PRACTICAL LEGAL RESEARCH

J.E. CÔTÉ* AND D.J. MACGREGOR**

Keeping current with changes in the law is fundamental for law students, lawyers, and judges. Effective skills in legal research are necessary to accomplish this goal. Unfortunately, most guidance on legal research tends towards either overly laborious techniques or the use of shortcuts. This article addresses this issue by providing a practical, realistic, balanced, reliable, and flexible approach to the research that is critical in the legal profession.

Il est essentiel pour les étudiants en droit, les avocats et les juges de se tenir au fait des changements apportés aux lois. Toutefois, cet objectif ne saurait être atteint sans de solides compétences en recherche documentaire. Malheureusement, la plupart des manuels d'orientation proposent des techniques éminemment laborieuses ou des raccourcis. L'auteur propose ici une démarche de recherche pratique, réaliste, équilibrée fiable, souple, qui est essentielle à l'exercice de la profession.

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* The Honourable Mr Justice JE Côté is a judge on the Alberta Court of Appeal in Edmonton.
** Debra MacGregor is one of the legal counsel to the Alberta Court of Appeal in Edmonton. We thank Eve Leung for her help. Linda Harmata gave us very helpful information on her experience with statutory research.

I. INTRODUCTION

There are many guides to legal research in Canada, but they tend to go to extremes. Some state or imply that one should meticulously use about a dozen sources and methods to research any legal topic. Such laborious counsels of perfection are increasingly difficult to follow today, for a host of reasons. Conversely, other guides to research are much shorter, and focus on one or two shortcuts or methods only. That may partly explain why the ability to research and keep up with the law is slipping among students, lawyers, and even judges. This article describes a more practical, realistic, balanced, reliable, and flexible approach.[1]

II. SELECTING THE TOPIC TO RESEARCH

A. PROPORTIONALITY

Before one starts legal research, or even plans it, two questions should be asked:

1. How much time and money can I spend on this research? and

2. What is the precise result I hope to achieve?

Most guides to legal research are written as though the first question did not exist or did not matter. But no legal research in Canada can be perfect, and a good-quality piece of research often requires huge amounts of time, which may well be a lawyer's billable time. Therefore, searches for perfection are often useless. Furthermore, at an early stage of a file, often it is enough to get a reasonably accurate view of the law; polishing, perfection, and complete thoroughness can be postponed until a later stage. After all, most issues on a lawyer's file or in a lawsuit eventually become moot, or are compromised before a full hearing.

B. DO NOT SEEK THE HOLY GRAIL

One should also think about what the ideal research result would be. The above discussion of efficiency suggests that one should have some idea of the form and volume of the result one's research will achieve. For example, in a chambers application before a busy motions judge it would be unnecessary to cite the amount of authority in a good-quality law review article. Indeed, it would be a grave hindrance.

There is always a temptation to look for a reported decision whose facts are virtually identical to the facts of one's own case. That temptation may be a relic of discussion years ago in law school about how to define the *ratio decidendi* of a case, and about distinguishing cases. However, identical facts are a dubious goal. Anyone who has tried to research cases on size of damage awards or on length of jail sentences learns that even in commonly-litigated areas, finding identical facts is almost impossible. Even if another litigant in another

[1] When in doubt, professional librarians at courthouses and specialized law libraries are indispensable sources of assistance in conducting legal research.

reported case also has a broken collarbone, it can turn out that the reported litigant has a broken wrist as well.

There is a far bigger objection to looking for identical facts. In principle, precedent is supposed to be cited for propositions of general law, not for fact situations. For one thing, how to evaluate the facts is the province of the trier of fact, which in some cases is a jury. If one judge has held that it is negligent to drive into a residential intersection when the driver's vision to the right is partly blocked by a parked moving van, that does not mean that every other judge faced with a similar fact situation should find negligence on the part of such a driver. That is simply a question of fact, not a question of law.[2]

It is true that finding a favourable case whose facts are virtually identical to one's case will give a great deal of encouragement and comfort. Such a case is worth citing to a judge, if only for the comfort which it may also give him or her. However, citing the case does not go further than that. Counsel should not be surprised if the judge does not follow that reported case; the similarity of facts between the cases does not in itself compel the judge to follow that case.

Finding such a similar case at an early stage may also be useful for other reasons. For example, it will likely cite relevant law. But even that would be only a first step, not the aim of one's legal research.

There is another basic problem with merely looking for one or two very similar very favourable cases. Counsel has an ethical obligation to look for and cite serious strong authority which is contrary to their position. Judges have a similar duty to be fair and not one-sided in citing authority.

Therefore, primary emphasis should not be placed on finding an identical case. One should instead look for applicable principles and cases establishing them.

C. DEFINING THE QUESTIONS

How should one define the questions to research? First, one must think hard about the file or litigation being worked on. Second, one should read a little general law (such as the relevant chapter in a good textbook). Both give clues as to the precise legal questions to research.

Often there will be more than one legal question. Sometimes a textbook cites what one might think was one topic, in two different places. That may be a clue: other people may look at the problem in a similarly split fashion. If a second, third, or fourth legal proposition may also be relevant, it is useful and efficient to do all the legal research about all the questions at the same time.

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[2] On the limited value of factual precedents, see *R v Hennessey*, 2010 ABCA 274, 490 AR 35 at para 80; *R v JLMA*, 2010 ABCA 363, 499 AR 1 at para 216. See also Lee F Peoples, "The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?" (2005) 97:4 Law Libr J 661 at 665, 673.

Once the legal questions to research have been decided on, one should precisely write out the questions. There are several reasons for this. First, this ensures that the question is framed precisely. The written question will help guide the research, especially online research. Second, it leaves a record of exactly what was initially searched for. As more law is looked up, one's thinking is almost certain to change somewhat. So it may later be forgotten that the question which is currently being researched (partway through the project) is not identical to the question which was initially being researched. That in turn may mean that one's initial searches were not quite on point, or not complete, and will have to be amended or redone later.

D. GET ORGANIZED EARLY

Before any legal research is started, one or more precise written questions of general law on which one wants authority is needed. If the research topics are not closely connected, then it would also be useful to have an electronic or paper file for each separate question. Notes or printouts for each can be kept separate. One should also make a checklist of those sources one plans to use. It is helpful to make a grid, with columns for the legal topics being researched, and lines for each different location to search in. Otherwise, it is very easy to miss one step in the research.

III. TEXTBOOKS AND ARTICLES

A. START WITH AUTHORS

We are now past the stage of one's initial survey in a textbook. It is usually best to start detailed research with several good-quality textbooks and maybe some journal articles. Half a dozen textbooks would be a good foundation.

Some textbooks will not be as useful as others because they are designed primarily for university use, not for practitioners. A good practitioner's textbook is highly desirable for full treatment of the case law. Even one from England or Australia can often lay a good foundation for one's search. A great many Canadian works, however, are designed for university students and not for lawyers.

B. SEARCH WIDELY

Never assume that there is nothing published on the topic in question. It is also dangerous to assume that the title of a book or article will accurately reflect its scope.

Finding a suitable textbook is not easy because legal bibliographies and indexes rarely list individual chapters in textbooks. A particular textbook on contracts, for example, will contain a number of topics not found at all in another textbook on contracts.

A good start is to imagine what broad topics of the law (such as criminal law or administrative law) might touch on one's particular problem or research topics. List those broad topics, go to a big law library, and retrieve a considerable number of textbooks on those broad topics. It is necessary to look at the table of contents and the index of each one

to see which ones seem to touch on the general area to be researched. If cases on point are already known, one should also look for them in the tables of cases in the textbooks.

With luck, these steps will lead to statements on point in some of the books, and to citations of some cases or other writings for that particular proposition. At the very least, one should at least get a feel for the arrangement of the topic and how people are likely to classify it. That will be useful later in using legal encyclopedias or other indexes.

Textbooks and journals also show examples of the proper terminology for the problem which one has in mind. Proper terminology is useful in browsing the law in print, and indeed absolutely vital for full-text online searching.

C. FOLLOW THE TRAIL

At an early stage in one's research, it is always very helpful to find some authority on point, no matter how old or weak (or contrary) it may be. As we will see in later parts of this paper, any authority at all on point is part of a thread which likely will lead exactly to what one seeks, or at least a significant part of it.

Therefore if passages in any textbook or article which seem to be on point are found, one must look carefully at everything connected to that passage. The obvious thing to look at is any authority cited in its relevant footnotes and in the bibliography. Even a book or article cited in a nearby footnote may be a useful lead.[3]

IV. RESEARCHING STATUTES

A. ONLINE VS. PRINT

Deciding whether to search online or in print resources depends on the nature of the task. Checking to see if there is legislation governing a particular topic can be done readily online or by using the tables of contents in print volumes.

A common issue for researchers is statutory interpretation, requiring one to look for judicial consideration of a particular statutory provision. Searching case law databases using the statute name and section number is straightforward. Legislation citators in online sources are easy to use efficiently, allowing one to link quickly to the resulting cases. It is important to check the dates and jurisdiction of coverage of cases in databases to confirm the search is comprehensive.[4]

One may also need to research the history of a legislative provision, perhaps to find out if a particular phrase appears throughout various revisions of the legislation since its enactment, including when such amendments came into force. This can be a complex task, especially if going back many years, and here it may be preferable to use print sources. However, this depends on several factors: whether one has ready access to a large law

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[3] See Part VI.F.4, below, for more on this topic.
[4] See Part VI.F.3, below, for more on this topic.

library; how far back in the legislative history one needs to go; how big the statute is; whether one is looking at the whole statute or only one provision; whether using a database with free access is important; and how much time one has. For example, tracing legislative history of an Alberta statute back about ten years can be readily done online in an authoritative source. Historical searches of Alberta legislation further back can be done online, but the process can be time-consuming.

Accessing the most current version of a statute is best done online. Some online sources offer "point in time" searches, and these can be used to determine how a statute or section read on a particular date, although coverage (dates and jurisdiction) may not be extensive.

B. END WITH AUTHENTIC TEXT

Whichever method one uses to find statutory material (including regulations or rules of court), one must obtain a reliable print copy of that section. Typically that requires going to the published revised statutes or annual statutes of the relevant legislative body. Do not rely on an office consolidation published by the Queen's Printer if the statutory point is a vital one. Still less should one rely on a quotation in a textbook or article.

In legislation, small errors, even in punctuation or format, can matter. For example, it is quite common for quotations from statutes to contain errors in indentation. Such errors are dangerous, because they change whether words are merely part of a subparagraph, or are an independent part of the subsection itself. That can have a dramatic effect on the meaning.[5]

Furthermore, where the relevant provision was inserted or amended in the statute many years ago, pay careful attention. What is the relevant time period for one's lawsuit? Did the amendment come into force before or after? Check the amending statute to see whether that date was the date of assent, some fixed date in the legislation, or was fixed by proclamation.

The amending statute may also contain transitional provisions which make the amendment only conditionally applicable. For example, the necessary proclamation to bring the amendment into force might not yet have been made, or had limited scope. There may also be specific standing conditions on that.

Where repeals or amendments are involved, it is useful from time to time to refresh one's memory with the relevant portions of the applicable *Interpretation Act*. A rose is a rose is a rose, but a repeal is often not always a full repeal.

V. RESEARCHING REGULATIONS

The comments in Part IV apply here as well. However, one would most commonly be checking whether any regulations have been made under a particular statute to ensure no legislative pronouncement has been missed. If a statute provides that regulations may be made under it, any that have been made are readily found in online sources, including those with free access. Searching the statute and resulting regulations and then linking to the text

[5] See e.g. Alta Reg 390/68, r 537.1.

of the subordinate legislation is a quick process. In researching rules of court, one should become familiar with annotated print and online editions of the rules available in one's jurisdiction.[6]

VI. RESEARCHING CASES

A. STARE DECISIS (PRECEDENT)

When searching case law, one may be dismayed by the large number of cases to sort through. That is especially true when there is reason to believe that (on close inspection) most will prove to be almost useless. "Your search may retrieve a large number of documents" sounds almost as hopeless as "No documents found satisfy your search."

However, take heart. There is a hierarchy of precedent. In particular, binding precedent always trumps persuasive precedent. If any research method produces a large number of possibly relevant precedents, the first step is to note which are Supreme Court of Canada decisions. They should be read carefully. Even decisions not directly on point likely offer at least *obiter dicta* of general use in one's case. They are at least ordinarily a firm foundation of basic principles.

If no Supreme Court of Canada decisions are decisive or directly applicable in one's suit, the next step is to see how many decisions there are by the Court of Appeal in the respective province or territory. If the number is not too large, look at each one. There is a good chance that at least one will be on point. If the number of decisions is large, check them in chronological order, starting with the most recent. Rarely will the decisions from one's local Court of Appeal be so numerous as to make this task insurmountable. If there are too many however, go back only 30 or 40 years, or stop when you find that the Court has radically changed the law during that period. Usually there is not much binding case law directly on point then.

If either the Supreme Court of Canada or the respective Court of Appeal has given an answer on the topic, it may not be necessary to look for much more case law; there may be little point to looking at trial decisions from one's own province or territory, and still less looking at decisions elsewhere. It may only be necessary to look at some of the authorities which the Court of Appeal has cited, quoted, and relied upon. One may be able to do general background reading on the precise principles which seem to have motivated the relevant Court of Appeal decisions.[7]

If there is nothing useful from the Supreme Court of Canada or the respective Court of Appeal, one will have to look for merely persuasive authority. This may consist of trial decisions from the respective province or territory, decisions (at any level) from other provinces, or writings of authors. It will take some knowledge of one's local judges to know which type of persuasive authority is likely to carry more weight than another.

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[6] See Part VI.F.3, below, for more on this topic.
[7] See the comments in this Part, below, regarding later judicial consideration.

It is important to understand the significance (or lack of significance) of issues such as the age of a decision. Where persuasive authority is involved, some people are very reluctant to rely on cases older than 20 or 30 years, believing that recent cases are better than older ones. Some provinces' courts are receptive to case law from other provinces, but other courts are not at all receptive. However, currency has very little to do with binding authority from the Supreme Court of Canada or the Court of Appeal in the respective province. Appellate authority binds courts in a province regardless of its age.

After one has finished going through the steps above and found cases which appear to be on point and valuable, it is still important to check for their later legal history. This can be done online, or by using print volumes accompanying *The Canadian Abridgement*.[8]

One must look for two types of "history." The first is whether a specific case was appealed (and so reversed or affirmed), or indeed whether the Supreme Court of Canada gave or denied leave to appeal from it. The second type of history is commentary by later cases, especially by courts whose decisions are binding in one's own province. Such searching prevents embarrassing errors, such as citing what was reversed on appeal, or was criticized or distinguished by binding authority.

Happily, such searching often leads to newer authorities which are even better. If newer authorities mostly agree with the authority which one has already found, then judicial consideration of the earlier decision will at least multiply good, more recent authority. It will often reveal newer cases which lack flaws or uncertainties marring the earlier decision, and often one later authority is from a higher court and so binding.

B. GEOGRAPHY

1. GEOGRAPHY AND BINDING AUTHORITY

As noted above, binding case law is much more important than merely persuasive law. Therefore, where appellate decisions are concerned, decisions from one's own province or territory are important. However, where the Supreme Court of Canada and the Judicial Committee of the Privy Council are involved, geography probably does not matter.

A Supreme Court of Canada decision is binding in all jurisdictions in Canada, irrespective of the province or territory from which the appeal came. The only exception would be a case where there is a fundamental difference in the case law or the statute in question between provinces. As an obvious example, where the decision involves the civil law of Quebec, Supreme Court of Canada decisions would have to be approached with considerable caution in other provinces and territories (and vice versa if one is in Quebec). As far as legislation is concerned, if the Supreme Court of Canada quotes the relevant passages of the legislation (as modern Supreme Court of Canada decisions usually do), checking for important differences with legislation in one's home jurisdiction should be comparatively easy.

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[8] *The Canadian Abridgement*, 3d ed (Toronto: Thomson Carswell, 2003). See Part VI.F.2, below, for more on this topic.

Decisions of the Judicial Committee of the Privy Council decided before 1949 are binding everywhere in Canada (unless inconsistent with later decisions of the Supreme Court of Canada). A handful of Privy Council appeals from Canada which were decided after 1949 are also binding.[9] A Privy Council decision does not have to be on appeal from a Canadian court to be binding. For example, if the common law or the *Sale of Goods Act*[10] is involved, a Privy Council decision on appeal from Fiji is just as binding as one from Ontario.[11]

2. GEOGRAPHY AND PERSUASIVE PRECEDENT

As mentioned, different provinces have different receptivity to persuasive precedent from outside the province. There is little point in trying to swim against the current and urge on the judges of one's province as to persuasive authorities which they are likely to discount or ignore.

Judges of any court are likely receptive to decisions from their own court, particularly decisions in recent years by judges who are still on the court, or somewhat older decisions by judges with a good reputation. So, trial level decisions are likely to be more persuasive in the trial court than in the Court of Appeal.

Subject to those human qualifications, there are two important objective criteria for assessing the weight of any persuasive authority, be it case law, a book, or an article. The first criterion is quantity. If one can find a handful of persuasive cases which all go in the same direction, that line of cases may well be significant. But, if one can find only one authority which is merely persuasive and not binding, then what one has may be fairly weak.

The second criterion is inherent persuasiveness. A book, article, or court decision from a trial court or another province is a weak authority if it merely announces the legal result one wants but does not really explain why. That is doubly so where the person writing (judge, professor, or lawyer) does not have some large, well-established reputation. If the only reason given by the author is citation of other authority, then it does not have much more than the weight of the previous authority. If that previous authority has some demonstrable flaw, then the whole structure may collapse under any significant criticism.

On the other hand, a persuasive authority (judicial or extra-judicial) which gives good, convincing reasons is much stronger. The ideal authority has several foundations: other respectable authority; persuasive policy considerations; fairness; and sound, non-controversial basic principles of law.[12]

People sometimes wonder why Canadian courts keep citing English authority. One reason is that judicial and extra-judicial authority from England is typically well-written, very closely reasoned, and so persuasive. It is a pity that more Australian precedent is not cited

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9 When the appeal has come from Canada.

10 1893 (UK), 56 & 57 Vict, c 71.

11 See William A Stevenson & Jean E Côté, *Civil Procedure Encyclopedia*, vol 3 (Edmonton: Juriliber, 2003) ch 66 at 7-8.

12 On citing academic articles in court, see JE Côté, "Far-Cited" (2001) 39:3 Alta L Rev 640.

in Canada, as the standard of reasoning and research in Australian judgments is often extremely high as well.

In North America, good and persuasive judgments can be more difficult to find because of the sheer volume of case law being reported.

C. AGE OF PRECEDENT

As noted above, binding precedent remains binding despite its age. However, some judges are skeptical about older precedent, and so tendering old authority which is merely persuasive is very risky. For these purposes, "old" probably means before that judge was called to the Bar. If the judge is the sort of person much enamoured with the latest thing, then "old" may mean anything more than 15 years old.

A much sounder reason to reject older authority is subsequent changes in the law. Changes in the common law would have to be very significant, or very close to the precise topic, in order to invalidate older authority. However, changes in legislation are often treacherous, particularly if one is not well familiar with the legislation in question, or the judge to whom the argument will be put is not well familiar with it.

Therefore, another reason to read around the topic generally in textbooks before one gets down to serious research is to detect major shifts in legislation.[13] Where another jurisdiction is involved, this is particularly important.[14] For example, in common-law Canada, the sale of goods legislation in each jurisdiction closely tracks the English statute passed in the 1890s. However, significant changes in sale of goods legislation have been enacted in England in the last generation.

This means that later precedent sometimes has considerable value, but earlier precedent might have little. Occasionally, where there have been legislative changes elsewhere but not in one's own home province or territory, older precedent is preferable. Where common law is involved, the latest book or article is usually the best. Therefore, later editions of Canadian texts are usually better than earlier ones. Often, new editions of basic English texts contain chapters of limited use in Canada because they are affected by British legislation with no Canadian equivalent. Older English editions may be more useful in Canada for those topics.

D. PROBLEMS OF COMPLETENESS

How completely and thoroughly does a textbook, legal encyclopedia, or digest cover the case law? Rarely will the author or publisher volunteer a frank answer. Still less are they likely to point out that they do not include case law from a certain jurisdiction or outside a certain jurisdiction.

Sometimes it is useful at an early stage to look at *The Canadian Abridgement* (in print or online) to get a rough idea of approximately how many cases it digests on the general topic

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13 See Part II.C, above, for more on this topic.
14 See Part VI.B.2, above, for more on this topic.

in issue. What if it seems to digest dozens of cases, even hundreds, but the textbook being looked at only seems to cite five or six? In that case, the textbook is likely looking at the baseball game through a small knothole in the fence.

When looking at various sources, it is often helpful to start by skimming the table of cases, or checking the currency and scope notes of databases. One should look for the approximate number of cases cited, over what span of years, and over what geography. For example, a high-quality, thorough English practitioner's textbook which also cites a fair amount of case law from other parts of the Commonwealth can be very valuable as a first step. If one has several reference books it can quickly be determined which work has the fullest case coverage.

There are many Canadian reference works whose tables of cases do not seem to grow much longer with successive editions. Such works usually add many new cases, so they must achieve this stasis by discarding older cases, or discarding cases from other jurisdictions. Checking extra print sources is always useful, particularly if a work is well-organized. Confining oneself to one reference source or starting with the wrong one can be very misleading.

One should also see if the source indicates as of what date it states the law, and look very carefully at its publication date. It is also useful to skim the table of cases to see where recent cases seem to stop. If one knows of an important and fairly recent case in the area, it is always useful to find it in the table of cases to see how much coverage it has. Occasionally, a textbook will be found whose early editions offered what was then a very complete citation of the law, but has not really been kept up-to-date in later editions.

Sometimes when researching a topic such as civil procedure, unreported cases may matter.[15] Every year, a certain number of decisions well worth reporting do not get reported anywhere, electronically or otherwise, for various accidental or mysterious reasons. Some of the cases turn up somewhere in a brief digest (summary), but many not even there. For instance, in 1985, 42 percent of written Alberta Court of Appeal decisions were not reported anywhere.[16] Now cases from the last 20 years not in law reports are likely to be on websites published by the courts concerned, but of course without any kind of headnote, making them very difficult to find if one does not already know their name. Most court websites started only in the 1990s, although some older decisions may be available through CanLII.[17]

Of course, one should look at the actual text of judgments. Only as a desperate last resort should one rely upon a mere digest of a court decision. If it is possible through any reasonable means to obtain the full text of a seemingly relevant judgment, that should be done. When looking for the whole text of a judgment, the most reliable place to look is the website of the court which issued the judgment if it is recent enough to be there.

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15 Forty years ago, an unreported case was one which was not in any print law report. Now the definition is much more complex.

16 Based on the author's private research and tabulation.

17 See online: CanLII <http://canlii.org>.

A print law report usually gives a reliable text of a judgment, particularly a report published in the last 20 or so years. Indeed, some of these law reports in recent times are even more accurate than the "original" signed judgment reposing on the court file. In England, for example, the judges read over the judgments before publication in the *Appeal Cases*, *Queen's Bench*, *Chancery*, and *Family* (or *Probate*) law reports, and often make corrections. Volume 1 of the *Weekly Law Reports* contains cases which will not go through that process. Volumes 2 and 3 will, and so are only temporary reports. In Canada, this editing process happens with the *Federal Court Reports*. The editors of many law reports are very careful, and they often catch errors in citation or even in content, and secure corrections from the court. In addition, courts often issue brief corrigenda correcting errors in judgments, and law report editors are usually meticulous in picking those up.

Conversely, commercial electronic databases of case law in North America appear to be plagued by typographical and other errors. One small word substituted for a different small word is fairly common (for example: "or" instead of "of"; "on" instead of "or").

Alarmingly, in some rare cases, long passages have been missing from the commercial electronic version. No one ever seems to be able to explain how those errors occur, particularly where the judgment is readily obtainable electronically from the court website. However, editors of law reports and commercial websites in the past said that a certain percentage of court judgments were obtainable only in hard copy.[18] That means that a commercial website had the choice of either manually typing the whole judgment, or scanning it electronically into machine-readable form. Neither method was completely reliable.

When printing judgments from an electronic database, it is important to preserve all nuances of original formatting. An occasional lawyer will use older methods which produce a printout looking much more like a page of typewriting than like a book. When reading such a primitive transcript, it is very easy to overlook names of judges, headings, or breaks between parts. Serious errors can then occur, such as not noticing that a favourable passage is in a dissent. Other judgments can be found online as scanned images, making them easy to cite and print.

How to cite cases taken off websites needs attention. Where the website gives the original neutral citation and the court's original paragraph numbers of the judgment, citing them should not be too much of a problem. However, omitting either the neutral citation or paragraph numbers is problematic. Many lawyers produce printouts from websites which omit paragraph numbers. And of course, 45 years ago, no judgments or law reports had any paragraph numbers. Electronic websites now often retroactively add paragraph numbers to old cases, but those numbers are not uniform and (of course) are not in the original reports. Nor do most printouts indicate the page number from any print law report. So, paragraph numbers from old cases are of limited use.

Worst of all, the pagination of computer printouts is idiosyncratic, not merely to that particular website, but quite possibly to that particular printout. To cite a passage in a 120-

[18] Based on the author's personal communications and discussions over many years.

page decision as page 72 of one's own personal printout is useless. The reader has no way of producing another printout with similar pagination. To find the particular passage, the reader would have to access and search an electronic copy to assist, or comb almost all 120 pages of the judgment in the hope of stumbling across the passage cited. The best that that will produce for counsel is an irritated judge. But the judge might give up and stop looking, especially after the fifth such blunder. If the judge does find and read the passage, how can he or she then cite it in his or her judgment? He or she will need to conduct more research just to get a court paragraph number or a law report page number.

E. ONLINE VS. PRINT SOURCES

1. INTRODUCTION

It is important to do case law research using the traditional print sources and also electronic databases because the two work so differently. With print, one generally looks for ideas, whereas in searching electronically, one generally looks for precise words or phrases. Both search methods have serious drawbacks, but they are very different drawbacks.

Both methods give false positives (cases not on point), and false negatives (miss things). Using both methods reduces considerably the number of false negatives (omissions). And there are practical reasons for using both: database searches may yield more current results, but technical problems and the costs of using commercial databases may be an issue.

2. HOW TO CONDUCT FULL-TEXT CASE LAW SEARCHES

a. Generally

The number of false negatives (omissions) can be reduced in full-text searching by searching the same database in two or more ways. One can craft different combinations of words, or use both words and also specific phrases. One can also look for phrases and occurrences of different words within, for example, ten words of each other in the text. Obviously, by searching in more databases or widening the date range being searched, there will be fewer omissions.

But all that in turn often induces a larger problem: an undue number of false positives (cases not on point). If one knows that there are, for example, 200 cases on the general topic in *The Canadian Abridgment*, and a computer search indicates manyfold more, most of the cases so found are probably not on point at all.

Many words have multiple meanings, and often it is necessary to include synonyms in a computer search. However, this can result in cases on totally unrelated topics. For example, if one is looking up cases on enforcing a money judgment by seizing assets, one cannot avoid the word "execution." Yet that may give one cases on capital punishment, on performance of contracts, and on signing contracts or other documents as well as other non-legal topics.

Unimaginative computer searching, particularly using only Boolean combinations of words, can result in a dilemma. Using only one combination with no alternatives and some

exclusions can give no results, or a list obviously too small. Using several combinations, or synonyms and no exclusions, can give far too many "results." It is lengthy and discouraging work to look at and weed out a large number of cases, even online.

What is one to do? These problems will never be completely be eliminated, but in many cases they can be reduced to a manageable size.

b. Specific Winnowing Techniques

The following five techniques should usually help to reduce the number of false hits.[19]

i. When viewing results, it is often best to use the "search terms in context" feature so that the relevant line or two of the case can be seen at once, revealing whether the appearance of the word is obviously on the wrong topic.

ii. When one gets too many supposed results, look at a few of them to see if there is any common reason for picking up such irrelevant cases. If so, there may be some obvious way to reshape the search and start again. For example, if the word "execution" or "execute" is in the search, exclude results using the word "contract." Or add a subject matter topic such as "creditor and debtor law" to the search, and so confine it.

iii. Pay attention to the way the computer sorts results (by relevance or frequency of occurrence, for example). Deliberate contiguity of words may be more frequent in a case right on point; accidental contiguity of unrelated words is probably less frequent.

iv. What if irrelevant uses of the search term are turning up outside the judges' main reasons, for example, the word "trust" in names of trust companies? A search may be constructed to avoid that, or the search may be confined to certain fields. For example, searching headnotes, summaries, or keywords. That could exclude some relevant cases, but it should greatly reduce the number of totally irrelevant ones.

v. A search can be switched from unlimited in scope to one confined to a certain court, or only for recent years. That especially makes sense when the topic is fairly new (for example, the *Charter*), or if the Supreme Court of Canada recently and radically transformed the law in the area. Most initial results might be eliminated without undue labour or disappointment. Weeding a small flower bed is easier than weeding a big market garden. Of course, eliminating earlier cases makes little sense in some legal areas. Finally, if there is no binding authority, eliminating cases from other provinces is very dangerous, especially if one's local courts are not parochial or xenophobic.

[19] As always, a law librarian can assist legal researchers with any of these techniques.

c. Summary

There are some legal topics which cannot be reliably researched using full-text searches in databases. All one can do in that case is to conduct some limited searches (that is, limited in time or by courts), and recognize that the electronic search is incomplete. On the other hand, many legal topics can be usefully researched by full-text searching if different and imaginative search parameters are experimented with. The results will be neither complete nor free of irrelevant results, but on the whole they will be worthwhile.

If one finds a handful of cases exactly on point, it is useful to note up each of those cases to check for judicial consideration of them. This could result in stray mentions of them or citations on other irrelevant topics (such as costs). However, often cases on point are not discoverable any other way.

3. MARITIME LAW BOOK TOPICS

One very useful case law database deserves mention. Maritime Law Book publishes print law reporters which cover every jurisdiction in Canada except Quebec (for example, *Alberta Reports* and *National Reporter*). Maritime Law Book also produces an online database.[20]

The database offers a search feature, unique in Canadian legal research, called the Key Number System. As explained on the Maritime Law Book website, each point of law or issue discussed in a case is summarized by the editors and included as a "Topic" in the headnote of the case. Each topic is assigned a Key Number. For example, "Criminal Law - Topic 5855" is the topic Key Number assigned to every Maritime Law Book case for sentences for robbery. This number can be used to find all robbery sentencing cases without having to construct a search. The Key Numbers are categorized under 151 titles, such as "Criminal Law," "Family Law," "Evidence," and so on. Researchers may scan the list of Key Numbers or search all the titles and Key Numbers by word or phrase. Searches may be refined by jurisdiction. Maritime Law Book also provides a detailed alphabetical index to all these topic numbers.

Reading lengthy cases to find discussion of a particular issue is made far faster by using the summary of points of law in the Maritime Law Book headnotes, which pinpoint the paragraphs addressing each issue. Some Maritime Law Book series began in 1969. All go back at least to 1980. Cases turned up this way are almost always on point because they were sorted by careful lawyers, not by computers looking for strings of letters.

4. DIGESTS AND ABRIDGEMENTS

The traditional way to look up case law was to use a legal encyclopedia or digest. An encyclopedia is like a large textbook with authorities in footnotes. A digest is a collection of condensed summaries or quotes from portions of cases.

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[20] See online: Maritime Law Book <http://www.mlb.nb.ca/html/mlb-law-search-key-numbers.php>.

In the past, one had to supplement searches of the main work with detours into its various supplements (volumes or pocket parts) for later cases. A number of such works are now available online, with all supplements already incorporated, making the search much faster, and often more current.

In theory, using one or two legal encyclopedias or digests should be all that is needed. And if one were looking only for American or English law, using American or English reference works, often that would suffice. However, if one is looking for law to cite to a Canadian court, there are a number of problems.

One problem is obvious. American and English works do not refer to Canadian cases (with a few exceptions), and Canadian encyclopedias or digests do not give non-Canadian cases. Canadian works do not even give pre-1949 Newfoundland cases. The Canadian pilot volumes to *Halsbury's Laws* added some Canadian cases, but their coverage is modest, and they ceased publication some years ago. So one must look at works from more than one country. Much the same is true of *Canadian Annotations to the Consolidated Tables and Index* of the *All England Report*.[21] This is a work of English cases judicially considered in Canada. Its coverage of English cases before 1920 is sparse.

The second problem with Canadian research is less obvious: it is quality. A legal reference work is useful only to the extent that it offers three things: reasonable completeness; intelligible arrangement; and accuracy. The last two overlap. If cases are put into the wrong categories or footnotes, or if the categories are too big, then legal research becomes laborious. Worse still, it becomes incomplete and misleading.

Some Canadian legal encyclopedias or digests have very limited case coverage. And the criteria for exclusion of cases are either unstated or non-existent (that is, inclusion is arbitrary or random). Severe geographical or date restrictions probably have been used, and getting access to older editions of encyclopedias or digests is difficult, especially outside a large city. Even the *English & Empire Digest*, now called *The Digest*, dropped many cases between its blue-band and later green-band editions, yet the publishers told subscribers to destroy their blue-band volumes.[22]

The Canadian Abridgement probably contains the majority of important Canadian cases. Its coverage is now pretty thorough.[23] But sometimes the relevant legal point in a case is not clear or obvious from the extracts digested or reprinted. The individual extracts are also often long and full of irrelevant details. This greatly slows research.

Worse still, the subdivisions in *The Canadian Abridgement* are often large and vague. If working with the print volumes, it is very laborious to try to read several hundred wordy fact summaries of cases clumped under one large vague heading, not to mention trying to stay

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21 *The All England Reports: Canadian Annotations to the Consolidated Tables and Index* (Markham: LexisNexis, 1990).

22 *The Digest: Annotated British, Commonwealth and European Cases*, 3d reissue (London, UK. LexisNexis UK, 2004). The request for destruction was included in little loose slips enclosed with the new volumes.

23 See Appendix A.

vigilant throughout that task, always trying to spot evidence of one's precise desired legal topic. It is like reading several hundred law school examination problems in one sitting.

The original classification scheme of *The Canadian Abridgement* in the 1930s was very good and sophisticated. Unfortunately, in the 1950s through the 1970s, staff assigning cases to categories sometimes did not seem to understand the categories. The editorial standards soared in the 1980s. But, by then, huge volumes of available case law threatened to swamp everyone. Further, many categories are still too broad or vague to be very useful.

The new *Halsbury's Laws of Canada*, available in print and online, should prove useful, but not all of its volumes have been issued yet.[24] However, the completeness of its case law may be questionable. For example, its contracts volume cites about 2000 cases. *The Canadian Abridgement* seems to cite about twice as many. The fourth edition of *Halsbury's Laws of England* cites many times that number of cases in its "contract" volumes.[25]

All law reports have subject indexes, and most reports cumulate those indexes every few years. The quality of such work in Canada is often very high. This has been so especially over the past 25 years. Conducting large-scale research using a number of these indexes in print form would be a great deal of work. However, if one has access to online indexes, or if one is willing to confine the research to a particular jurisdiction or court, or to certain years, such research can be very useful. There are enough topical law reports in Canada that the indexes of any of them can also be very valuable.

5. CROSS-CHECKING

Electronic databases and traditional print reference sources require such different search methods, that usually the two will offer very different lists of cases in reply to the same problem. Even after eliminating cases not on point, what remains from each method will include a good percentage of cases (or other authority) not discovered elsewhere.

It is wise to do something about that, and not merely stop researching. If source A finds many cases not in source B, and there is no obvious reason on the face for it, try to discover the reason. For example, do various sources seem to be using different terminology or classifications? Does one work put this under "contract" and another under "debtors"? Are the cases on point favouring one's client given a different rule name or rationale than those against one's client? Go back to the research source which did not turn up a number of relevant cases, and try now (via name searches of the table of cases) to find the specific cases not revealed the first time. See if they are all hidden under one or two different topics or places. If so, what other undiscovered treasures can be unearthed?

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[24] *Halsbury's Laws of Canada*, 1st ed (Markham: LexisNexis, 2011).

[25] Lord MacKay of Clashfern, *Halsbury's Laws of England*, 4th ed, vol 9(1) (London, UK: Butterworths, 1998).

F. RESEARCH SHORTCUTS

1. INTRODUCTION

Though the word "shortcuts" often connotes slackness or skimpiness of research, that is not necessarily so. Sometimes the best and most thorough research starts with a quick or imperfect method to get some idea of the parameters of the problem, or to open a door by finding some authority.

As will be seen, all is not lost as long one relevant authority if available. But if no single authority is yet found which is really on point, then one is in the fog outside a huge locked building. With a single relevant authority, then one is at least inside the building. The building may be a maze, but patience will take one from room to room until what is needed is found.

2. CASES JUDICIALLY CONSIDERED

If even a single case on point can be found, then there is a fair chance that some of the later cases on the topic will cite the earlier case. If so, one can quickly and objectively find those later cases. This is the first shortcut. Of course, that will not work when a later judge does not know about the earlier case, or has not bothered to cite it. However, if a leading or popular case on point is found, then one can probably find most of the later law by looking up cases considering it judicially. This is most easily done by finding the case in which one is interested and noting it up online.

The most reliable and accurate Canadian print source was *CanCite*.[26] Its print version covered Canadian cases from 1940 to 1994. However, copies are difficult to find. Similarly, for American cases, *Shepard's* does the same thing, and still exists in print volumes as well as online.[27] The red volumes (Canadian Case Citations) of *The Canadian Abridgement* will do the same thing if one prefers print to online research. However, that source seems not to be complete for the period between about 1940 and 1970.

Those methods will also find references to English cases in Canadian courts. References to English decisions in English courts can be found in the indexes to the *Law Reports* or to the *All England Reports*. For older cases, refer to *The Digest* (formerly *The English and Empire Digest*).

Much case law revolves around legal concepts, not any particular formula of words. However, when a specific term or phrase has come to be used in relation to a certain topic, and still more when legislation is involved, then precise words matter. These words may be a good key for online searches. At that point, any work on words and phrases judicially considered or a large annotated legal dictionary can be very useful. The newest one covers

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[26] *The Canadian Citations Research System* (Toronto: McGraw-Hill Ryerson, 1994) (continued online by Quicklaw under the name of QuickCite).

[27] *Shepard's United States Citations Case Edition*, 7th ed (Colorado Springs: Shepard's/McGraw-Hill, 1994) (also available online through Quicklaw).

words and phrases in the Supreme Court of Canada and the Judicial Committee of the Privy Council.[28]

3. LEGISLATION JUDICIALLY CONSIDERED

If particular legislation is relevant to the research question, then in theory one should be able to look up resources with statutes (or rules of court or regulations) judicially considered, and there find the relevant case law about that legislation. In practice, however, such resources are somewhat difficult to use, particularly as they typically do not link various successive versions of what is essentially the same statute. But, with patience, one may find something.

When looking for judicial consideration of legislation, it is often very rewarding to look hard for annotations of such legislation. Commentaries on rules of court are common, and in Canada some major statutes (especially the *Criminal Code*) are published commercially in one or more annotated editions. Looseleaf "services" by Canadian publishers will often feature annotations of the relevant statutes and regulations, or at least close cross-indexing between the two.

Where a provision in a statute is important (for example in sale of goods), it may be worth taking some trouble to discover which is the equivalent provision in each jurisdiction, so that for annotations or judicial consideration of particular provisions may be searched for. Textbooks commonly contain tables of statutes (for different jurisdictions) under sections considered, but they will not typically contain a concordance linking equivalent section numbers between jurisdictions.

4. CITED AUTHORITIES

Once one finds anything on point in a case or in a textbook or article, one should also examine footnotes attached to or near that proposition, and check all the relevant authorities listed there. This follow-up is one of the oldest methods of legal research, and it is still good. When one of the authorities cited looks useful, it should be pursued further by looking for it in tables of cases in other sources, and also looking for judicial consideration of that authority.

G. THE LAST RESORT

Sometimes no authorities can be found, despite searching in a number of different sources. Even careful inspection of *The Digest* (the *English and Empire Digest*) yields little or nothing. But one feels confident that there must be authority somewhere on the topic. It is one which must have been litigated somewhere in the last 200 years. One hope remains: the big old American legal encyclopedia, *Corpus Juris*.[29] It should be used in desperate situations. The original work, published in the 1920s and early 1930s, cites quite fully

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[28] Jean EL Côté, *Words that Bind* (Edmonton: Juriliber, 2011).

[29] William Mack & William Benjamin, eds, *Corpus Juris: Being a Complete and Systematic Statement of the Whole Body of the Law as Embodied in and Developed By All Reported Decisions* (New York: The American Law Book Co, 1919).

English, Canadian, and Australian cases, as well as American ones. However, its supplement volumes and its current supplementary work named *Corpus Juris Secundum* cite only American cases.[30]

The old *Corpus Juris* is extremely well-organized, with excellent tables of contents and cross-references. It is quick and easy to use. Most of the time, the cases in the footnotes fully support the propositions in the text. *Corpus Juris* will virtually always give some cases right on point, and often they will include English and Canadian ones. The cases will be old, but looking them up elsewhere will show one (1) where to look in textbooks and other legal encyclopedias and digests, and (2) what later judicial consideration of these cases exists.

For older English law, more thorough works are Mews' *Digest*,[31] *Chitty's Equity Index*,[32] and the various indexes to the *Law Reports*, from 1865 on. If one had found a few relevant cases in *Corpus Juris*, they would be a quick lead (via the table of cases or cases judicially considered) into the right parts of those English sources. Older English works, such as *The Digest*, often put later judicial consideration right after the digest of the subject case.

30 *Corpus Juris Secundum: A Contemporary Statement of American Law as Derived from Reported Cases and Legislation* (Thomson/West, 2005).

31 John Mews, *A Digest of the Reported Decisions of the Common Law, Bankruptcy, a probate, Admiralty, and Divorce* (London, UK: H Sweet, Stevens & W Maxwell, 1884).

32 Henry Edward Hirst, ed, *Chitty's Index to All the Reported Cases Decided in the Several Courts of Equity in England* (London, UK: Stevens, H Sweets & W Maxwell, 1888).

APPENDIX A: EXAMPLES OF LOST LAW[33]

A. OMITTED FROM CURRENT *CANADIAN ABRIDGEMENT*

1. About one-third of cases in the first edition (from 1930s) and from pre-1900 Ontario cases.

2. Cases reported only in the *Canadian Law Times*.

3. Privy Council cases from outside Canada, even if reported in the *Western Weekly Reports.*

4. Cases on old legislation, like pre-1948 labour law or rent control.

5. Pre-1949 Newfoundland decisions.

6. A very large portion of Quebec decisions, even on national topics like criminal law, bankruptcy, bills of exchange, or insurance. As much as two-thirds of cases are omitted.

7. Unreported cases (for example, 37 percent of decisions from Alberta in 1985).

B. OMITTED FROM CURRENT (GREEN-BAND) *DIGEST* (FORMERLY CALLED *ENGLAND AND EMPIRE DIGEST*)

1. About half of the pre-1865 cases.

2. About one-fifth of the 1860-1900 cases.

3. Privy Council decisions from India (which constitute almost half of all the Privy Council decisions).

4. A significant portion of cases from the blue-band edition.

[33] Based on a private sampling and study by the author many years ago.