the transferee are all related. Paragraph 53(1)(f.1) then adds the amount of the denied loss to the adjusted cost base of the debt in the hands of the transferee, effectively deferring the loss until a subsequent disposition. Although the mechanism here—the deferral of a loss—would need to change, the concern that the rules address would remain. In the current system, these rules exist to mitigate a strategy whereby the creditor sells the debt of a related debtor (for example, a subsidiary corporation) to a related person to realize a loss without triggering the debt forgiveness rules that would deem the debtor to have received income.

Under a mark-to-market system, this concern would be dealt with in the determination of the fair market value of the asset rather than the precise wording of specific stop-loss rules. Still, it may be particularly difficult to determine the fair market value of the debt of a related person. There may be several options to deal with the issue. For example, the system might assume that the value of related-party debt remains its original cost (effectively denying any gain or loss) until the debt is either settled or sold to an arm's-length party to establish a more accurate value. The key to the simplification is that arguments about the meaning of the technical language used in the rule or about its application to the particular circumstances would be replaced by an argument about the fair market value of the debt.

Other events that trigger an adjustment to the cost base could simply be considered capital gains or losses in the year that those events happen. To take simple examples, where subsection 18(2) or 18(3.1) denies the deduction of an expense related to a land or building of a corporation of which the taxpayer is a specified shareholder, paragraph 53(1)(d.3) allows the amount of that expense to be added to the cost base of the shares. Effectively, this denies a current expense, but allows that expense to reduce a future capital gain (or increase a future capital loss). A mark-to-market system could simplify this rule by turning the denied current expense into a capital loss in the year. Similarly, amounts that 53(2) requires to be deducted from the cost base would become capital gains in the year. In addition to the minor simplification of not having to track the adjusted cost base of each capital asset, the system could remove subsection 40(3), which deems a taxpayer to have a capital gain where the

adjusted cost base becomes negative, and paragraph 53(1)(a), which adds that deemed gain to the cost base of the asset, effectively bringing it back to zero.

Calculating the capital gain on the disposition of an asset based on its initial cost and its sale price is conceptually simple enough. In practice, however, tracking the adjusted cost base of capital assets can be quite complicated. A mark-to-market system for capital gains would remove this complication.

#### F. OTHER ANTI-AVOIDANCE RULES

In addition to the types of rules above, there are other anti-avoidance rules that aim to mitigate tax planning strategies that make use of the realization rule. For example, subsections 39(2.01)–(2.03) deem a taxpayer to have a foreign exchange capital gain where the taxpayer has used a debt parking strategy to avoid realization of the gain. However, where capital gains are taxable on accrual rather than realization, tax planning strategies that rely on avoiding realization are ineffective and rules like these are not needed.

To explain in more detail, take the example of a Canadian taxpayer with a debt of \$1000 US dollars. At the time of the loan, the value of the debt was \$1500 Canadian dollars. Due to the appreciation of the Canadian dollar, the debt can now be repaid for \$1200 Canadian dollars; however, doing so would give rise to a capital gain of \$300 under subsection 39(2). The foreign exchange gain might be avoided if the taxpayer does not repay the loan but, instead, a related person (the taxpayer's spouse or a corporation controlled by the taxpayer, for example) purchases the loan for \$1200.

The rules in subsections 39(2.01)-39(2.03) deem the taxpayer to have a gain in these circumstances as well, despite the absence of a disposition.

In a mark-to-market system, the capital gain (or loss) would arise and be reflected in the taxpayer's income annually, as the value of US dollars relative to Canadian dollars changed. Debt parking, and all of the other tax planning strategies that make use of the realization rule to defer tax by avoiding a disposition, would cease to have any effect. The specific anti-avoidance rules that aim to mitigate these strategies would then no longer be needed.

#### G. SIMPLIFICATION OF OTHER RULES

Stop loss and rollover rules are not the only ones that affect the timing of income inclusion from capital gains. There are other rules applicable to timing that, similarly, would lose their underlying justification in a move from realization to accrual as the basis for capital gains taxation. For example, subparagraph 40(1)(a)(iii), subsection 40(1.1), and paragraph 40(2)(a) provide for the capital gains reserve.

Where a taxpayer sells a capital asset and realizes a capital gain, but the payment of the price is spread over the course of several years, the capital gains reserve provides taxpayers with the limited ability to spread out the recognition of the capital gain as well. This reserve helps to avoid a situation where a taxpayer is called upon to pay a large tax bill for a realized capital gain but will not receive the money until a future year. However, in a system where the gain was recognized as it accrued, the impetus behind the capital gains reserve disappears.

Other rules in the tax system may be simplified by the move to a mark-to-market system for capital gains taxation. For example, the principal residence exemption, provided by paragraph 40(2)(b), is complicated in part because it aims to look back from the year in which the taxpayer disposed of the residence and exempt the portion of the gain related to the years in which the taxpayer owned the house, used it as a principal residence, and was resident in Canada. The provision is also complicated by the changes to the rules related to capital gains taxation over time, and so provides for the cases of property owned prior to December 31, 1971 and property owned prior to February 23, 1994. If capital gains were taxed as they accrue, the provision could be simplified to exempt the gain where the property qualifies, without bothering with the whole history of the property's ownership and use and the changes in the rules over time. Even assuming that the principal residence exemption and the capital gains preference were retained, the complication faced by homeowners selling their homes—such as the first hypothetical taxpayer from chapter 7—would be significantly reduced.

#### H. ACCESS TO JUSTICE EFFECTS OF THE REALIZATION RULE

The realization rule creates significant complexity in the tax system, and that complexity has negative effects on access to justice. In this section, I draw on the concepts and idea developed in chapters 5 and 6 to argue that moving to an accrual taxation system for capital gains would improve access to justice. While the rules to be changed apply to a relatively small and well-off set of taxpayers, the structural

change would make the tax system as a whole more accessible to a broad range of taxpayers.

It might seem that the complexity of rules that apply to holders of appreciable capital assets should be of relatively little concern. After all, these are likely to be middle- and high-income individuals who are able to afford professional assistance.<sup>65</sup> However, in the access to justice-oriented discussion of tax complexity, the focus is not exclusively those individuals from whom the law demands compliance. Rather, the structure and fairness of the system affects everyone and there are several reasons that we should expect the reduction in complexity associated with a move to an accrual taxation system would improve access to justice for a broad range of individuals.

The first is the sheer scope of the simplification. As evidenced by the lengthy—and yet incomplete—list of examples above, a large number of provisions of the *Income Tax Act* could be eliminated and many more could be simplified. It might not be the case that the size of the *Income Tax Act* could be cut in half as Shoup estimated for the American *Internal Revenue Code* in 1960,<sup>66</sup> but still an *Income Tax Act* that was significantly shorter would be more accessible. The resulting statute would still be

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<sup>65</sup> Access to justice for middle-income individuals has been identified as an area of concern in the literature. See, for example: Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012); Deborah L Rhode, “Access to Justice: An Agenda for Legal Education and Research” (2012) 62 J Leg Educ 531 at 531; Herbert M Kritzer, “Access to Justice for the Middle Class” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 257. However, as I explain below, the effects of a move to an accrual tax system would largely be borne by wealthy taxpayers.

<sup>66</sup> Shoup, *supra* note 13 at 97–98.

long, complicated, and conceptually complex. However, this calls to mind my response to the saturation hypothesis discussed in chapter 6. The tax system would not be rendered simple or immediately accessible, but we should expect accessibility to be improved where we can shrink the statute by removing parts of it that contain significant complication and conceptual complexity.

The second reason to expect improved accessibility is the nature of the change and its interaction with the vortex of legal precision. As Macdonald wrote in discussing the vortex of legal precision, “[t]he more rules there are, the greater the tendency to be legalistic...rather than to reach solutions on the basis of the policy of the law and its overall systemic logic.”<sup>67</sup> The move to an accrual tax system for capital gains would remove a vast swath of complicated rules that are unconnected (or even contrary) to the policy of the law and its overall systemic logic. It would replace these rules with a principle that is in line with the system’s logic and goals. Keeping the policy and systemic logic in mind may help in avoiding the path the Macdonald identifies as leading to the vortex of legal precision.

Third, and related to the second, is the fact that the rule in an accrual tax system is more accessible than the rules it would replace. As I noted in chapter 6, it is sometimes remarked that income is a complex concept and so an income tax system will necessarily be complex. However, the idea that the value of a taxpayer’s assets might change and causes that taxpayer’s net worth to go up or down is relatively

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<sup>67</sup> Roderick A Macdonald, *Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995) at 49.

intuitive and straightforward. Certainly, it is a more accessible conversation to enter than one about the definition of “disposition”, the applicability of a stop-loss rule, or the technical requirements of a roll-over provision.

The change from our current realization-based system to an accrual for capital gains taxation, then, has significant potential for the empowerment of individuals. It could make the *Income Tax Act* shorter and more approachable. It might avoid the effects of the vortex of legal precision in this area. It also has the potential to take a legal conversation that is currently only accessible to a relatively small number of experts and replace it with one that much more broadly intuitive and accessible.

Thus far, I have highlighted the fact that the realization rule is contrary to the ideal income tax system. I have also highlighted the significant complexity created by the realization rule and argued that an accrual tax system would improve access to justice by making the discussion of these issues at all of the sites of law-making, administration, and interpretation understandable to a broader audience. What remains is to consider the concerns which have traditionally been used to justify the deferral of capital gains taxation until realization and to consider arguments against such a large and fundamental change.

#### IV. OVERCOMING CONCERNS ABOUT LIQUIDITY AND VALUATION

The Department of Finance’s *Tax Expenditure Report* concisely gives the most common justification for the realization rule: concerns about taxpayers’ liquidity and



about the difficulty of valuing gains before a disposition of the property.<sup>68</sup> In this section, I suggest that, at least in the contemporary Canadian context, these concerns hold little weight.

#### A. LIQUIDITY

The concern around liquidity is that a taxpayer who is holding an asset over the long-term may not have cash available to pay tax on the accrued gain until they sell the asset. For this reason, the argument goes, it makes more administrative sense to tax the gain in the year it has been realized and we can expect that the taxpayer will usually have money to pay the tax. Despite the intuitive appeal of this line of thinking, the liquidity concern is not pressing in most cases, particularly in the contemporary Canadian context. In cases where liquidity concerns pose real problems, these would be most logically resolved by delaying the collection of tax debts rather than the assessment of tax liability.

There are several reasons to think that liquidity on its own was never a particularly strong barrier to the mark-to-market taxation of capital gains. First, the taxpayer will generally have the option of selling the property or borrowing against it to pay the tax. While this option may be intuitively unappealing to the affected taxpayer, the result would accord with horizontal equity, as Professor David Elkins points out.<sup>69</sup> The taxpayer who is forced by tax liability to sell a piece of property is, after all, in the same position as similarly situated taxpayer “whose pre-tax income

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<sup>68</sup> Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 2 at 255.

<sup>69</sup> Elkins, *supra* note 11 at 379.

was sufficient to purchase the property, but whose post-tax income was insufficient.”<sup>70</sup>

Second, the liquidity problem is one that taxpayers can generally plan around. As Carl Shoup wrote, “Once the rules of the tax game are fixed, households and firms will adapt their liquidity practices to accord with them.”<sup>71</sup> Indeed, nearly all owners of real property in Canada are already finding ways of paying the municipal property taxes that raise the same problems.<sup>72</sup>

Third, the Canadian tax system already disregards liquidity concerns in many cases. For example, in-kind benefits from employment are taxable with no regard to liquidity.<sup>73</sup> In calculating capital gains to be included in income, the full value of consideration—not only the cash or other liquid assets—is included.<sup>74</sup> Taxable capital gains are included in income based on the fair market value of the property where a

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<sup>70</sup> *Ibid.*

<sup>71</sup> Shoup, *supra* note 13 at 99.

<sup>72</sup> Some exceptions exist; for example, owners of land in unincorporated areas: CBC News, “How Thousands of People Don’t Pay a Dime in Property Tax”, (17 September 2013), online: CBC News <[www.cbc.ca/news/canada/newfoundland-labrador/how-thousands-of-people-don-t-pay-a-dime-in-property-tax-1.1856765](http://www.cbc.ca/news/canada/newfoundland-labrador/how-thousands-of-people-don-t-pay-a-dime-in-property-tax-1.1856765)> [perma.cc/M49F-NES7].

<sup>73</sup> *ITA*, *supra* note 4, s 6(1)(a). Consider, for example, the facts in *Detchon v Canada*, [1996] 1 CTC 2475, 96 DTC 2032 (TCC), in which the Minister assessed a taxable benefit of \$16,116 for a year in which the taxpayer’s salary was \$30,621. In *Detchon*, at para 57, Rip J explicitly disregarded liquidity as a relevant factor:

Here, too, it is obvious that the salaries of the appellants are insufficient to meet the tax assessed on the value of the benefit added to their incomes. However, it would not be just and reasonable to other Canadian taxpayers that employees, solely because of their occupations and low level salaries, obtain a tax free benefit from an employer who does not pay a higher wage. To permit such a tax advantage to one group of taxpayers is not within the object and spirit of the Act.

<sup>74</sup> *Robert v MNR*, [1990] 1 CTC 2407, 90 DTC 1277 (TCC).

taxpayer disposes of property by way of gift, or to a non-arm's length person for less than fair market value.<sup>75</sup> The deemed disposition on death creates a tax liability even in absence of cash to pay the tax.<sup>76</sup>

Finally, the liquidity concerns that might have troubled the Carter Commission as they proposed a new tax system in the 1960s are greatly reduced in the contemporary Canadian context. The *Carter Report* envisioned fully taxing capital gains;<sup>77</sup> our one-half inclusion rate goes some distance toward alleviating concerns around liquidity.<sup>78</sup> Further, a great deal of Canadians' accrued gains are sheltered from tax because they accrue to a principal residence, to funds in a registered account like a registered retirement savings plan (RRSP), tax-free savings account (TFSA), registered education savings plan (RESP), or registered pension plan (RPP), or to property eligible for the lifetime capital gains exemption. Other assets will be taxable; however, many of these, such as shares of publicly traded corporations and units of mutual funds, will be relatively liquid.

Moreover, if there were cases in which mark-to-market taxation threatened to cause liquidity problems for particular taxpayers, the Minister and her delegates in the CRA have the power to negotiate a payment schedule that defers collection of tax.<sup>79</sup> The Minister may even decide that liquidity concerns were severe enough to trigger

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<sup>75</sup> *ITA*, *supra* note 4, ss 69(1)(a), (b).

<sup>76</sup> *Ibid*, s 70(5)(a).

<sup>77</sup> Canada, *Carter Commission Report*, *supra* note 1, vol 3 at 337–338.

<sup>78</sup> *ITA*, *supra* note 4, s 38(a).

<sup>79</sup> Canada Revenue Agency, "If You Cannot Pay in Full Now", (26 July 2016), online: CRA <[www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/when-you-money-collections-cra/you-cannot-pay-full.html](http://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/when-you-money-collections-cra/you-cannot-pay-full.html)> [perma.cc/SKD5-A9GU].

the taxpayer relief provisions and waive interest on the accruing tax debt.<sup>80</sup> If there are significant concerns around liquidity, they would be most logically dealt with at the point of collection of tax debts, rather than the assessment of tax liabilities.

## B. VALUATION

The valuation of capital assets is a more salient concern. To correspond with the Schanz-Haig-Simons ideal in an annual self-assessment tax system, the legislation would require the taxpayers to know the fair market value of all of their assets at the end of each year. At first blush, this seems like an enormous, difficult, and costly undertaking, and a boon for the appraisal industry.<sup>81</sup> In the contemporary Canadian economy, however, and given the Canadian tax system as it currently stands, the task would not be as difficult or costly as it first appears.

The following are the assets of Canadian households from Statistics Canada's Survey of Financial Security from 2016:

| Total Assets                  |  | 100%  |
|-------------------------------|--|-------|
| Private Pension Assets        |  | 29.2% |
|                               | Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs), Locked-in Retirement Accounts (LIRAs), deferred profit sharing plans, annuities, and miscellaneous pension assets | 10%   |
|                               | Employer-sponsored Registered Pension Plans  | 19.3% |
| Financial Assets, non-pension |  | 11.4% |
|                               | Deposits in Financial Institutions   | 3.3%  |
|                               | Mutual funds, investment funds and income trusts   | 2.5%  |
|                               | Stocks   | 2.1%  |
|                               | Bonds (saving and other)   | 0.2%  |

<sup>80</sup> *ITA*, *supra* note 4, s 220(3.1).

<sup>81</sup> Bittker, "Tax Reform and Tax Simplification", *supra* note 18 at 3.

|                             |   |              |
|-----------------------------|---|--------------|
|                             | Tax-Free Saving Accounts  | 1.4%         |
|                             | Other Financial Assets (including RESPs, mortgage-backed securities, money held in trust, money owed to the respondent, shares of privately held companies, and other miscellaneous financial assets) | 2.0%         |
| <b>Non-financial assets</b> |   | <b>51.5%</b> |
|                             | Principal residence   | 36.0%        |
|                             | Other real estate   | 10.0%        |
|                             | Vehicles  | 2.5%         |
|                             | Other non-financial assets (including the contents of the respondent's principal residence, valuables and collectibles, copyrights and patents)   | 2.9%         |
| <b>Equity in business</b>   |   | <b>7.9%</b>  |

Table 8: Canadians' assets in 2016.<sup>82</sup>

From the survey data, it appears that about 65 per cent of Canadians' assets (by value) produce gains that are tax sheltered or tax-exempt by virtue of being in a registered account (RRSPs, RRIFs, RPPs, TFSAs, and so on) or because of the principal residence exemption. Assuming that the policies which shield these gains from tax or defer them until withdrawal from the account would be retained, about two-thirds of Canadians' assets would be immune from the requirement of annual valuation under a mark-to-market tax system.<sup>83</sup> It is worth noting that in the 2016 data, only 42 per cent of "economic families" in Canada had any assets in a TFSA. The median value for those who did have a TFSA was \$12,000.<sup>84</sup> The maximum value would have been

<sup>82</sup> Statistics Canada, *Survey of Financial Security (SFS), Assets and Debts Held by Economic Family Type, by Age Group, Canada, Provinces and Selected Census Metropolitan Areas (CMAs)*, Table No 11-10-0016-01 (Ottawa: Statistics Canada, 2018), online: <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110001601](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110001601)>.

<sup>83</sup> These assets may need to be valued in particular cases where they enter or leave the sheltered plan, for example when the holder of an RRSP turns 71, when assets are moved out of a TFSA, where a plan is de-registered for some reason, and so on.

<sup>84</sup> *Ibid.*

\$45,500 for each individual who was over the age of 18 when the program started in 2009.<sup>85</sup> Accordingly, a change to mark-to-market taxation may result in more Canadians using the TFSA and encourage those who do use it to increase their use, further reducing the number of assets which would require annual valuation.

Of the remaining categories of assets, several have readily available market values. In general, valuation problems will not arise for deposits in financial institutions, mutual funds, investment funds, income trusts, (publicly traded) stocks, and bonds. The valuation of real property (other than principal residences) is a non-trivial problem; however, the vast majority will be regularly appraised for the purposes of municipal property tax already. Taken together, this provides values for about 18 per cent of Canadians' assets by value.

In general, a mark-to-market system would not need to worry about depreciable personal property as these assets yield neither taxable capital gains nor allowable capital losses. Most vehicles fall into this category, accounting for another 2.5 per cent of Canadians' assets that would be removed from the pool of assets needing valuation. Most of the contents of Canadians' homes would also fall into this category.

Having eliminated sheltered assets and those with easily accessible values, a mark-to-market system would be left with the problem of valuing some financial assets, including mortgage-backed securities and shares of privately-owned companies (for which the lifetime capital gains exemption is not claimed), and some

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<sup>85</sup> *ITA, supra* note 4, s 146.2.

non-financial assets including valuables, collectibles, and intellectual property. We can safely estimate that less than 5 per cent of the value of Canadians' assets lie in this category.

The nebulous category of “equity in business” accounts for almost 8 per cent of Canadians' assets by value according to Statistics Canada's estimates. Equity in business is “[t]he estimated amount the respondent would receive if the business were sold, after deducting any outstanding debts to be paid.”<sup>86</sup> For the most part, the value of taxpayers' equity in their businesses likely consists of categories already discussed—real property, tangible personal property, accounts receivable—though the business's goodwill and customer lists can be added to the list of difficult to value items. Nevertheless, it seems that this list of assets that a) would need to be valued in a mark-to-market system and b) are not already valued for other purposes, represents a relatively small fraction of Canadians' assets. It appears to be less than 15 per cent by value, and perhaps less than 10 per cent.

Given that there will be some valuation to be done in a mark-to-market system, the next question to address is which taxpayers will bear the cost of valuation. In the current Canadian economic landscape, it appears that the highest net worth economic families would be most affected and the poorest Canadians would notice little impact. According to the survey data for 2016, only 8.3 per cent of the economic families in the lowest net worth quintile hold any assets in the “other financial assets”

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<sup>86</sup> Statistics Canada, “2005 Survey of Financial Security - Public Use Microdata File User Guide, Concepts and Definitions”, online: <[www150.statcan.gc.ca/n1/pub/13f0026m/2007001/ch3-eng.htm](http://www150.statcan.gc.ca/n1/pub/13f0026m/2007001/ch3-eng.htm)> [perma.cc/7BB3-HSKT].

category (which includes potentially difficult to value assets like shares of privately held corporations and mortgage-backed securities).<sup>87</sup> Of the total value held by Canadians in the other financial assets category, more than 80 per cent is held by members of economic families in the top net worth quintile.

Looking at real property holdings aside from principal residences, Statistics Canada was unable to get reliable data for the bottom quintile, but estimates that only 9 per cent of economic families in the second lowest net worth quintile hold any assets in this category.<sup>88</sup> More than three-quarters of the value of these assets was held by the top net worth quintile, and more than 90 per cent was held by the richest 40 percent of Canadians.<sup>89</sup>

The “equity in business” category tells a similar story. Less than 7 per cent of economic families in the bottom quintile have any equity in a business, and more than 90 per cent of the value in this category is held by the top net worth quintile.<sup>90</sup>

The category of “other non-financial assets”, which comprises the value of personal property such as “the contents of the respondent's principal residence, valuables and collectibles, copyrights and patents” is slightly more difficult to be confident about. Statistics Canada estimates that all Canadians have some assets in this category.<sup>91</sup> It seems unlikely, however, that many of these assets appreciate in

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<sup>87</sup> Statistics Canada, *Survey of Financial Security (SFS), Assets and Debts by Net Worth Quintile, Canada, Provinces and Selected Census Metropolitan Areas (CMAs)*, Table No 11-10-0049-01 (Ottawa: Statistics Canada, 2018), online: <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110004901](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110004901)>.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*



value. The *Income Tax Act*'s definition of "listed personal property" for which capital losses are allowed is a fair guide to the types of tangible personal property that a mark-to-market system might be concerned with, including art, jewellery, rare books, stamps, and coins.<sup>92</sup> While it seems likely that these assets are also held mainly by high-net worth Canadians, the survey data is not detailed enough to be sure. Of the value of assets in the "other non-financial assets" category, more than 45 per cent is held by the highest net worth quintile, and more than 70 per cent is held by the richest 40 per cent of Canadians.

While the difficulties associated with periodic valuation are real, in the contemporary Canadian context, they are smaller than previous discussions of mark-to-market taxation may have assumed for two reasons. First, most of Canadians' appreciable assets are already sheltered or exempt from taxation, and so would not need to be valued for tax purposes. Second, many of the assets which yield taxable gains are periodically valued already. Finally, whatever administrative difficulties would remain in a mark-to-market system for taxing capital gains would be distributed in a relatively progressive way, falling most heavily on high-net worth Canadians, and with little impact on the poorest.

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<sup>92</sup> *ITA*, *supra* note 4, s 54.

## C. POLITICAL FEASIBILITY

### 1) PAPER GAINS

A final charge that is sometimes leveled against a mark-to-market regime is that it could never be politically accepted. While the political saleability of a mark-to-market taxation system is not the topic of this chapter, a brief comment can be made.

In trying to account for the existence and persistence of the realization rule in the United States, Professor Deborah Schenk argued that concerns around liquidity and valuation formed part of the explanation, but were not strong enough on their own to explain the existence of the rule given its many drawbacks.<sup>93</sup> A third argument in support of the realization rule has to do with the popular conception of income. Taxpayers, the argument goes, simply do not think of unrealized gains—sometimes called “paper gains”—as income.

While there may be some truth to this idea, it deserves further interrogation. Take, for example, a taxpayer who has invested in units of a mutual fund. Sometime in January or February, even if she has not sold any units of the fund, she will receive a T3 or a T5 slip for income tax purposes. It will inform her of the earnings attributed to her, including interest, dividends, capital gains, and capital gains dividends (capital gains are attributed to her although she has not sold any units of the mutual fund during the previous year). Is there some sense in which these distributions are “real” income, while the rest of the appreciation of her mutual fund holdings are mere paper

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<sup>93</sup> Deborah H Schenk, “A Positive Account of the Realization Rule” (2003) 57 Tax L Rev 355.

gains? If the capital gains box of her T3 slip was adjusted to fully reflect the change in value of her mutual fund holdings, would she cry foul?

The intuitive argument for not taxing “paper gains” is perhaps more obvious in cases of tangible property. For a taxpayer who owns a cottage, increases in the value of the land might feel less like income—that taxpayer may not feel they have an increased ability to pay. In thinking through this argument, however, it is worth considering the recent expansion in the use of home equity lines of credit (HELOCs). The Financial Consumer Agency of Canada notes that between 2000 and 2010, HELOC balances grew by an average of 20 per cent annually.<sup>94</sup> Recent figures indicate that there are 3 million HELOC accounts in Canada with a total outstanding balance of \$211 billion. In making use of these accounts, Canadians “borrowed against their home equity to consolidate debt, finance home renovations, fund vacations and purchase big-ticket items such as cars, rental properties, cottages and financial assets (e.g., securities), using leveraged investment strategies.”<sup>95</sup> In other words, many Canadians did see the increased value of their real estate holdings as a real gain, and made use of that gain to increase their personal consumption or as part of a strategy to further increase their net worth.

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<sup>94</sup> Financial Consumer Agency of Canada, Home Equity Lines of Credit: Market Trends and Consumer Issues: Public Research Report (Financial Consumer Agency of Canada, 2017) at 2, online: <[www.canada.ca/content/dam/fcac-acfc/documents/programs/research-surveys-studies-reports/home-equity-lines-credit-trends-issues.pdf](http://www.canada.ca/content/dam/fcac-acfc/documents/programs/research-surveys-studies-reports/home-equity-lines-credit-trends-issues.pdf)> [perma.cc/DJM9-BFF].

<sup>95</sup> *Ibid.*

## 2) ARGUING FOR ACCRUAL TAXATION

In a political argument for accrual taxation, it may be worth noting a pair of intuitive benefits. First, in a mark-to-market system, the taxpayer who owns a cottage will be encouraged to adopt a “pay-as-you-go” strategy for the tax on the accruing gains.<sup>96</sup> While this denies her the benefit of tax deferral, it presents at least two advantages. First, it spreads out the gain over time, avoiding any “bunching” issues. Second, it avoids what may be a large and surprising tax bill to be paid by the taxpayer’s estate upon death or by the taxpayer when she gives the cottage away, giving the taxpayer more freedom to dispose of the property as she wishes rather than forcing a sale for tax purposes.<sup>97</sup>

Second, while there is support for the argument that taxpayers view paper gains as somehow unreal, fictitious, or ephemeral,<sup>98</sup> it is worth thinking about losses as well. Given the panic that sometimes accompanies downturns in the stock market, it is less obvious that “paper losses” are seen as somehow less than real. While there is

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<sup>96</sup> As noted above, the Minister may decide that liquidity concerns justify delaying collection of the tax, and so such a taxpayer may not be forced to pay the tax as the value of the cottage accrues.

<sup>97</sup> On this problem, see: David Friend, “Say Goodbye to the Family Cottage before It’s Too Late”, *The Globe and Mail* (8 August 2014), online: <[www.theglobeandmail.com/globe-investor/personal-finance/household-finances/say-goodbye-to-the-family-cottage-before-its-too-late/article19248055/](http://www.theglobeandmail.com/globe-investor/personal-finance/household-finances/say-goodbye-to-the-family-cottage-before-its-too-late/article19248055/)> [perma.cc/PR5P-A7BD]; Jamie Golombek, “The Tax Hassles of Owning and Selling a Cottage or Second Home”, *Financial Post* (17 August 2017), online: <[business.financialpost.com/personal-finance/the-tax-hassles-of-owning-and-selling-a-cottage-or-second-home](http://business.financialpost.com/personal-finance/the-tax-hassles-of-owning-and-selling-a-cottage-or-second-home)> [perma.cc/66E5-5454]; Guy Dixon, “Leaving the Family Cottage to Children Will Cost You – or Them”, *The Globe and Mail* (31 March 2017), online: <[www.theglobeandmail.com/globe-investor/leaving-the-family-cottage-to-children-will-cost-you-or-them/article34516844/](http://www.theglobeandmail.com/globe-investor/leaving-the-family-cottage-to-children-will-cost-you-or-them/article34516844/)> [perma.cc/BZX5-KPNR]; Scott Noble, “Cottage Inheritance Woes”, online: *Saltscapes Magazine* <[www.saltscapes.com/9-home-cottage/896-cottage-inheritance-woes](http://www.saltscapes.com/9-home-cottage/896-cottage-inheritance-woes)> [perma.cc/C5MT-RTE2].

<sup>98</sup> For an excellent review of the literature, see: Schenk, *supra* note 93 at 377–383.

evidence that investors have different reactions to realized losses and “paper losses,”<sup>99</sup> all taxpayers would benefit from a tax system that did away with the distinction between the two.

Tax-savvy investors may realize paper losses purely for tax reasons,<sup>100</sup> which has led to a proliferation of rules designed to limit this behaviour.<sup>101</sup> A mark-to-market system would give investors the benefit of a realized loss without the transaction costs of the sale and the difficulty of complying with the anti-avoidance rules. Investors on the whole exhibit a hesitancy to realize their paper losses in spite of the tax benefits, a phenomenon known as the disposition effect.<sup>102</sup> These taxpayers would receive the same benefit as the tax-savvy investors under a mark-to-market system. While investors seem to generally have a different mindset as regards realized losses and paper losses, surely no taxpayer would object to having her taxable income reduced because of “paper losses.”

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<sup>99</sup> Alex Imas, “The Realization Effect: Risk-Taking after Realized versus Paper Losses” (2016) 106:8 *American Economic Rev* 2086.

<sup>100</sup> The so-called “wash sale”, in which a taxpayer sells an asset to realize a loss for tax purposes and then purchases the asset again, is a tax minimization device that predates capital gain taxation in Canada, see: Robert Tresilian, “Tax Minimization” 1:1 *Can Tax J* 31.

<sup>101</sup> See, for example, the denial of “superficial losses”: *ITA, supra* note 4, s 40(2)(g)(i).

<sup>102</sup> Hersh Shefrin & Meir Statman, “The Disposition to Sell Winners Too Early and Ride Losers Too Long: Theory and Evidence” (1985) 40:3 *J Finance* 777; Terrance Odean, “Are Investors Reluctant to Realize Their Losses?” (1998) 53:5 *J Finance* 1775.

## V. RESPONDING TO OBJECTIONS TO MARK-TO-MARKET TAXATION OF CAPITAL GAINS

Even if the tax system would be simplified by a move to the accrual taxation for capital gains and even if the traditional justifications no longer justify the status quo, several objections may be raised. Opponents may be concerned that the need to periodically value assets presents a heavy administrative burden, that it may increase the number of tax disputes, and that it may give rise to a new set of complicated rules as the vortex of legal precision continues to operate. In particular, opponents of the proposal may be concerned that no real simplification will have been obtained, or that access to justice will not be improved. In addition, the size and scope of such a fundamental change to the tax system means that the change itself will be difficult and costly. In this section, I explain and respond to these objections and argue that, while work remains to flesh out a proposal to move to accrual taxation of capital gains, this work is worth pursuing.

### A. THE ADMINISTRATIVE COST OF VALUING ASSETS

In part IV of this chapter, I considered the available data and argued that the concerns around valuation are not as strong as might first be imagined. However, even if it is the case that only 15% of Canadians' assets (by value) will require a regular valuation and do not already have one, and even if we can expect that the difficulty associated with this valuation will be progressively distributed, the cost may still be significant. The cost of valuation is a concern and would need to be weighed.

However, it would not indicate an increase in complexity in the tax system and might even be considered beneficial from an access to justice perspective.

As I argued in chapter 6, the cost of valuation does not represent complexity in the sense that I am using the term here. The valuation of assets would not make it more difficult to understand or engage with the tax system. Determining the fair market value of assets is already a task that the tax system regularly undertakes and is one of the system's more readily comprehensible functions. It is often difficult to grasp what is meant by income, the distinction between capital and current expenses, the distinctions between avoidance, abusive avoidance, and evasion, and many other features of the tax system. However, the idea that assets have a fair market value is relatively clear and uncontroversial, even if controversy arises when determining the fair market value of any particular asset.

The CRA might need more staff and resources to regularly value assets. The hope would be that some of these resources will be available due to the fact that a plethora of complicated rules have disappeared from the tax system and so are no longer at issue for CRA rulings officers, auditors, appeals officers, or for counsel at the Department of Justice and the Tax Court of Canada. Even if the result is an increase in administrative cost, we should not confuse that administrative cost with complexity that will reduce access to justice in the system.

Further, while asking taxpayers to report and value their appreciable capital assets regularly may seem to impose a heavy burden, it may be thought of as increasing access to justice. In the present system, taxpayers' reporting obligations

with respect to many appreciable capital assets only come into play when there has been a disposition of the property. In that year, the taxpayer is asked to report the cost of the asset and the proceeds of disposition (or the fair market value, if the property was disposed of as a gift or to a non-arm's length person for less than fair market value).<sup>103</sup> The effect of ignoring these assets until realization will, in some cases, be that the taxpayer is surprised: surprised, perhaps, that giving away a piece of art that has appreciated while the taxpayer held it gives rise to tax liability, or surprised at the size of the tax liability incurred on the disposition of an investment. The practice of reporting the value of appreciable capital assets would create more work for the taxpayer, but would also give the taxpayer more information about the state of their affairs and thus better ability to plan their lives within the legal rules. This work would represent increased engagement in the tax system on the part of these taxpayers.

## B. THE POTENTIAL FOR DISPUTES AROUND VALUATION

A related concern exists around the potential volume of tax disputes related to valuation. As noted above, some assets do not have ready valuations in the current system and so the value of these assets may be disputed. In addition, many pieces of real estate are periodically appraised, but concerns are sometimes expressed about

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<sup>103</sup> *ITA*, *supra* note 4, s 69(1).



valuations of real estate for property tax purposes.<sup>104</sup> Attempts to use these values for income tax purposes as well may be expected to give rise to disputes.

In considering this possible explosion of tax disputes related to valuation, however, several things are worth bearing in mind. First, we can expect that an erroneous valuation in any particular year will be corrected in a future year. A capital gain that is over-estimated in one year will result in a smaller gain or a loss in a future year, and, when the property is disposed of, the correct gain will have been taxed. Thus, the stakes for any particular annual valuation are relatively low. Second, disputes about valuation are easy for the CRA to settle. The “principled basis” approach to settling tax disputes will prevent the CRA from settling a dispute about the interpretation of a stop-loss rule, the technical requirements of a rollover, the definition of disposition, and the interpretation of a deemed disposition provision, and so on.<sup>105</sup> Conversely, a dispute about valuation is a purely factual dispute and entirely within the CRA’s power to compromise. In a system of yearly valuations, the

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<sup>104</sup> Kate Porter, “Cornwall Sues MPAC over Warehouse Assessments”, CBC News (8 August 2018), online: <[www.cbc.ca/news/canada/ottawa/cornwall-sues-mpac-warehouse-assessments-1.4776277](http://www.cbc.ca/news/canada/ottawa/cornwall-sues-mpac-warehouse-assessments-1.4776277)> [perma.cc/7HVD-78NK]; See, for example, Alan S Hale, “Cornwall’s Lawsuit against MPAC Will Be on the Back Burner for a Long Time”, Cornwall Standard-Freeholder (6 November 2018), online: <[www.standard-freeholder.com/news/local-news/cornwalls-lawsuit-against-mpac-will-be-on-the-back-burner-for-a-long-time/wcm/699e5372-fc4f-4c94-b619-8fb43a6cf2bb](http://www.standard-freeholder.com/news/local-news/cornwalls-lawsuit-against-mpac-will-be-on-the-back-burner-for-a-long-time/wcm/699e5372-fc4f-4c94-b619-8fb43a6cf2bb)> [perma.cc/5ZVC-SHRB]; Kate Porter, “City of Ottawa Refunded \$40M in Property Taxes in 2017”, CBC News (17 August 2018), online: <[www.cbc.ca/news/canada/ottawa/city-of-ottawa-refunded-40m-in-property-taxes-in-2017-1.4787677](http://www.cbc.ca/news/canada/ottawa/city-of-ottawa-refunded-40m-in-property-taxes-in-2017-1.4787677)> [perma.cc/7TKW-6RUK].

<sup>105</sup> Daniel Sandler & Colin Campbell, “Catch-22: A Principled Basis for the Settlement of Tax Appeals” (2009) 57:4 Can Tax J 25; Colin Jackson, “Settlement and Compromise in Canadian Income Tax Law since Carter” in Kim Brooks, ed, *The Quest for Tax Reform Continues: The Royal Commission on Taxation Fifty Years Later* (Toronto: Carswell, 2013) 295; Saul Templeton, “A Defence of the Principled Approach to Tax Settlements” (2015) 38 Dal LJ 29.

relatively low stakes attached to any particular year's valuation and the CRA's flexibility in compromising with taxpayers on any particular year's valuation mean that the concerns about the Tax Court's capacity to deal with a large volume of valuation disputes may not be as strong as they first appear.

Moreover, a dispute around valuation is an easily understood one for most taxpayers. We can expect, therefore, that a taxpayer's ability to effectively engage and participate in the dispute resolution process (with or without professional assistance) will be much better than it would in a dispute about the definition of disposition, the applicability of a deemed disposition, or the availability of a cost base adjustment. Valuation disputes also go directly to the core policy issue at stake in the case—the amount of the taxpayer's economic gain or loss—rather than revolving around the wording of particular rules. For these reasons, it is possible that an accrual taxation system for capital gains would provide both better access and more justice, even if the volume of disputes increases.

### C. THE POTENTIAL PROLIFERATION OF RULES AROUND VALUATION

Opponents may argue that simple rules facilitating a mark-to-market regime will quickly give way to a regime of complicated rules around valuation. To deal with capital gains related to listed personal property like art and collectible stamps, or to deal with gains or losses related to shares in private corporations, various forms of debt, and derivative instruments, it would be tempting for tax policy makers to write rules in an attempt to avoid the cost of valuation. In this case, opponents may argue,

we will have replaced one set of complicated rules with a new set and we should expect the vortex of legal precision to multiply these rules.

Previous proposals for mark-to-market taxation have been vulnerable to these criticisms. In proposing mark-to-market regimes for the United States, some commentators have proposed partial mark-to-market regimes or hybrid regimes. Some relatively easy-to-value assets would be taxed on a mark-to-market basis, while others would remain taxed on a realization basis. For example, David Elkins has suggested mark-to-market taxation of publicly-traded securities.<sup>106</sup> David Dodge fleshed out a proposal for the mark-to-market taxation of publicly-traded securities as well as options and other derivatives combined with an integration proposal for the American corporate tax system.<sup>107</sup> David Weisbach outlined a partial mark-to-market system that would include publicly-traded property, derivatives, and debt instruments, as well as any other property that is sufficiently liquid and easy to value.<sup>108</sup> All of these are worthy proposals; however, applied to the Canadian tax system, none would accomplish the simplification that moving entirely away from the realization requirement offers. Instead, it would add a new regime and draw a new line between assets taxed on a mark-to-market basis and those taxed on a realization basis, with the attendant rules for characterizing any particular asset, disputes about those rules, reforms to the rules, and so on.

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<sup>106</sup> Elkins, *supra* note II.

<sup>107</sup> Dodge, *supra* note II.

<sup>108</sup> Weisbach, *supra* note II.

Others have considered a set of tables to estimate the appreciation of difficult to value assets, similar to the way in which the capital cost allowance system estimates depreciation of capital assets.<sup>109</sup> This proposal would remove the need for a valuation of individual assets without creating a hybrid or dual-track system. However, it would require creating lists of appreciable capital assets and estimating their annual appreciation, a system that would perhaps create its own complication. Can shares of private corporations be lumped into one class, or will there be several classes for different types of shares that are expected to appreciate at different rates? Does all art appreciate at the same rate, or will we need one class for paintings by recognized masters, and another for more recent works? Will we need to distinguish between oil paintings on canvass, bronze sculptures, and charcoal drawings? Again, it is easy to envision a new complicated regime taking the place of the old one.

Instead of either of these, a system in which taxpayers are responsible for declaring the value of their appreciable assets, and the normal tax administration and dispute resolution system works from there, presents the simplest solution. Without the addition of any new rules or powers, the CRA would remain responsible for weighing the costs and benefits of investigating a taxpayer's valuation and applying the penalties for failure to file returns, repeated failure to report income, making false statements or omissions in tax returns, and so on.<sup>110</sup>

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<sup>109</sup> Shakow, *supra* note 11 at 1122.

<sup>110</sup> *ITA*, *supra* note 4, ss 162(1), 163(1), 163(2).

The CRA also has the power to make administrative concessions in their assessing practices and informing taxpayers of them. For example, the CRA may decide, in general, to accept the original cost of a piece of art as the best estimate of its current value until the taxpayer sells it to an arm's length party. While this may appear to be creating a realization tax system for paintings, it does not require the full set of legislation entailed in a realization system, but only an admission from the tax administration that paintings are difficult to value and the taxpayer's cost will be the best estimate much of the time. Moreover, this would not prevent the CRA from assessing based on a better valuation in particular cases, though it may influence their decisions about whether to apply penalties, whether to accept delayed payment, and whether to waive interest. An administrative concession like this one would be conceptually consistent with accrual taxation and would fit in the legislative framework for a mark-to-market tax system while reducing the administrative burden that a strict application of mark-to-market seems to require. Importantly, it would also avoid the proliferation of complicated rules for the valuation of particular assets.

#### D. THE DIFFICULTY OF THE TRANSITION

Even if, as argued above, none of the arguments against accrual taxation of capital gains and none of the arguments in favour of taxing capital gains on disposition are compelling, one rather large hurdle remains. The change from Canada's current system to the one proposed here would be large. Making that change would be difficult and resource intensive.

As noted above, there are over 3,600 references to the disposition of property in the *Income Tax Act*, and so moving the taxation of capital gains to an accrual system would be an enormous legislative reform. Each of those references would need to be examined. Some would be retained as they discuss the disposition of property for the purpose of calculating business income (disposition of inventory or disposition of depreciated capital assets, for example). Others would need redrafting to make the change to accrual taxation of capital gains. Still others could simply be deleted. Further, many of the changes and simplifications discussed above are to provisions which contain no direct reference to disposition. It seems that vast swathes of the 3,000-page *Income Tax Act* would need to be closely examined and much would need to be changed.<sup>133</sup>

In this chapter, I have isolated the change to an accrual taxation system, assuming that the goals of the corporate tax other than combatting the potentially unlimited deferral of tax that a realization system offers for shareholders would be enough to sustain it. If the corporate tax was eliminated at the same time, the change would be even larger, and the simplification would be even larger. However, even if the corporate tax was retained, it must be recognized that a move to accrual taxation would have large consequential changes on the taxation of shareholders and corporations. Canada's tax system attempts integration: it aims to impose the same tax on income earned through a corporation (via the corporate tax and the tax on

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<sup>133</sup> The *Income Tax Act* runs to 3,220 pages with English and French side-by-side, and including the title page, introductory table of provisions, schedule and list of related provisions: online: <[laws-lois.justice.gc.ca/PDF/I-3,3.pdf](http://laws-lois.justice.gc.ca/PDF/I-3,3.pdf)>.

either dividends or capital gains) as it imposes on income earned directly.<sup>112</sup> However, deferring the taxation of the capital gains on shares until realization complicates the integration picture by reducing the effective tax rate in present-value terms.<sup>113</sup> Thus, even an accrual system that retained a corporate tax might see significant change to its corporate tax system as the long-standing assumptions that underlie the system shift.

While the work entailed in examining the *Income Tax Act* should not be understated, it is worth reiterating that much of the change would be simplification. As noted above, many rollover rules, stop-loss rules, cost base adjustments, and so on could simply be deleted. Others could be rewritten more simply. Other rules that survive, such as the principal residence exemption, would be simplified.

However, not all of the revisions would be so simple. In some cases, making the change to an accrual tax system would have the side-effect of cancelling a policy that policy makers may wish to retain. For example, Canada provides a tax incentive for the donation of Canadian cultural property or ecologically sensitive land to specified organizations. In addition to a tax credit, the taxpayer who makes a donation pays no capital gains tax on the disposition.<sup>114</sup> Keeping these incentives in an

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<sup>112</sup> For more on integration, and the structure of corporate tax generally, see: Krishna, *supra* note 25 at 11-21; Duff & Loomer, *supra* note 25 at 222-226; Paul Bleiwas & John Hutson, eds, *Taxation of Private Corporations and Their Shareholders*, 4th ed (Toronto: Canadian Tax Foundation, 2010) at 2:4-2:17; Canada, *Carter Commission Report*, *supra* note 1, vol 4, ch 19.

<sup>113</sup> Kenneth J McKenzie, "Income Taxes, Integration, and Income Trusts" (2006) 54:3 Can Tax J 633 at 637; Graham Glenday & James B Davies, "Accrual Equivalent Marginal Tax Rates for Personal Financial Assets" (1990) 23:1 Can Tax J 189.

<sup>114</sup> *ITA*, *supra* note 4, ss 38(a.2), 39(1)(a)(i.1).

accrual tax system would require significant revision, as the taxpayer would have paid capital gains tax annually as the value of the property increased. This challenge might be overcome simply—by increasing the size of the tax credit to compensate for the loss of the other subsidy—but the existence of this challenge further illustrates the point that much of Canadian tax policy assumes the taxation of capital gains on disposition and that a change to that fundamental assumption would be significant.

In addition to the difficulty of redrafting legislation, we can expect a significant administrative cost in the first year. The cost of transitions to new forms, new reporting requirements, and new patterns of enforcement may be significant. The transition also likely entails a deemed disposition to put an end to the old system, thus requiring a valuation of all appreciable capital assets and the liquidity issues associated with taxing many years' worth of accrued gains for many different assets at once. Valuation and liquidity issues can be handled in same way discussed above, but it may be particularly costly during the transition.

While none of the arguments against accrual taxation are compelling, advocates of reform have the burden of overcoming inertia and arguing for the difficult and resource-intensive task of transition to the new system. Certainly, more work remains to be done to lay out a comprehensive path for transition that allays these concerns. However, the potential in this area for tax simplification that endures and for an end to the perpetual cycle of amendments needed to maintain taxation on disposition should give sufficient incentive to start that work.



Moreover, looking at this problem through the access to justice lens pushes even more strongly in favour of exploring this reform. If we have the opportunity to empower individuals in the legal system, to give them the agency that the current system denies, to help them plan their lives and to engage with and re-create the legal structures that affect them, then failing to do so because making the transition is difficult or because the one-time cost of change is high seems much less palatable. As noted above, the change to accrual taxation gives people more information about their tax situation and provides them more opportunity to engage with the system. It also moves disputes from the obscure realm of statutory interpretation and the application of abstract legal concepts to the easily grasped realm of valuation. It would make the tax system more accessible. There is more work to do to make the case that the transition is possible, but that work is worth attempting.

## VI. CONCLUSION

A system that taxes realized capital gains rather than accrued capital gains was always considered a pragmatic compromise.<sup>115</sup> Generally, the difficulties of ongoing valuation and liquidity associated with an accrual taxation system have thought to be enough to sustain taxation on disposition. In contemporary Canada, however, valuation has become less of a concern as most of Canadians' investments are regularly valued for other purposes. Liquidity concerns have also receded as many of

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<sup>115</sup> Canada, *Carter Commission Report*, *supra* note 1, vol 3 at 368-370. Canada, Department of Finance, *Tax Expenditure Report 2019*, *supra* note 2 at 255; Kwall, *supra* note 21. For normative arguments in favour of realization, see: Benshalom & Stead, *supra* note 9; Schizer, *supra* note 9; Delmotte, *supra* note 9.

these assets are relatively liquid and the taxpayers who face capital gains taxation have the ability to plan around the tax liability associated with holding appreciating assets.

Moreover, both valuation and liquidity concerns have decreased as individual taxpayers in Canada have several options for sheltering their investments from capital gains taxation. “As the TFSA matures,” the Department of Finance estimates that by 2030 “it will permit over 90% of Canadians to hold all of their financial assets” in some form of tax-sheltered account.<sup>116</sup> These accounts, as well as the principal residence exemption, mean that the costs associated with these liquidity and valuation concerns are likely to fall on a relatively small number of taxpayers.

At the same time, the proliferation of rules to reinforce the taxation of gains on disposition has continued. Indeed, rules discussed above in part IV are only a few of many provisions that exist only to bolster the taxation of capital gains on disposition. Much of the tax system could be simplified with a move to accrual taxation, which would also move the system closer to the accepted theoretical ideal. It is worth noting that I have not assumed any simplifications beyond the move to mark-to-market taxation of capital gains. Advocates of accrual taxation systems are understandably tempted to package them with the full taxation of capital gains and some drastic corporate tax reform or even the elimination of corporate taxation

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<sup>116</sup> Canada, Department of Finance, *Tax Expenditures and Evaluations 2012* (Ottawa: Department of Finance, 2012) at 42, online: <[www.fin.gc.ca/taxexp-depfisc/2012/taxexp-depfisc12-eng.pdf](http://www.fin.gc.ca/taxexp-depfisc/2012/taxexp-depfisc12-eng.pdf)> [perma.cc/2Z9D-MQB2]; see also: Kevin Milligan, “Policy Forum: The Tax-Free Savings Account—Introduction and Simulations of Potential Revenue Costs” (2012) 60:2 *Can Tax J* 355 at 357 (estimating that in a mature TFSA system, less than 2% of families “would face any capital income taxation for savings.”).

altogether.<sup>117</sup> In this chapter, I show that significant simplification is possible, even if the justifications for the preferential treatment of capital gains and the corporate tax survive.

Moving to accrual taxation for capital gains would lead to a simpler, more accessible system. It may not improve accessibility in the sense of reducing the number of disputes or providing improved access to the court system. However, it would eliminate disputes about complex legal concepts and the application and interpretation of complicated sets of rules. These would be replaced with easily understandable factual disputes about the values of appreciable capital property. The result would be a simpler tax code and a capital gains taxation system that would be easier for taxpayers to comprehend and engage with.

The work that remains is charting a course and weighing the cost. Implementing such a fundamental change to the system would be difficult and costly. It would require untangling nearly 50 years of interwoven provisions intended to protect the taxation of gains on disposition. However, the discussion in this chapter, provides several reasons to think that this work is worth beginning. The move to a mark-to-market system for taxing capital gains has the potential to offer simplification that endures and, at least in this area, arrests the vortex of legal precision.

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<sup>117</sup> For example, Bittker, “Tax Reform and Tax Simplification”, *supra* note 18 at 3 imagines that with a move to accrual taxation “a number of complexities in existing law would evaporate.”

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## CHAPTER 9: CONCLUSION

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### I. ACCESS TO JUSTICE

“Access to justice” has served as a rallying cry, an aspiration, and a research agenda for over 50 years. The history of access to justice research and advocacy is one in which we repeatedly ask, “are we asking the right questions?” And, moreover, how can we do better at realizing the aspirations of law, justice, and access to justice? This iterative questioning has led to broader and broader conceptions of access to justice. It led researchers to include in the scope of access to justice not just access to court processes for the vindication of individual rights, but also recognition of collective rights, and access to alternative dispute resolution processes. Eventually, social and economic justice came to be included within the ambit of access to justice.

Despite the increasing breadth of our theoretical conception of access to justice, practical agendas for research and advocacy have lagged behind. Much of the debate and many of the access to justice initiatives have remained centred on legal representation.<sup>1</sup> While the revolution represented by legal needs research has allowed access to justice research to move beyond access to courts and access to lawyers, it has not escaped the focus on disputes as understood and framed by courts and lawyers.

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<sup>1</sup> On this point, see Jennifer Ann Leitch, *Having a Say: Democracy, Access to Justice and Self-Represented Litigants* (PhD Dissertation, York University, 2016), online: <[digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1023&context=phd](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1023&context=phd)> [perma.cc/9H]U-JSJP] at 283–285.

The stated goals of access to justice research require supply-side and demand-side research, but also research that moves beyond that dichotomy and its emphasis on justiciable disputes.

Even within a comprehensive approach to access to justice, it might make sense to focus first on serious and difficult to resolve justiciable disputes, in the same way that a medical professional would choose to prioritize an acute, treatable condition. However, we will ultimately fail to realize our access to justice goals if we wholly ignore the everyday, chronic access to justice problems. This thesis represents one attempt to engage more of the breadth of access to justice in a particular area of law. It lays out a research agenda with a focus on empowering individuals in their everyday interactions with legal systems, in all of the sites, processes, and institutions where law is made, administered, and applied.

In the tax system, this agenda might include future supply-side access to justice research. It could include inquiries into taxpayers' experiences of the various parts of the tax dispute resolution system: their experiences in the CRA's administrative appeals process, in settlement discussions with Justice counsel, in judicial mediation sessions, and in the courts. It could look into the effectiveness of the informal procedure in improving access, the effects of the particular procedural rules of tax litigation, and the ways that geographic barriers to access have been mitigated.

There is also an important role for demand-side research in the tax system. How many of the 28 million tax returns processed by the CRA in a given year lead to a

problem that the taxpayer experiences as serious and difficult to resolve? To whom do they turn for help when that happens and how satisfied are they with the results? How often do these tax problems cluster with other legal problems? Or are they triggered by employment, money, or family law problems? What effects do these tax law disputes have on the people experiencing them? All of these are pertinent and open questions.

However, taxation is one example of an area of law in which these might not be the most pressing questions, and they are certainly not the only relevant ones. In tax law, justice—and therefore access to justice—is worked out as much in the everyday interactions with the system, as much in the annual ritual in which our attention turns to taxation, as much in the design and implementation of the regime as it is in the 85,000 annual instances in which taxpayers object to their assessment. For readers interested in access to justice, the aim of this thesis has been to demonstrate that a research agenda might be pursued—about complexity, for example—that can offer insights into the ways in which access to justice might be achieved “by empowering a diverse citizenry to make, decide and enforce their own law in the multiple sites where they actually find normative commitment.”<sup>2</sup>

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<sup>2</sup> Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 107 [Macdonald, “Scope, Scale and Ambitions”].

## II. TAXATION

For readers interested in taxation, my aim in this thesis has been to use this access to justice lens to bring a fresh look at several well-discussed issues. In part, the hope had been to show the usefulness of the access to justice perspective. It is, of course, only one perspective and not necessarily a superior one.<sup>3</sup> It foregrounds some issues and minimizes others. In the context of Canadian tax law scholarship, however, it has allowed me to provide a different perspective than has been presented before.

The focus on empowering individuals in the tax system has led me to see tax complexity as an access to justice problem. Complexity is not the only example of an issue that might be seen in a new way using the access to justice lens. However, complexity is a long-standing concern of tax scholars and has rarely been looked at in this way.

While tax complexity is far from a new concern, the access to justice lens led me to a particular way of thinking about complexity, its effects, and its sources. The key change here was to move away from framing the discussion in terms of tax compliance. Tax scholars, particularly in writing about complexity, have usually framed the problem in terms of the cost (perhaps broadly construed to include the taxpayers' time and energy) of tax compliance and administration. Macdonald's comprehensive approach access to justice, however, asks us not to settle for efficiency in the enforcement of the rules on the legal subjects. In fact, the goal of empowering taxpayers and improving their engagement with the system—turning these legal

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<sup>3</sup> *Ibid.*

subjects into legal agents—is, if not directly opposed, at least in tension with the goal of minimizing administrative costs in the system.

In chapter 5, I attempted the fraught task of putting forward a relatively simple, pragmatic model of complexity. To talk about complexity in terms of complication and conceptual complexity is to obscure some things and ignore others. It ignores, for example, cost or burden of compliance, which is often included in discussions of complexity. It also risks obscuring the different causes and effects of various forms of complication—linguistic complication, the detail of the rules, the complicated interaction between rules, and so on. However, the model presented in chapter 5 provides an easy way of talking about complexity and captures the trade-off that is sometimes observed between the complexity of rules and the complexity of standards (or the complexity of principles).

Using this access to justice centred look at complexity, I offered a way of thinking about the drivers of tax complexity. In particular, I suggested that two of these three drivers add complexity to the tax system without advancing the system's main goals. Researchers and advocates can target these two, though we should expect change to be difficult. Acting on the first of these complexity drivers will require a change in the culture and processes of tax law. Doing so offers the chance to empower citizens and improve their engagement in the tax system, but we should not expect such a change to happen quickly or easily. The final category of complexity drivers can be the target of law reform; however, as chapter 8 demonstrates, the details of a large



simplification effort are important and working out a plan to implement such a reform is a large task.

### III. LOOKING AHEAD

While this thesis demonstrates—at least to me—the value of both the comprehensive approach to access to justice and my framework for organizing tax complexity, the avenues for research using these are not exhausted. In this section, I briefly sketch research that might be done in the future building from what appears in this thesis.

Chapter 7 provided stark information about the readability of Canadian tax materials, and particularly the *Income Tax Act*, but left some unanswered questions about why it appears that the provisions governing relatively simple, personal income tax questions are less readable than the *Income Tax Act* as a whole. Is it the case that newer provisions are written in a more readable style and many of the provisions governing individuals were drafted in an earlier era? Is the difference attributable to the vortex of legal precision that operates more quickly in these provisions because they apply to so many more people? Was there some flaw in the sampling or the methodology that caused this result? Or is it simply the case that statutory drafters have chosen a less readable style for these provisions?

Readability is not the only element of complication that is worth investigating. Future research might look into the level of detail of the rules and their interaction. Or it might examine other ways of drafting to improve comprehension. Certainly, it might be possible to reconsider the convention of one sentence per subsection. But a

more radical agenda might consider stating principles or goals in the legislation,<sup>4</sup> drafting based on principles,<sup>5</sup> including examples, as the American *Treasury Regulations* do,<sup>6</sup> or yet more innovative and radical ways of communicating normative content.<sup>7</sup>

In chapter 8, I argued that the justifications for the deferral of capital gains taxation until the gains are realized are no longer sufficient to outweigh the evident complexity that the realization rule creates, particularly considering the access to justice consequences. However, I noted there that the realization rule is so firmly ingrained in Canada's tax system that examining all of the consequences of moving to an accrual tax system for capital gains and fleshing out a full plan to make that transition would be a book-length project of its own. That work remains to be done.

Moreover, the move to accrual taxation was but one of perhaps hundreds simplification-minded projects that might be pursued based on the framework presented in chapter 6. Some would be large projects, such as examining the capital gains preference, the corporate tax system, or the distinction between employees and independent contractors. Others might be smaller, examining the access to justice effects of individual tax expenditures, or of particular types of tax expenditures.

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<sup>4</sup> Judith Freedman, "Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament" (2007) 123 *Law Q Rev* 53 [Freedman, "Interpreting Tax Statutes"].

<sup>5</sup> Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55 *McGill LJ* 257.

<sup>6</sup> See, for example, 26 CFR § 1.1-1(a). For the argument that regulatory examples make law just as the rest of regulations do, and a method for interpreting regulatory examples, see: Susan C Morse & Leigh Osofsky, "Regulating by Example" (2018) 1 *Yale J on Reg* 127.

<sup>7</sup> Roderick A Macdonald, "The Fridge-Door Statute" (2001) 47 *McGill LJ* 11.

It may be, in some ways, unsatisfying to leave so much work undone. However, it has been challenging to wrestle with and attempt to contribute to the large bodies of literature around access to justice, legal complexity, tax complexity, and particular issues in the design and implementation of tax systems. If it seems that the perspectives and frameworks put forward here demonstrated their usefulness in advancing some of these conversations and that they might continue to do so in future research, then I suggest that the project, whatever its flaws, might be considered a success.

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