

**ACCESS TO LAW-RELATED INFORMATION IN CANADA  
IN THE DIGITAL AGE**

by

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# **Access To Law-Related Information In Canada In The Digital Age**

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## **Abstract**

Access to law-related information in Canada is – and should be – a fundamental right. This access is crucial in a democracy such as Canada that follows the rule of law since access to legislation, case law and other government information that is law-related is essential for an informed citizenry. However, a number of factors negatively impact this access, including the complexity of the Canadian legal system, the small size of the Canadian legal publishing industry, Crown copyright, contradictory government information policies, and a shrinking public domain through the digitization of information and other roadblocks on the Internet. The stakeholders involved – the government, private publishers, lawyers, law schools, and other public interest groups – have important roles to play in improving access, particularly through the use of Internet technologies. Recommendations are therefore included regarding specific steps that can be taken to improve access to law-related information in Canada in the digital age.

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## Introduction

The ability for all persons to access and contribute information, ideas and knowledge is essential in an inclusive information society.<sup>1</sup> This declaration of the World Summit on the Information Society – an obvious truism for most people – is far from being fully realized in many countries, however, due to any number of technological, societal, legal or cultural barriers that contribute to the so-called “digital divide.”<sup>2</sup> Information literacy will therefore be the goal and the challenge for those persons wishing to compete and flourish in modern society. And the “information society” as a concept is far-reaching, one that affects not only our industries and economic well-being but also permeates all aspects of life, including our legal system and legal publishing. Increasingly, law-related information is being digitized and made available online. As such, in a society governed by laws, access to *law-related information* is an equally essential component of access to information. Such access has many components, including the notion that courts should be open and accessible to all people, that

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<sup>1</sup> World Summit on the Information Society, “Declaration of Principles – Building the Information Society: A Global Challenge in the New Millennium” (12 December 2003) ¶ 24. Available online: <<http://www.itu.int/wsis/docs/geneva/official/dop.html>>.

<sup>2</sup> See, for example, Julie Hersberger, “Are the Economically Poor Information Poor? Does the Digital Divide Affect the Homeless and Access to Information?” (2003) *Can. J. of Info. & Libr. Science* 45; Susanna Frederick Fischer, “The Global Digital Divide: Focusing on Children” (2002) 24 *Hastings Comm. & Ent. L.J.* 477; Mark Lloyd, “The Digital Divide and Equal Access to Justice” (2002) 24 *Hastings Comm. & Ent. L.J.* 505; Catherine Russell, “Access to Technology for the Disabled: The Forgotten Legacy of Innovation?” (2003) 12 *I. & Comm. T.L.* 237. Issues raised by the digital divide are discussed in more detail in Chapter 5.

legislation should be published and clearly prescribed, and that access to government information be as inexpensive and accessible as is possible. Citizens need to know their legal rights and obligations; journalists need access to the courts and government information in order to be an effective “check” on public institutions; and researchers rely on a variety of government and law-related information to support their research. But the law is complex and law-related information difficult to understand, even for lawyers. This has been the situation for some time in Canada. Thirty years ago – in what was largely a “print-based” environment – Friedland concluded in a study that access to the law in Canada was poor, and even where persons could find law-related information, they often did not understand it or did not interpret it correctly.<sup>3</sup>

Since Canada is a country that follows the rule of law, Friedland’s conclusions – that the average person has some difficulty in accessing and understanding the law – are problematic. Taken to its extreme, the lack of access to law-related information results, among other things, in the potential abridgment of legal rights and a difficulty in holding public officials accountable. This worst-case scenario evokes the images of the nightmarish experiences suffered by Joseph K., the central character in Kafka’s *The Trial*. In that story, K. is unable to find out the details of the crime for which he is put on trial: “Who’s accusing me? What authorities are in charge of the proceedings?”<sup>4</sup> When K. later asks to see the law books sitting on the magistrate’s table, he is rebuffed:

“Can I look at the books” K. asked . . . .

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<sup>3</sup> Martin L. Friedland, with Peter E. S. Jewett and Linda J. Jewett, *Access to the Law: A Study Conducted for the Law Reform Commission of Canada* (Toronto: Carswell-Methuen, 1975) at 1 [the “Friedland study”]. This study is discussed in detail in Chapter 6.

<sup>4</sup> Franz Kafka, *The Trial*, trans. by Breon Mitchell (New York: Schocken Books, 1998) at 14.

“No,” said the woman and shut the door again, “that’s not allowed. Those books belong to the examining magistrate.”

“Oh, I see,” said K. and nodded, “they’re probably law books, and it’s in the nature of this judicial system that one is condemned not only in innocence but also in ignorance.”<sup>5</sup>

Later, when K. asks if there have been any actual acquittals by the court, he is told by a painter that in fact the decisions of the court are not published:

“Such acquittals are said to have occurred, of course,” said the painter. “But that’s extremely difficult to determine. The final verdicts of the court are not published, and not even the judges have access to them . . . .”<sup>6</sup>

Shortly before he is to be put to death for his unknown crime, K. is told by a priest a parable of a man seeking to gain admittance to the Law. In the parable, access to the Law is via a door that is guarded by a doorkeeper:

Before the Law stands a doorkeeper. A man from the country comes to this doorkeeper and requests admittance to the Law. But the doorkeeper says that he can’t grant him admittance now. The man thinks it over and then asks if he’ll be allowed to enter later. “It’s possible,” says the doorkeeper, “but not now.”<sup>7</sup>

The man in the parable thinks that the Law should be accessible to everyone and at all times but decides that he better wait until he gets permission to enter. The man dies waiting. But K. fails to understand the meaning of the parable. The priest points out there are many interpretations to the story: was the man asking the right questions to gain admittance? Was the doorkeeper answering the questions honestly? Did the man even understand how to gain admittance?

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<sup>5</sup> *Ibid.* at 55.

<sup>6</sup> *Ibid.* at 154.

<sup>7</sup> *Ibid.* at 215.

Although the situation in Canada has not deteriorated to this level, the story highlights the dangers of a system that does not provide access to the law. It is this narrower but important aspect of access to information – access to *law-related information* and legal information literacy – that I wish to explore in this thesis. Much has changed in Canadian society in the last thirty years since the Friedland study with the introduction of new technologies such as the Internet. Clearly, the legal system is drastically changing as a result of new technologies, moving away from a traditional print-based environment to an online environment:

And where is law going? To a place where information is increasingly on screen instead of on paper. To a place where there are new opportunities for interacting with the law and where there are also significant challenges to the legal profession and to traditional legal practices and concepts. To an unfamiliar and rapidly changing information environment, an environment where the value of information increases more when it moves than when it is put away for safekeeping and is guarded. To a world of flexible spaces, of new relationships, and of greater possibilities for individual and group communication.<sup>8</sup>

Have these new technologies “opened the door” to provide improved access to law-related information in Canada? Have new technologies improved comprehension of law-related information? And what roles do the various public and private “gatekeepers” to legal information in Canada – the government, private publishers, lawyers – play in providing access to law-related information? These are important questions if access to law-related information is to be taken seriously. Unfortunately, the answers to these questions are not simple and first require an analysis of overlapping political, social and economic factors that I address in the pages that follow. My goal, in part, is to re-address the issues raised by Professor Friedland thirty years ago in his *Access to the Law* study to

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<sup>8</sup> M. Ethan Katsh, *Law in a Digital World* (New York: Oxford University Press, 1995) at 4.



see what, if any, impact the Internet and other advances have had on access to law-related information.

Chapter 1 of this book will argue that access to law-related information in Canada is a fundamental right of every person, embodied in the fundamental legal rights enshrined in the *Canadian Charter of Rights and Freedoms*.<sup>9</sup> This first chapter will also explore the philosophical underpinning of the right to receive information and how it is manifested in different jurisdictions. An argument will be put forward – and expanded on throughout the book – that, despite the importance of the right to access law-related information, this right is not effectively realized by many Canadians.

Traditionally, however, access to law-related information in Canada meant access to print-based materials that were not always very well-organized, were expensive and subject to publication delays. Combine this with a mixed legal system in Canada (common law and civil law), bilingual legislation at the federal and some provincial levels, and the inherently confusing nature of the common law judicial system, you end up with a legal system with many complexities that also hinder access to law-related information, a topic that will be analyzed in Chapter 2.

Chapter 3 will examine the market in Canada for legal publishing. An argument will be made that the effect of a relatively small legal publishing industry in Canada is a diminished legal literature, which also negatively impacts access to law-related information. Moreover, there is a move by most private legal publishers from publishing

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<sup>9</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [“*Charter*”].

their products in print to publishing their products online with access restricted by license agreement, password or fees. This phenomenon of “digital drift,” which has the potential to drastically impact access to law-related information by the general public, will also be analyzed. Despite the existence of the private legal publishing industry in Canada and the limitations that industry faces due to the small size of the professional market for legal publications, an argument will be introduced here and expanded upon in Chapters 5 and 6 that Canadian governments have shirked their obligations to make primary sources of law more easily available and have instead left these obligations to private sector forces. As a result, it will be argued, access to law-related information is further hampered.

Compounding the problem of a complex legal system and challenges faced in the legal publishing industries in Canada is the role of Crown copyright. In Chapter 4, I will argue that Crown copyright in Canada has retarded access to and the availability of government information, including not only legislation and case law but other types of government information relevant to legal research. Comparisons will be made to the United States, where there is no Crown copyright, on the availability of government information and its impact on access to law-related information.

Chapter 5 will explore the trend towards a “shrinking information commons” and the phenomena of increasing private control of public goods. I will look at the role of the World Wide Web in providing public access to the law using free online resources and the impact of a “shrinking” information commons and the commercialization of the Internet. The commoditization of information generally and of law-related information specifically is a growing trend and risks hampering wide access to law-related

information by all sectors of society. Government information policies will also be examined.

The final area of focus – Chapter 6 – will be a brief review of the 1975 *Access to the Law* Friedland study, previously mentioned, by summarizing its research findings and addressing the impact of the Internet and other technologies thirty years after the study was conducted. Using Friedland's study criteria, I will argue that access to law-related information in Canada has definitely improved in certain areas since 1975 but that the ability of the average Canadian to fully comprehend and apply the law-related information they have found remains problematic. Included will be a look to the future to examine the role to be played by various stakeholders, including governments, private publishers, public interest groups and lawyers, regarding access to law-related information. I will recommend a number of steps that stakeholders should take in order to improve access to law-related information in Canada in the digital age. Despite the concerns raised regarding the difficulty for the average person to access law-related information, the future does bring some hope. More specifically, I will be examining the role of technology in improving access to law-related information in Canada.

## **Chapter 1**

### **Access to Law-Related Information as a Fundamental Right**

- 1.1 Definitions – Meaning of “Access to Law-Related Information”
- 1.2 Access to Law-Related Information and the Rule of Law
- 1.3 Access to Law-Related Information around the World
- 1.4 Access to Law-Related Information in Canadian Jurisprudence

This chapter will explore the argument that access to law-related information in Canada is – or should be – a fundamental right. For many, this should not be too controversial an argument; however, others may take it for granted that the right exists but fail to realize that such a right is not always effectively realized. Another issue is the extent of the right to access law-related information – does the right, for example, require the government to take positive steps to provide the information? As will be seen below, courts are quite deferential in some circumstances in upholding the right of the government to rely on statutory exceptions to be exempt from providing information under access to information legislation. In addition, although the right to receive information is constitutionally entrenched, this right is usually regarded as a “negative” right that limits the government from preventing access in the appropriate situation and not a “positive” right that requires the government to provide the information. To examine these issues, I will first explore the meaning and scope of “the right to access law-related information” in Canada and what is meant by both “access” and by “law-related information.” With this definitional framework in mind, I will then look to the

nature of the right as an essential component of the rule of law; in other words, I will argue that the rule of law (in the broad, democratic sense) cannot survive if there is not also a right to access law-related information. Following this, I will provide a brief comparative overview how international law and nations other than Canada respond to the notion of a right to access law-related information. Finally, in this chapter I will look at the vibrancy of the right to access law-related information and how it manifests itself in Canadian jurisprudence. An understanding of the basis for the existence of access to law-related information as a fundamental right will lay the foundation in subsequent chapters for more detailed analyses regarding factors that impair the right, including, for example, such things as the complexity of the Canadian legal system (Chapter 2), the small size of the Canadian legal publishing industry (Chapter 3), the existence of Crown copyright as a deterrent to the free flow of law-related information (Chapter 4) and the transformation of law-related information as a public good into a private good and confusing government information policies (Chapter 5).

## **1.1 Definitions – Meaning of “Access to Law-Related Information”**

Access to law-related information will likely mean different things to different people. In some ways it is narrower than “access to the law,” which ordinarily raises issues of the ability (or, in most cases, the inability) of the average citizen to litigate issues before the courts due to the cost of litigation and hiring a lawyer, cutbacks in legal aid funding, civil procedure complexities and other structural barriers. But “access to law-related information” *is* related to “access to the law” and some overlap in discussion and analysis will occur, where relevant, such as the complexities within the legal system

that act as barriers to lay litigants both in the procedures and costs involved but also in the difficulties in understanding the law and one's legal rights or options. Access to law-related information is relevant not only for persons wishing or needing to enforce their legal rights in court (including lay litigants and their non-lawyer representatives and also including lawyers themselves); it is also relevant to a broad range of society, including, for example, journalists who wish to investigate accountability by officials within the government or legal system and researchers wishing to obtain information and other law-related data to support their research. As such, access to law-related information is an aspect of "access to the law" with a focus on the information components of such access.

### **1.1.1 Meaning of "Access"**

In this thesis, I will use the word "access" in the phrase "*access* to law-related information" to mean the ability of the average person to *find* or *obtain* law-related information in any possible manner, whether print-based or online, incurring little or only reasonable costs in so doing. Thus, for example, this would include such things as the ability to look up (in print or online) a section of the *Criminal Code*, a tax interpretation bulletin or a local municipal bylaw regarding fence heights in a residential neighborhood. The issue of the *cost* of accessing this information is a complex one that will be discussed in more detail later on – for example, if there is a fundamental right to access law-related information, does this by necessity require that such access be free? In addition, my analysis will also look at both print and online access since in some cases – such as historical legislative research, for example – there is no choice but to use print materials.

And with the growing importance and availability of the Internet, it will be important to consider how access to information has changed as a result of new technologies.

Although the foregoing definition of access is relatively straightforward, I will also at times be using a broader definition of “accessing” to also encompass the notion of “understanding” or “comprehending,” a notion raised by Friedland in his study.<sup>1</sup> The rationale for this enhanced meaning of access is simple: the ability to access law-related information is greatly diluted if the information itself cannot be understood. In other words, if one of the main purposes of the right to access law-related information is, for example, to allow persons to find information that would allow them to defend or protect their legal rights, the right to access is rendered meaningless if the persons cannot understand or apply that information. I will comment throughout this thesis on this expanded notion of “access and comprehend” since, at times, it may be asking too much to expect that all providers of law-related information (i.e., private legal publishers, for example) make their information *comprehensible* for all persons in addition to also making it *accessible*. Nonetheless, the relationship between access and comprehension is important and cannot be overlooked.

### **1.1.2 Meaning of “Law-Related Information”**

The other major component of the phrase under consideration is “law-related information,” a potentially broad term capable of many meanings. Chapter 2 will highlight some of the complexities of the Canadian legal system that affect access to law-

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<sup>1</sup> *Supra*, Introduction, note 3 at 4-5.

related information; in that chapter, I will expand upon the different types of law-related information, primarily in the context of individuals seeking to enforce or learn about their legal rights (although, as already mentioned, the need to access law-related information arises in other circumstances, such as access to this information by journalists or researchers). For the purpose of my discussion at this stage, I will use the phrase “law-related information” to generally include the following types of information:

- **Legislation**: An important source of the law includes statutes, regulations, orders-in-council and other related legislative documents, including such things as Hansard transcripts and Parliamentary committee reports, for example. In Canada and other federal states, there is legislation at both the federal and provincial level (and also a third level of legislation at the municipal level in the form of municipal bylaws). As will be seen, current legislative materials are increasingly being made available online for free by governments but historical legislative materials remain largely print-bound. Researching legislation in Canada is difficult, even for experienced researchers.<sup>2</sup>
- **Case law**: Another important primary source of law in Canada is case law – or the common law – made up of the decisions of judges at all levels of courts, and to a slightly different extent, the decisions of administrative tribunals and arbitrators. In Canada, there are very few “official” reporters<sup>3</sup> and most Canadian courts accept any reliable version of a case. And although only

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<sup>2</sup> “Despite the importance of legislation to our legal system, very few people enjoy conducting legislative research” – Ted Tjaden, *Legal Research and Writing*, 2nd ed. (Toronto: Irwin Law, 2004) at 52. There are a number of reasons why legislative research is so difficult, ranging from arcane legislative terminology and procedure, delays in publishing and the use of print-based “Tables of Public Statutes” to update legislation in the traditional manner.

<sup>3</sup> The *Supreme Court Reports* and the *Federal Court Reports* are regarded as “official” reporters because they are both issued directly by the courts by legislative degree – see the *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 17 and the *Federal Court Act*, R.S.C. 1985, c. F-7, s. 58. The *Ontario Reports* are concerned “semi-official” since, although published by a private publisher (Butterworths Canada), they are authorized through the Law Society of Upper Canada. All other current print reporters in Canada (e.g., *Dominion Law Reports*) are concerned “unofficial” since they are published by private, commercial publishers.



*Canadian* case law is generally binding on Canadian courts, case law from jurisdictions from outside of Canada can have persuasive value and is also sometimes important and therefore needed for legal research.<sup>4</sup> Case law is also increasingly found online but, as will be seen, it is a much more chaotically organized form of legal literature (in both its print and online versions) compared to legislation. As such, finding and researching cases can be daunting at times, even for experienced researchers.

- **Government information**: Although legislation and case law are probably the most important types of law-related information for those seeking to protect or learn about their legal rights, there is a wide range of government information that is also relevant to legal research. This type of government information would include such materials as tax interpretation bulletins, policy/position papers, law reform reports, statistics and surveys, to name just a few examples of different types of government-produced information. As will be seen in Chapter 4, a lot of government information in Canada – above and beyond legislation and case law – is subject to Crown copyright, something which can hinder access to the law. In addition, Canadian governmental information policies (discussed in the final two chapters), such as retention policies and privacy policies, also affect access to this type of law-related information.
- **Personal information**: Another type of law-related information includes personal information that is gathered by or on behalf of the government or other organizations that has the potential to impact one's legal status. This information can range from health and medical records, one's credit rating and other financial information. Section 2 of Ontario's *Freedom of Information and Protection of Privacy Act*,<sup>5</sup> for example, has a very broad definition of "personal information":

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<sup>4</sup> Tjaden, *supra* note 2 at 135-136.

<sup>5</sup> R.S.O. 1990, c. F.31.

s. 2(1) “personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Personal information is, as might be expected, subject to a number of protections – discussed below – that affect who can access that information and what type of personal information may be affected. Although “privacy law” concerns are generally beyond the scope of this thesis, I will be examining the relationship between privacy law and access to law-related information when these interests intersect.

- **Secondary legal literature**: One final category of law-related information falls into the category of “secondary” legal literature, being books, journals, encyclopedias, case law digests, indexes, websites and other materials that provide commentary or explain the law. Typically, by their nature, secondary

legal resources lack the force of law and are not binding on the courts, but they can be an important source of information about the law and help explain the law. As will be seen in Chapter 2, secondary literature, such as books and journals, were traditionally print-based and relatively expensive. In recent years, there has been a move for some publishers to create online secondary legal resources with value-added features, but many of these online versions are not free or publicly available.

As a general rule, most legislation, case law and government information is – or should be – freely and publicly available to an individual. There are, however, some exceptions to the right of an individual to access some types of law-related information.

- **Certain court proceedings (publications bans and family law):**

As a general rule, court proceedings and documents in court files are publicly accessible in Canada.<sup>6</sup> The “open courts” principle is well-established in Anglo-American jurisprudence, being recently described by the Supreme Court of Canada as “a hallmark of a democratic society” that applies to all judicial proceedings.<sup>7</sup> It has been defined as “the right to be present in the courtroom as the proceedings are conducted and the right to access the court record and docket information upon which the judicial disposition was made.”<sup>8</sup> However, there are limitations on the principle. These limitations typically arise when there is a matter before the court, where, if exposed to public scrutiny (particularly by the media), the rights of the accused or other parties before the court will be severely prejudiced. In these circumstances, there may be an application by the concerned party or his or her lawyer to have the court file sealed or a publication ban ordered,

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<sup>6</sup> See, for example, s. 137 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides: “On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.”

<sup>7</sup> *Vancouver Sun, Re* (2004), [2004] 2 S.C.R. 332, 2004 SCC 43 ¶ 23.

<sup>8</sup> Judges Technology Advisory Committee, “Background Paper on Open Courts, Electronic Access to Court Records, and Privacy” at 18 (May 2003). Available online: <<http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf>>.

which is then in turn sometimes opposed by the media or other members of the public. Section 137(2) of the Ontario *Courts of Justice Act*, for example, permits a court to “seal” the file:

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

The sealing of a file is “to be resorted to sparingly, in the clearest of cases and on the clearest of materials”<sup>9</sup> and there is a presumption in favour of public access with the burden of proof resting with the person opposing public disclosure.<sup>10</sup>

Cases where the sealing of the file is likely to be granted include family litigation files (especially where children are involved) or cases where competitors would obtain access to trade secrets or other unfair advantages if the file is not sealed.<sup>11</sup>

In criminal law cases, there is also a presumption that trials will be held in open court, but a judge may, on specific grounds, exclude all or any members of the public from the court room for all or part of the proceedings.<sup>12</sup>

Also, under s. 486 of the *Criminal Code*, a judge may also order a ban on publication on the identity of a complainant or witness in certain cases<sup>13</sup> or in other cases where the judge is satisfied that the order is necessary for the proper administration of justice.<sup>14</sup> There are also provisions allowing for publication bans in other criminal law circumstances, including for preliminary inquiries<sup>15</sup> and for proceedings involving young offenders.<sup>16</sup> A review of Canadian *Charter* cases on publication bans and sealing of court files indicates that courts enter into

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<sup>9</sup> *S. (P.) v. C. (D.)* (1987), 22 C.P.C. (2d) 225 (Ont. H.C.) at 231.

<sup>10</sup> *CTV Television Inc. v. Ontario Superior Court of Justice* (2002), 59 O.R. (3d) 18 (C.A.).

<sup>11</sup> *McCormick v. Newman* (1986), 15 C.P.C. (2d) 1 at 3 (Ont. Master).

<sup>12</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 486(1). The specific grounds on which the trial may be closed to the public include: where the judge is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice, or that it is necessary to prevent injury to international relations or national defence or national security.

<sup>13</sup> *Ibid.*, s. 486(3).

<sup>14</sup> *Ibid.*, s. 486(4.1).

<sup>15</sup> *Ibid.*, ss. 539 and 542(2).

<sup>16</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1, ss. 110-111.

a balancing exercise to ensure that limitations to the “open courts” principles are kept to the necessary minimum.

In *MacIntyre v. Nova Scotia (Attorney General)*,<sup>17</sup> a decision pre-dating the *Charter*, at issue was the request by a C.B.C. investigative journalist to access a number of sworn informations used by the police to obtain search warrants in an ongoing investigation. In deciding whether to provide such access, the Court was guided by several broad policy considerations, including “respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of ‘openness’ in respect of judicial acts.”<sup>18</sup> In ruling that a member of the public could inspect a search warrant after it has been executed (and the information on which it is based), the Court (in a 5-4 majority) held that there is a presumption in favour of public access to the courts and court information and that the burden of contrary proof lies upon the person who would deny the exercise of the right.<sup>19</sup>

In *Edmonton Journal v. Alberta (Attorney General)*,<sup>20</sup> the Supreme Court of Canada held that provincial legislation imposing tight restrictions on the publication of information relating to matrimonial proceedings was overly broad and hence unconstitutional under the *Charter*. In so holding, Cory J. emphasized the importance of open courts to freedom of expression, democracy and the rule of law:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s. 2(b) in absolute terms which distinguishes it, for

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<sup>17</sup> [1982] 1 S.C.R. 175.

<sup>18</sup> *Ibid.* ¶ 53.

<sup>19</sup> *Ibid.* ¶ 70.

<sup>20</sup> [1989] 2 S.C.R. 1326.

example, from s. 8 of the Charter, which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances . . . .

There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public . . . .

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.<sup>21</sup>

In *Dagenais v. Canadian Broadcasting Corp.*,<sup>22</sup> at issue was a court order that proposed to ban the broadcast by the C.B.C. of the show *The Boys of St. Vincent*. The ban was sought by four accused who were former or present Catholic priests charged with offences similar to those in the fictional television drama; the accused argued that their current and upcoming trials would be prejudiced by the negative publicity. The Supreme Court of Canada, in overturning the publication ban, ruled that where a judge has discretion to order a publication ban, he or she must exercise that discretion “within the boundaries set by the principles of the *Charter*.”<sup>23</sup> The court established a test that a publication ban should only be ordered when:

- (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.<sup>24</sup>

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<sup>21</sup> *Ibid.* ¶ 78, 80 and 84.

<sup>22</sup> [1994] 3 S.C.R. 835.

<sup>23</sup> *Ibid.* ¶ 71.

<sup>24</sup> *Ibid.* ¶ 77.

Likewise, in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*,<sup>25</sup> the court also emphasized the importance of open courts. In that case, the Supreme Court of Canada held that the trial judge incorrectly excluded the public and media from the courtroom during the sentencing portion of the accused's trial on sexual assault charges. La Forest J. emphasized the importance of the principle of "open courts" in relation to the freedom of expression and freedom of the press guaranteed by s. 2 (b) of the *Charter*:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.<sup>26</sup>

In *R. v. Mentuck*,<sup>27</sup> at issue was a publication ban over evidence gathering by undercover police in the prosecution of the accused. In partially upholding the ban regarding the names and identities of the officers involved, the Supreme Court of Canada removed the ban regarding the operational aspects of the investigation. In doing so, the Court reformulated the test in *Dagenais* that a judge must consider in deciding whether to order a publication ban (with the test subsequently being referred to by many courts at the *Dagenais/Mentuck* test):

A publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.<sup>28</sup>

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<sup>25</sup> [1996] 3 S.C.R. 480.

<sup>26</sup> *Ibid.* at 496.

<sup>27</sup> [2001] 3 S.C.R. 442, 2001 SCC 76.

<sup>28</sup> *Ibid.* ¶ 32.

Before a ban will be ordered, the risk in the first part of this test to the administration of justice “is a *serious* danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.”<sup>29</sup>

In *Re Vancouver Sun*,<sup>30</sup> the Supreme Court of Canada was called upon to rule on the extent of the open court principle in the context of an investigative hearing by the Crown relating to the Air India terrorist attacks. In that case, the Crown sought and obtained an order that its investigative hearing involving a potential Crown witness be held *in camera*. Although the Supreme Court of Canada held that the identity of the potential witness was properly kept confidential,<sup>31</sup> the Court otherwise held that the hearing should have been kept open to the public, based on the open courts principle:

Public access to the courts guarantees the integrity of judicial processes by demonstrating “that justice is administered in a non-arbitrary manner, according to the rule of law” . . . . Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public’s understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein . . . . The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression . . . . The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions . . . . Consequently, the open court principle, to put it mildly, is not to be lightly interfered with . . . .

This Court has developed the adaptable *Dagenais/Mentuck* test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the Oakes test . . . . The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial . . . and may include privacy and security interests.

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<sup>29</sup> *Ibid.* ¶ 34.

<sup>30</sup> *Supra* note 7.

<sup>31</sup> *Ibid.* ¶ 47.



While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban . . . ; is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances . . . ; or under rules of court, for example, a confidentiality order . . . . The burden of displacing the general rule of openness lies on the party making the application . . . .<sup>32</sup>

In *Toronto Star Newspapers Ltd. v. Ontario*<sup>33</sup> – one of the most recent pronouncements by the Supreme Court of Canada on the open courts principle – the Court confirmed that the *Dagenais/Mentuck* test applies even to search warrant *applications*. In that case, the Court upheld the setting aside of a sealing order on search warrants in relation to a provincial investigation of a meat packing plant, except for the names of the confidential informants. One final note on the “open courts” principle – consistent with the notion of open courts is the philosophy and mandate of legal information institutes around the world (which includes the Canadian Legal Information Institute<sup>34</sup>). Their philosophy, which will be touched upon in Chapters 5 and 6, is that free access to law-related information (and court decisions) is essential:

Legal information institutes of the world, meeting in Montreal, declare that:

- Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;
- Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;

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<sup>32</sup> *Ibid.* ¶ 25-26, 28, 31.

<sup>33</sup> 2005 SCC 41.

<sup>34</sup> Canadian Legal Information Institute (CanLII), “Home Page.” Available online: <<http://www.canlii.org>>. CanLII will be discussed in more detail throughout, particularly in the final two chapters.

- Independent non-profit organisations have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published.<sup>35</sup>
- **Certain types of government information:**

Although federal and provincial legislation<sup>36</sup> provide a right of access to records in the custody or under the control of a government institution, there are also a number of exceptions to this right of access. The most important exceptions that impact legal research and the right to access law-related information fall into the following categories<sup>37</sup>:

- **Cabinet records and advice to government:** Current Cabinet records at the federal and provincial level are not accessible and the Crown may resist production of such records.<sup>38</sup> In addition, section 39(1) of the *Canada Evidence Act*,<sup>39</sup> for example, gives broad power to the Crown to protect such information:

39. (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

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<sup>35</sup> World Legal Information Institute, "Declaration on Free Access to the Law" (October 2002). Available online: <<http://www.worldlii.org/worldlii/declaration/>>.

<sup>36</sup> See, for example, the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

<sup>37</sup> See "Access to Information and Protection of Privacy," *Canadian Encyclopedic Digest*, 3rd ed. (Ontario), Vol. 1, Title 1.1, §§ 33-65. I have used the same categories as this publication for sake of convenience.

<sup>38</sup> For an example of a provincial statute that restricts access to Cabinet records, see the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1). In Ontario, "current" for this purpose means the most recent 20-year's worth of Cabinet records. The protection period varies across jurisdictions but is generally in this range.

<sup>39</sup> R.S.C. 1985, c. C-5.

In this section, “confidences of the Queen’s Privy Council for Canada” is defined broadly and includes such things as proposals made to Cabinet, discussion papers, Cabinet agendas and draft legislation.<sup>40</sup>

When courts interpret this section, they have typically shown extreme deference to the claim by the government to withhold production of the Cabinet-related information. In *Singh. v. Canada (Attorney General)*,<sup>41</sup> for example, the Federal Court of Appeal, upheld the validity of s. 39 of the *Canada Evidence Act*. In that case, the appellants sought production of government records surrounding the conduct of members of the R.C.M.P. at the 1997 Asia-Pacific Economic Co-operation conference where the appellants allege their rights as protesters were violated by the police. In response to a request for such documents at a public inquiry, the clerk of the Privy Council filed certificates under s. 39(1) of the Act objecting to the disclosure of government records on the ground that the information in certain documents constituted confidences of the Privy Council. In dismissing the appellants action that this section was *ultra vires* and inconsistent with ss. 2(b) and 7 of the *Charter*, the Court acknowledged the obvious importance of the secrecy of Cabinet deliberations to our system of government and upheld the refusal to have the Cabinet records disclosed.<sup>42</sup>

More recently, in *Babcock v Canada (Attorney General)*,<sup>43</sup> at issue was a lawsuit by Crown lawyers against the government for breach of contract and breach of fiduciary duty as a result of their salaries being lower than Crown lawyers in Ontario. An issue arose over some of the documents listed by the Crown and whether Cabinet confidentiality under s. 39 of the *Canada Evidence Act* applied to prevent disclosure of some of the documents where the Clerk of the Privy Council provided the necessary certification under the Act. The majority of the

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<sup>40</sup> *Ibid.*, s. 39(2).

<sup>41</sup> (2000) 183 D.L.R. (4th) 458, 251 N.R. 318, [2000] 3 F.C. 185 (C.A.), leave to appeal to S.C.C. refused, (2000) 259 N.R. 400 (note).

<sup>42</sup> *Ibid.* ¶ 21.

<sup>43</sup> [2002] 3 S.C.R. 3, 2002 SCC 57.

Supreme Court of Canada held that the s. 39 certificate, properly certified, prevented disclosure of the Cabinet documents, unlike the position at common law that at least allowed the court to balance the competing interests.<sup>44</sup> In applying the *Singh* decision, the Court ruled that s. 39 did not offend the Preamble to the *Charter*:

I share the view of the Federal Court of Appeal [in *Singh*] that s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary. It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.<sup>45</sup>

- **Law enforcement:** Another category of government information that is subject to restricted access is information relating to police investigations that could, for example, lead to the identification of a confidential police informant or that might otherwise harm the safety of a police officer.<sup>46</sup>

In *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*,<sup>47</sup> at issue before the Ontario Divisional Court was a request by the Criminal Lawyers' Association ("CLA") for the Ontario government to produce a 318-page police report, a memo and a letter that related to an official investigation by the provincial police into findings by a Superior Court of Justice trial judge that the *Charter* rights of two men accused of murder had been violated by "abusive

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<sup>44</sup> *Ibid.* ¶ 19-23.

<sup>45</sup> *Ibid.* ¶ 57.

<sup>46</sup> See, for example, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 14(1).

<sup>47</sup> (2004) 70 O.R. (3d) 332 (Div. Ct.), leave to appeal allowed, 2004 CarswellOnt 3875 (19 July 2004).

conduct” on the part of police and Crown officials.<sup>48</sup> The police investigation was related to the arrest and detention of two men accused of murder where the charges were subsequently dismissed as a result of police misconduct. Nine months after the charges were dismissed and an internal police investigation conducted, the police released a statement that their investigation revealed no misconduct by the police.<sup>49</sup> The government refused production of this report and supporting materials under sections of the Ontario *Freedom of Information and Protection of Privacy Act*<sup>50</sup> that exempt from disclosure government information relating to law enforcements records, solicitor-client privilege and personal privacy. The CLA sought a review of this refusal before the office of the Information and Privacy Commissioner of Ontario, but this appeal was dismissed. CLA then appealed that refusal to the Divisional Court of Ontario arguing that the refusal to produce the information violated CLA’s s. 2(b) freedom of expression under the *Charter* and also violated the fundamental constitutional principle of democracy:

Stripped to its essentials, the Applicant’s position is that members of the public have a general constitutional right – founded upon the s. 2(b) freedom of expression and the principle of democracy – to have access to government-held information and documentation, and to comment thereon, unless a balancing exercise, conducted on a case-by-case basis, demonstrates that what is in the public interest favours non-disclosure. To the extent that the *Freedom of Information and Privacy Act* excludes law enforcement records

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<sup>48</sup> *Ibid.* ¶ 3.

<sup>49</sup> *Ibid.* ¶ 6.

<sup>50</sup> *Supra* note 46.

and documentation protected by solicitor-client privilege from this “public interest override,” it is unconstitutional.<sup>51</sup>

In dismissing CLA’s appeal and upholding the action of the government in not releasing this information, the Court noted that the Act had two purposes: “(a) to provide a statutory right to access to government information where no such general right existed previously – subject to specific exemptions – and (b) to protect personal privacy.”<sup>52</sup> The Court specifically rejected CLA’s argument that the principle of democracy mandated openness and access to documents such as documents relating to the police’s internal investigation:

The CLA argues that the principle of democracy necessarily includes a principle that institutions fundamental to our society - like the courts and the criminal justice system - must be subject to scrutiny and open discussion. Information concerning their operation must be accessible to the public, based on this governing principle of openness and subject to reasonable limits and restrictions imposed in the public interest . . . . 39

I do not accept this submission. As Professor Hogg has noted, “unwritten constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy” and the courts should be cautious about invalidating government initiatives on the basis of such principles . . . . In *Babcock v. Canada (Attorney General)* . . . , the Supreme Court rejected the argument that s. 39 of the *Canada Evidence Act*, which allows the federal government to withhold cabinet documents from court proceedings to which the documents are irrelevant, contravened unwritten constitutional principles. At para. 55, McLachlin C.J. noted that “the unwritten principles must be balanced against the principle of Parliamentary sovereignty.”<sup>53</sup>

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<sup>51</sup> *Ibid.* ¶ 32.

<sup>52</sup> *Ibid.* ¶ 16.

<sup>53</sup> *Ibid.* ¶ 39-41.

In so holding, the Court reasoned that principles of democracy and other unwritten constitutional principles are already embedded in the s. 2(b) freedom of expression and that it was therefore improper or unnecessary to consider these principles separate from the balancing mechanisms provided under the *Charter*:

. . . [I]t would be redundant to apply the unwritten principle of democracy as a separate ground for attacking the purported governmental restriction on the Applicant's expressive activity. Moreover, to do so would undermine the equilibrium mechanism carefully put in place by the Charter, namely, the constitutional entrenchment of freedom of expression in s. 2(b) balanced by the s. 1 saving justification. If the unwritten constitutional principles are imbedded in the s. 2(b) freedom in the first place then it does not advance the argument to reconsider them, either separately, or under the guise of being combined with the s. 2(b) analysis. I would therefore not give effect to the Applicant's submissions based upon the unwritten constitutional principle of democracy.<sup>54</sup>

Of significance is the Court's ruling that there is no positive obligation on the government to provide access to information to allow freedom of expression to occur and that there is therefore no constitutional obligation upon the government to provide access to the information in question:

[This case] raises the question of whether a positive obligation on the part of government to provide access to information in order to facilitate expressive activity is a component of the s. 2(b) right. It is in this context that the question of balancing the public interest arises . . . .

In my opinion, the authorities do not support the Applicant's position and I would be reluctant to extend the law to establish that there is a constitutional right to know, or a positive obligation on the part of government to disclose information - even subject to public interest balancing - in the circumstances of this case.<sup>55</sup>

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<sup>54</sup> *Ibid.* ¶ 44.

<sup>55</sup> *Ibid.* ¶ 46, 58.

- **Government relations:** The government may also refuse production of documents that could reasonably be expected to prejudice international affairs or intergovernmental relations.<sup>56</sup>
- **Third party information:** Governments are also give fairly wide latitude to restrict access to information that might prejudice the interests of a third party, unless the government has the consent of that third party or there is a compelling public interest that clearly outweighs the interests of the third party.<sup>57</sup> Examples of “third party information” that will not likely be producible include such things as trade secrets of a third party; financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party; information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.<sup>58</sup>
- **Economic and other interests:** The government may also be able to resist production of its own information that contains valuable information, including such things as trade secrets or financial, commercial, scientific or technical information of monetary value that it owns.<sup>59</sup>

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<sup>56</sup> See *supra* note 46, s. 23 and the *Access to Information Act*, R.S.C. 1985, c. A-1, s. 14.

<sup>57</sup> *Access to Information Act*, R.S.C. 1985, c. A-1, s. 20(1).

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

<sup>59</sup> *Ibid.*, s. 18(a).



- **Solicitor-client privilege:** Likewise, the head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.<sup>60</sup>
- **Personal privacy:** The head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in s. 3 of the *Privacy Act*<sup>61</sup> unless that person has the consent of the individual concerned, the information is already publicly available or unless the disclosure falls into the list of exceptions in s. 8 of the *Privacy Act*.<sup>62</sup>
- **Information subject to privacy laws:** A series of primarily provincial legislation and the federal *Personal Information Protection and Electronic Documents Act*<sup>63</sup> protect personal information and limit access to such information, often in (but not limited to) the fields of medical and credit information.

In Ontario, for example, regarding medical information, s. 52(1) of the *Personal Health Information Protection Act, 2004*<sup>64</sup> provides that an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian subject to a list of enumerated exceptions (such as where the granting of access to the medical information could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the individual<sup>65</sup>). Section 31 of that same Act forbids a health information custodian who collects personal health information from using it or disclosing it unless required by law to do so.

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<sup>60</sup> *Ibid.*, s. 23.

<sup>61</sup> R.S.C. 1985, c. P-21.

<sup>62</sup> *Supra* note 46, s. 19(1).

<sup>63</sup> S.C. 2000, c. 5.

<sup>64</sup> S.O. 2004, c. 3, Schedule A.

<sup>65</sup> *Ibid.*, s. 52(1)(e)(i).

- **Information subject to licensing/password control:** Another very large source of law-related information in Canada resides on commercially owned databases, including, but not limited to, those owned by Quicklaw, LexisNexis, WestlaweCARSWELL, Canada Law Book, Maritime Law Book and SOQUIJ. The information on these databases includes both public domain material (statutes and reasons for judgment from court decisions) and proprietary or copyrighted material (books and journal articles, for example, and headnotes added to the cases by the database providers). In most situations, access to these databases is for a fee (often in the range of \$200 or more per hour) and requires an account name and password.

Thus, as can be seen, there are a number of restrictions – largely arising out of confidentiality and security concerns – that are placed on accessing certain types of law-related information. For now, it is sufficient to be aware of these restrictions. As my analysis proceeds, however, it will be necessary to constantly question the need and scope of these restrictions and how new technologies impact these issues.

With this broader understanding of the types of “law-related information” and some of the broader types of “limitations” that affect access to some of these types of law-related information, it is time now to look at the relationship between access to law-related information and the rule of law.

## **1.2 Access to Law-Related Information and the Rule of Law**

The rule of law in Canada is a fundamental aspect of our legal tradition – the preamble to the *Charter* says as much: “Whereas Canada is founded upon principles that recognize the . . . *rule of law*” (emphasis added). One of the main attributes of a country

governed by the rule of law is that the rules that govern its citizens are published and made available to everyone. Oft-quoted is Dicey's definition of the rule of law that incorporates three separate but related meanings. Professor Schneiderman describes it this way:

It refers to no one single idea, but to a cluster of ideas. It is a term often associated with the English legal scholar Albert Venn Dicey who described the 'rule of law' as a paramount characteristic of the English Constitution. It was comprised of three "kindred conceptions": (1) that government must follow the law that it makes; (2) that no one is exempt from the operation of the law - that it applies equally to all; and (3) that general rights emerge out of particular cases decided by the courts.<sup>66</sup>

In *The Reference re Quebec Secession*,<sup>67</sup> relying in part on Dicey's traditional definition, the Supreme Court of Canada's explanation of the rule of law inherently assumes a legal system with pre-established, stable rules accessible to all as a means of verifying compliance with the law:

The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law is "a fundamental postulate of our constitutional structure." As we noted . . . "[t]he 'rule of law' is a highly textured expression, importing many things . . . but conveying, for example, *a sense of orderliness, of subjection to known legal rules* and of executive accountability to legal authority." At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs . . .

. . . [T]he rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, *we explained . . . that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order . . ."* A third aspect of the rule of law is . . . that "the exercise of all public power must find its ultimate source in a legal rule." Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.<sup>68</sup> [emphasis added]

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<sup>66</sup> David Schneiderman, "Rule of Law" in "Constitutional Keywords", Centre for Constitutional Studies. Available online: <[http://www.law.ualberta.ca/ccskeywords/rule\\_law.html](http://www.law.ualberta.ca/ccskeywords/rule_law.html)> Date accessed: 15 April 2005, citing A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1885) at 175-84.

<sup>67</sup> [1998] 2 S.C.R. 217.

<sup>68</sup> *Ibid.* at ¶ 70-72.

In a country governed by the rule of law, access to law-related information is inherently tied to this right. Without access to law-related information – be it legislation, case law, court documents or government information – it is that much more difficult to verify what the law is or should be. This also makes it more difficult for public officials to be held accountable if the media or the public are unable or have difficulty in accessing the variety of law-related information that is integral to our legal and political systems. For some, the Internet holds great promise in improving access to this information and strengthening the rule of law:

One of the greatest promises of the global information infrastructure is improved public access to government information. As court decisions, legislative enactments, and rules of administrative agencies become available through the Internet's World Wide Web, the rule of law is strengthened. The legitimacy of public institutions increases when the public knows what the institutions are doing. Compliance with the law increases when the law is available. Accountability and quality of government decision-making improves when members of the public have information allowing them to express meaningful views before decisions are made.<sup>69</sup>

Tied to this notion of accountability as a component of the rule of law is the notion of transparency, that good government – and hence the rule of law – requires that governments operate transparently in an open manner:

A cornerstone of the human rights movement is establishing the rule of law; without the rule of law, the very meaning of the term “rights” dissipates. A foundational principle of the rule of law is governmental transparency, i.e., governments operating not secretly, but openly. One aspect of this transparency is ready access to the law. Having open and public laws that are relatively easily available is an important aspect of efforts to create or enhance the rule of law.<sup>70</sup>

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<sup>69</sup> Henry H. Perritt, Jr. and Christopher J. Lhulier, “Information Access Rights Based on International Human Rights Law” (1997) 45 Buff. L. Rev. 899.

<sup>70</sup> Steven D. Jamar, “The Human Right of Access to Legal Information: Using Technology To Advance Transparency and the Rule of Law” (2001) 1 Global Jurist Topics Article 6 at 1.

In connection to law-related information, transparency includes the entire range of law-related information discussed in the previous section, including the processes by which law-related information is generated:

Transparency refers to a cluster of related ideas, including governmental action in the open, the availability of information (particularly law), and accuracy and clarity of the information. Official action, which includes the content of laws and regulations, the processes of enacting law, and the processes involved in enforcing the law, is transparent to the extent that the information relating to those processes or that content is readily available to interested or affected persons.<sup>71</sup>

The rule of law therefore assumes a pre-existing, codified and stable set of laws. One manifestation of this is that, in many situations, citizens are “deemed” to know the law. Section 19 of the *Criminal Code*,<sup>72</sup> for example, states that ignorance of the law is not excuse as a defence to a crime. A similar rule also applies in a common law context – *ignorantia juris non excusat*. This maxim is a statement of the general applicability of rules of law and operates to preclude individuals from seeking to excuse themselves from criminal or other liability. In municipal law, for example, ignorance of the law is not an excuse for the failure to provide a municipality of statutorily-required notice of a claim (even where the notice period is very short, as often is the situation in possible claims against municipalities).<sup>73</sup>

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<sup>71</sup> *Ibid.* at 3.

<sup>72</sup> R.S.C. 1985, c. C-46.

<sup>73</sup> *Egan v. Saltfleet (Township)* (1913), 13 D.L.R. 884 (Ont. C.A.); *Biggart v. Clinton (Town)* (1903), 2 O.W.R. 1092 (H.C.), affirmed (1904), 3 O.W.R. 625 (C.A.).

### 1.3 Access to Law-Related Information around the World

Freedom of information is a fundamental right that is recognized at international law<sup>74</sup> and in the domestic law of most democratic nations throughout the world. The question remains, however, to what extent freedom of information translates into access to information and the extent to which these rights mandate positive obligations on governments to provide access to information as a corollary of freedom of information or freedom of expression laws.

#### 1.3.1 Access to Law-Related Information at International Law

In 1946, the General Assembly of the United Nations affirmed in Resolution 59(1) the importance of freedom of information as a fundamental human right:<sup>75</sup>

*Freedom of information is a fundamental human right* and . . . the touchstone of all the freedoms to which the United Nations is consecrated. [emphasis added]

Likewise, Article 19 of the *Universal Declaration of Human Rights*<sup>76</sup> affirms the right to receive information as part of the right to freedom of opinion and expression:

Everyone has the right to freedom of opinion and expression; *this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.* [emphasis added]

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<sup>74</sup> See, for example, Geoffrey A. Hoffman, “In Search of an International Human Right to Receive Information” (2003) 25 Loy. L.A. Int’l. & Comp. L. Rev. 165.

<sup>75</sup> GA, 1946, 65th Plen. Mtg.

<sup>76</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

Article 19(2) of the *International Covenant on Civil and Political Rights*<sup>77</sup> (the “ICCPR”) also affirms this right in slightly broader terms:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 19(3) of the ICCPR outlines that the right to receive information may be subject to limitations but only those that are provided by law and are necessary:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Meetings of the World Summit on the Information Society in 2001 were established by United Nations General Assembly Resolution 56/183 (21 December 2001). Participants in the World Summit include governments, UN bodies, IGO’s, NGO’s, civil society and the private sector. From its December 12, 2003 Declaration of Principles<sup>78</sup> come a number of endorsements in support of the right to access information:

1. We . . . declare our common desire and commitment to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life . . . .

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<sup>77</sup> 16 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

<sup>78</sup> *Supra*, Introduction, note 1.

4. We reaffirm, as an essential foundation of the Information Society, and as outlined in Article 19 of the *Universal Declaration of Human Rights*, that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.

24. The ability for all to access and contribute information, ideas and knowledge is essential in an inclusive Information Society.

25. The sharing and strengthening of global knowledge for development can be enhanced by removing barriers to equitable access to information for economic, social, political, health, cultural, educational, and scientific activities and by facilitating access to public domain information, including by universal design and the use of assistive technologies.

26. A rich public domain is an essential element for the growth of the Information Society, creating multiple benefits such as an educated public, new jobs, innovation, business opportunities, and the advancement of sciences. Information in the public domain should be easily accessible to support the Information Society, and protected from misappropriation. Public institutions such as libraries and archives, museums, cultural collections and other community-based access points should be strengthened so as to promote the preservation of documentary records and free and equitable access to information.

27. Access to information and knowledge can be promoted by increasing awareness among all stakeholders of the possibilities offered by different software models, including proprietary, open-source and free software, in order to increase competition, access by users, diversity of choice, and to enable all users to develop solutions which best meet their requirements. Affordable access to software should be considered as an important component of a truly inclusive Information Society.

The right to access information has also been repeatedly stressed by the Special Rapporteur Abid Hussain in his annual reports to the United Nations on the promotion and protection of the right to freedom of opinion and expression:

### III. ISSUES: A. The right to seek and receive information

11. The Special Rapporteur has consistently stated that the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own.



14. The Special Rapporteur is of the view that *the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems, including film, microfiche, electronic capacities and photographs.*

16. Finally, the Special Rapporteur supports the view that Governments have a responsibility to facilitate access to information which is already in the public domain such as the reports and recommendations of truth and reconciliation commissions, the State's reports to United Nations human rights treaty bodies, recommendations arising from consideration of the State's report by one of these treaty bodies, studies and impact assessments conducted by or on behalf of the Government in areas such as the environment and industrial development, and constitutional and legal provisions relating to rights and remedies. He notes that Governments may discharge this obligation for instance by systematically integrating information about key civic issues, such as human rights, international treaties binding on the State, elections and other political processes, into the education system and popularizing the information through the media. *Access to records such as court reports and parliamentary proceedings can be published in a timely fashion and disseminated through major public and university libraries throughout the country and, where technology permits, the Internet.*<sup>79</sup> [emphasis added]

In a more recent report, the Special Rapporteur called for governments to take legislative action to better implement access to information:

On that basis, the Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also

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<sup>79</sup> Report of the Special Rapporteur, Mr. Abid Hussain, "Promotion and Protection of the Right to Freedom of Opinion and Expression" E/CN.4/1998/40 (28 January 1998), pursuant to Commission on Human Rights Resolution 1997/26.

provide for a number of mechanisms to address the problem of a culture of secrecy within Government;

- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.<sup>80</sup>

### 1.3.2 Access to Law-Related Information in Other Countries

In addition to these rights at international law, most modern democracies have legislation that provides access to government information under freedom of information laws.<sup>81</sup> Less clear is the extent to which there is a constitutional right to information aside

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<sup>80</sup> Paragraph 44, Report of the Special Rapporteur, Mr. Abid Hussain, "Promotion and Protection of the Right to Freedom of Opinion and Expression" E/CN.4/2000/63 (18 January 2000), pursuant to Commission on Human Rights Resolution 1999/36.

<sup>81</sup> See, for example: Canada: *Access to Information Act*, *supra* note 36; United States: *Freedom of Information Act*, 5 U.S.C. 552 (1966); United Kingdom: *Freedom of Information Act 2000* (U.K.), 2000, c.

from access to information legislation. In many situations, the right to access or receive information is seen as a corollary of the freedom of expression but this usually does not translate into a positive obligation on the government to provide the information.

In the United States, the U.S. Supreme Court has repeatedly noted that the United States is a government of laws and not of men,<sup>82</sup> reflecting a basic ideology of the rule of law. Under the U.S. *Constitution*, the U.S. Supreme Court has also been quite clear that the freedom of expression guaranteed by the *Constitution* by necessity includes the right to receive information.

In *Martin v. Struthers*,<sup>83</sup> for example, at issue was whether the door to door pamphleting of a Jehovah's Witness violated a municipal bylaw forbidding such activity. The appellant argued that the bylaw violated her freedom of speech guaranteed by the First Amendment. In holding that her constitutional rights were violated, Mr. Justice Black held for the court that the right of freedom of speech or expression also includes the right to receive information:

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. *This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.* The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets.<sup>84</sup>  
[emphasis added]

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36; and Australia: *Freedom of Information Act 1982* (Cth.). For a useful overview of freedom of information legislation around the world, see: David Banisar, "Freedom of Information and Access to Government Record Laws around the World" (May 2004). Available online: <[http://www.freedominfo.org/survey/global\\_survey2004.pdf](http://www.freedominfo.org/survey/global_survey2004.pdf)>.

<sup>82</sup> See, for example, *Marbury v. Madison*, 5 U.S. 137 at 163 (1803). Also see Susan Nevelow Mart, "The Right to Receive Information" (2003) 95 Law Libr. J. 2 for an overview of American cases involving the right to receive information.

<sup>83</sup> 319 US 141 (1943).

<sup>84</sup> *Ibid.* at 143.

In *Griswald v. Connecticut*,<sup>85</sup> a case involving the criminalization of providing information on contraception, the U.S. Supreme Court again affirmed the right to receive information:

[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.<sup>86</sup>

However, both of these cases deal with improper interference by the government with a citizen's right to receive information; the cases do not automatically infer that the government has a positive obligation to provide access to information.

In a series of decisions involving requests by the press to access prisons to report on the conditions in them, American courts have refused to extend a constitutional right to "access" this sort of information since it is not a right extended to the general public and the government is not under a positive obligation to provide access to all information in its control.<sup>87</sup> In *Pell v. Procunier*<sup>88</sup> and *Saxbe v. Washington Post Co.*,<sup>89</sup> reporters were denied access to prisons to interview inmates because, as per the Court in *Pell*, the freedom of expression guaranteed by the Constitution prohibits the government from interfering with the press but "does not, however, require government to accord the press special access to information not shared by members of the public generally."<sup>90</sup>

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<sup>85</sup> 381 U.S. 479 (1965).

<sup>86</sup> *Ibid.* at 482.

<sup>87</sup> See Matthew D. Bunker, "Access to Government-Held Information in The Computer Age: Applying Legal Doctrine to Emerging Technology" (1993) 20 Fla. St. U. L. Rev. 543 at 550.

<sup>88</sup> 417 U.S. 817 (1974).

<sup>89</sup> 417 U.S. 843 (1974).

<sup>90</sup> *Supra* note 88 at 834.

Likewise, in *Houchins KQED, Inc.*,<sup>91</sup> a television station sought a court order to access a prison where it was alleged prisoners were being maltreated. In that case, the United States Supreme Court denied access arguing, in part, that the television station was not being denied information about prison conditions since it could obtain that information from receiving letters from inmates or interviewing recently released prisoners.<sup>92</sup> In denying access, the Court characterized the request to access the prison as *not* being the same as the right to receive information.<sup>93</sup> Furthermore, as the court reasoned, “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”<sup>94</sup> However, Mr. Justice Stevens, with the concurrence of two other judges, dissented and ruled that the prison policy that concealed knowledge of prison conditions violated freedom of expression, and he characterized the right of the public or media to receive information about prison conditions as more than just a negative right:

It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.<sup>95</sup>

In a footnote to the preceding quotation, Justice Stevens acknowledges that the right to receive or acquire information is not specifically mentioned in the Constitution but that sometimes this right must be protected by governmental action:

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<sup>91</sup> 438 U.S. 1 (1978).

<sup>92</sup> *Ibid.* at 7-8.

<sup>93</sup> *Ibid.* at 7.

<sup>94</sup> *Ibid.* at 8.

<sup>95</sup> *Ibid.* at 32.

. . .”[t]he protection of the *Bill of Rights* goes beyond the specific guarantees to protect from . . . abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . . The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers . . . .” It would be an even more barren marketplace that had willing buyers and sellers and no meaningful information to exchange.<sup>96</sup>

In the European Union, Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* provides for a right to receive information:

#### Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The “right to receive information” component of Article 10 has been interpreted in a number of cases, and although the right has been interpreted broadly it has not yet been interpreted so as to impose a positive obligation on governments to collect and disseminate information on its own initiative. An example of a broad interpretation of the right where there has been a purported restriction on information imposed by government was in *Open Door Counseling Ltd. v. Ireland*.<sup>97</sup> That case, like *Griswald*, involved the

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Open Door Counseling Ltd. & Dublin Well Woman Centre Ltd. v. Ireland*, App. Nos. 14234/88 & 14235/88, 15 Eur. H.R. Rep. 244 (1992). This case is discussed by Hoffman, *supra* note 74 at 5.

attempt by companies to provide abortion counseling services to pregnant women (in Ireland) to travel abroad to get abortion (since abortions were illegal in Ireland). In that case, the Supreme Court of Ireland issued an injunction against the companies, who appealed to the Commission. In determining that the injunction was invalid and violated Article 10, the Commission held that “the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman’s health and well-being” and that “[l]imitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.”<sup>98</sup>

In *Leander v. Sweden*,<sup>99</sup> even though Sweden has perhaps the broadest adoption in the European Union of a constitutional right to access public documents dating back hundreds of years,<sup>100</sup> the Swedish government opposed the request by Mr. Leander to access the security file held by the government on him when information in that file was used to deny him a position in a museum on a naval base. His action against the Swedish government before the European Court of Human Rights was also dismissed on a number of grounds, with the Court ruling on the freedom to receive information argument that Article 10 did not impose an obligation on the government to release documents to an

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<sup>98</sup> *Ibid.* at 266.

<sup>99</sup> (1987) 9 E.H.R.R. 433.

<sup>100</sup> See Inger Osterdahl, “Openness v. Secrecy: Public Access to Documents in Sweden and the European Union” (1998) 23 Eur. L. Rev. 336. Chapter 2, Article 1 of the Swedish *Constitution* guarantees freedom of information, including “the freedom to obtain and receive information and otherwise acquaint oneself with the utterances of others.

individual but acted as a limitation on the government from restricting a person from receiving information that others are trying to impart:

The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.

There has thus been no interference with Mr. Leander's freedom to receive information, as protected by Article 10.<sup>101</sup>

Likewise, in *Gaskin v. United Kingdom*,<sup>102</sup> the European Court of Human Rights limited the scope of the right to receive information. In that case, the applicant was a foster child who, upon attaining the age of majority, alleged that he was mistreated as a foster child and that he wanted to review details of his care and treatment from the records held by the Liverpool City Council regarding his various placements. After litigation with the Council, the Council agreed to make information from his files available to him but only where the various contributors to that information consented to the disclosure. Not all of the contributors consented, so the applicant brought his claim before the European Court of Human Rights, which, however, followed *Leander* to rule that the right to receive information was not violated in these circumstances:

The Court holds, as it did in *Leander v. Sweden*, that 'the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.' Also in the circumstances of this case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual.<sup>103</sup>

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<sup>101</sup> *Supra* note 99 at 456-57.

<sup>102</sup> (1990) 12 E.H.R.R. 36.

<sup>103</sup> *Ibid.* at 51.



Finally, in *Guerra v. Italy*,<sup>104</sup> in a majority ruling, the European Court of Human Rights applied *Leander* in ruling that Article 10 did not apply to oblige the Italian government to provide environmental information to residents adversely affected by a local chemical factory (but the Court did rule that Article 8, dealing with the right to respect for private and family life, had been violated):

The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, “basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him.” That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.<sup>105</sup>

In *Guerra*, however, in a concurring opinion, a number of judges ruled that Article 10 might impose a positive obligation on government to make information available, but not in this particular case:

In [deciding that Article 10 is not applicable in this case] I have put strong emphasis on the factual situation at hand not excluding that under different circumstances the State may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not otherwise come to the knowledge of the public.<sup>106</sup>

Additionally, Judge Jambrek, in a dissent, ruled that Article 10 could impose an obligation on a government to produce information that is in its possession and has been demanded by a member of the public who is a potential victim of an industrial hazard:

In my view, the wording of Article 10, and the natural meaning of the words used, does not allow the inference to be drawn that a State has positive obligations to provide information, save when a person of his/her own will demands/requests information which is at the disposal of the Government at the material time.

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<sup>104</sup> (1998) 26 E.H.R.R. 357.

<sup>105</sup> *Ibid.* 382.

<sup>106</sup> *Ibid.* 386-87.

I am therefore of the opinion that such a positive obligation should be considered as dependent upon the following condition: that those who are potential victims of the industrial hazard have requested that specific information, evidence, tests, etc., be made public and be communicated to them by a specific government agency. If a government did not comply with such a request, and gave no good reasons for not complying, then such a failure should be considered equivalent to an act of interference by the government, proscribed by Article 10 of the Convention.<sup>107</sup>

The *Guerra* decision was cited by the Ontario Divisional Court in the *Criminal Lawyers' Association* decision<sup>108</sup> but that Court refused to adopt in Ontario the dissenting opinion in *Guerra* that a government might be under a positive obligation to provide information in the appropriate circumstances.<sup>109</sup>

The foregoing examples of the right to receive information represent only a sampling of how this right has been legislated in a few democracies. As will be seen below, the right is also recognized in Canada, albeit in the same limited form of it generally being a “negative” right to stop the government from impairing the ability of a citizen to obtain information and not necessarily as a “positive” obligation to provide information.

#### 1.4 Access to Law-Related Information in Canadian Jurisprudence

Canada is a signatory to both the *Universal Declaration of Human Rights*<sup>110</sup> and the *International Covenant on Civil and Political Rights*.<sup>111</sup> As such, Canada recognizes the right and freedom to seek, receive and impart information. Moreover, in Canada, as in the United States and elsewhere, any right to receive information or access law-related

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<sup>107</sup> *Ibid.* at 387-88.

<sup>108</sup> *Supra* note 47.

<sup>109</sup> *Ibid.* at ¶ 82.

<sup>110</sup> *Supra* note 76.

<sup>111</sup> *Supra* note 77.

information is a corollary of the freedom of expression guaranteed by s. 2(b) of the *Charter*. However, as mentioned above, the right to receive information in Canada is typically enforced by courts only in the context where government restrictions (in the form of statutory provisions, for example) impair access to information and not in the context of creating a positive obligation on the government to provide such information.

*Re Klein and Law Society of Upper Canada*,<sup>112</sup> for example, is a decision where an attempt through law society regulations to limit what lawyers could say to the media was seen as an improper restriction on the right of the public to receive information. At issue in that case were rules of the Law Society that restricted lawyers from fee advertising and promoting themselves in the media. On the issue of restrictions on a lawyer contacting the media, a majority of the court held that the rule creating such restriction violated the *Charter* and was of no force or effect to the extent it interfered with the right to receive information:

In addition, the public has a constitutional right to receive information with respect to legal issues and matters pending in the courts and in relation to the profession and its practices. This right is substantially impaired by the rule in that it significantly restricts the right of the press and other media to offer – and the right of the public to receive and discuss – information of important public issues relating to the law and the operation of legal institutions.<sup>113</sup>

More recently, the Supreme Court of Canada in *Harper v. Canada (Attorney General)*,<sup>114</sup> a case involving limits on third party election advertising expenses, highlighted the importance of the right to receive information and its being the necessary corollary of the freedom of expression:

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<sup>112</sup> (1985) 16 D.L.R. (4th) 489 (Ont. Div. Ct.).

<sup>113</sup> *Ibid.* at 541.

<sup>114</sup> [2004] 1 S.C.R. 827.

The right to receive information is enshrined in both the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47. Canada is a signatory to both. American listeners enjoy the same right . . . . The words of Marshall J., dissenting, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775, ring as true in this country as they do in our neighbour to the south:

[T]he right to speak and hear – including the right to inform others and to be informed about public issues – are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the means indispensable to the discovery and spread of political truth.<sup>115</sup>

However, both *Klein* and *Harper* were cases dealing with the “negative” right, i.e., they were cases where the government had attempted to restrict access to information through, in the first case, “gagging” lawyers, and in the second case, creating rules that would have the effect of limiting what third parties could communicate to the public regarding their election platforms. In other Canadian cases involving the right to receive information in the context where it would require positive governmental action, courts have been loathe to impose positive obligations on the government. In *obiter dicta* in *Haig v. Canada*,<sup>116</sup> the Supreme Court of Canada suggested that a positive obligation on the government might be required in the correct circumstances. In that decision, Graham Haig was not eligible to vote in either the provincial referendum in Québec or the federal referendum across the rest of Canada regarding possible Québec separation. His lack of eligibility to vote arose because of being in the process of moving from Ontario to Québec and being unable to satisfy the residency requirements for voting in either

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<sup>115</sup> *Ibid.* ¶ 18.

<sup>116</sup> [1993] 2 S.C.R. 995.

jurisdiction. He filed application seeking a declaration and *mandamus* that he be enumerated to vote in the referendum. The Supreme Court of Canada, on hearing the case, ruled that Haig's constitutional rights had not been violated in these circumstances:

Both Canadian society and the courts have at all times recognized that freedom of expression is a fundamental value in Canada. This court has abundantly discussed the values underlying freedom of expression, and since those values are not in dispute here, it is not necessary to delve into them at great length. Nor is it in dispute that the activity of casting a ballot is an expressive one . . . .

As a starting point, I would note that case law and doctrinal writings have generally conceptualized freedom of expression in terms of negative rather than positive entitlements. In *The System of Freedom of Expression* (New York: Random House, 1970), Thomas Irwin Emerson, speaking of the United States Bill of Rights whose First Amendment provision is even more stringent than its Canadian Charter counterpart, observes at p. 627:

The traditional premises of the system [of freedom of expression] are essentially laissez-faire in character. They envisage an open marketplace of ideas, with all persons and points of view having equal access to the means of communications. In supporting this system, the First Amendment has played a largely negative role: it has operated to protect the system against interference from the government. Thus the issues have turned for the most part upon reconciling freedom of expression with other special interests that the government seeks to safeguard. *The development of legal doctrine has been primarily in the evolution of a series of negative commands.* (Emphasis added.)

Like its United States First Amendment counterpart, the Canadian s. 2(b) Charter jurisprudence has been shaped by these same foundational premises, focusing mainly on attempts by governments to place limitations on what can be expressed. The traditional question before courts has been: to what extent can freedom of expression be justifiably limited? The answer has been that individuals can expect to be free from government action the purpose or effect of which is to deny or abridge freedom of expression, unless the restraint is one that can be justified in a free and democratic society in accordance with s. 1 of the Charter.

It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under s. 2(b) of the Charter to provide *a particular platform* to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones.<sup>117</sup>

However, as mentioned, in reviewing academic commentary on the topic, the court hinted at the possibility that, in the correct circumstances, in order to fully protect or

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<sup>117</sup> *Ibid.* ¶ 68, 70-72.

guarantee the freedom of expression, the government may be required to act positively and that “a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the market-place of ideas”<sup>118</sup> since both “the resources and the very opportunities for speech may tend to be limited, whether by time, lack of money, unavailability of space, or even by our capacity to digest and process information”<sup>119</sup>:

The distinctions between “freedoms” and “rights”, and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this court . . . . *Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required.* This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, *or ensuring public access to certain kinds of information.*<sup>120</sup> [emphasis added]

To date, no Supreme Court of Canada decisions subsequent to *Haig* have “opened the door” (to use the metaphor from Kafka and a phrase from the Ontario Divisional Court in *Criminal Lawyers’ Association*) to extending the s. 2(b) freedom of expression right into a positive obligation on the part of the government to provide information. The *Haig* decision, as well as two other recent Supreme Court of Canada decisions where freedom of expression was limited to a “negative right”,<sup>121</sup> was cited by the applicants in *Criminal Lawyers’ Association*,<sup>122</sup> but the Ontario Divisional Court in *Criminal Lawyers’ Association* refused to apply the foregoing *obiter dicta* reasoning from *Haig* and denied

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<sup>118</sup> *Ibid.* ¶ 74.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.* ¶ 79.

<sup>121</sup> *Native Women's Assn. of Canada v. R.*, [1994] 3 S.C.R. 627 (denial of funding to applicant to attend Charlottetown Conference did not violate her freedom of expression) and *Delisle c. Canada (Sous-procureur général)*, [1999] 2 S.C.R. 989 (R.C.M.P. members rights not violated in not being allowed to form an independent employee association for R.C.M.P. members). In the first case, if the Court were to impose a positive obligation, this would have required the government to fund the applicant to attend the conference in order to realize her constitutional rights. The second case goes beyond mere non-interference by the government in the applicant’s right to form an employee’s association but involved the active legislative policy by the government to forbid such association.

<sup>122</sup> *Supra* note 47.

that the government had a positive obligation to provide access to the internal police report under discussion in that case. The decision in *Criminal Lawyers' Association* appears to be under appeal; as such, this issue may be re-addressed at least one more time.

## Conclusions

Access to law-related information means access to fundamentally important types of information that can greatly affect the legal rights of the average citizen. This access – to print or online materials – covers a broad range of information, including legislation, case law, government information, personal information (such as health or credit information) and secondary legal literature. Access to this sort of information is critical in a democracy that follows the rule of law since such access helps to ensure transparency in governmental action and the ability of average citizens to learn of and protect their basic legal rights. Freedom of expression and the right to receive information is recognized both at international law and by many countries throughout the world. In Canada, although there is no specific *Charter* right to access information, access to information legislation provides mechanisms for citizens to access certain government information that is often law-related, and the relatively strong enforcement of the “open courts” principle ensures that most court-related information will be relatively accessible. Canadian courts have interpreted the s. 2(b) freedom of expression right to include the right to receive and impart information, but these decisions reinforce the notion that the right to receive information, being a corollary to the s. 2(b) freedom of expression right, only prohibits undue restrictions by government on the exchange of information (i.e., it “prohibits gags”) but does not impose positive obligations on government to provide information (i.e., it does not “compel the distribution of megaphones”).

This is not to say, however, that in the appropriate cases, as suggested by the Supreme Court of Canada in *Haig*, that the government may be required to take active steps to ensure a meaningful exercise of freedom of expression or the right to receive information as part of the s. 2(b) *Charter* right. As suggested by the Court in *Haig*, “a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required” that might “take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.”<sup>123</sup> In the context of law-related information, for information such as case law or legislation, where there is an obligation or duty on the courts or governments to create such information, ensuring public access to this kind of information would certainly seem to fall within this type of s. 2(b) freedom of expression as envisioned in *Haig*. For other types of government information that falls within categories within access to information legislation where there are exceptions to disclosure (such as “government relations” or “economic interests”), courts are less likely to extend the freedom of expression right to impose an obligation for the government to disclose such information where the balancing of interests can otherwise be achieved under the applicable access to information legislation. The question of how effectively access to law-related information is realized is dealt with in the next chapter regarding complexities within the Canadian legal system and how these complexities impact access to law-related information.

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<sup>123</sup> *Supra* note 122.



## Chapter 2

### Complexity as a Factor Inhibiting Access to the Law in Canada

- 2.1 Canada's Mixed Systems of Law
- 2.2 Complexities within the Canadian Legislative Scheme
- 2.3 The Court System and the Impact of the Common Law
- 2.4 Consequences of Complexity of the Canadian Legal System

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

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<sup>1</sup> *Supra*, Introduction, note 3 at 6.

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

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

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

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

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

There is one overwhelming reality that I have learned since my call to the bar in 1958, and it is that the challenges facing the administration of justice in Ontario have grown hugely in the subsequent years. The increasing complexity simply reflects the development of an ever increasing complex society.

While I believe that the citizens of Ontario are very well served by the hundreds of men and women who discharge their daily responsibilities as judges with commitment, impartiality and fairness, all judges recognize that we must continue to strive to earn that confidence. The issues particularly related to access to justice and justice in a timely fashion will continue to demand the collective attention of the bar, government and the judiciary.<sup>4</sup>

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

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

to assume that they may also have difficulty in paying for the costs of online legal research on the commercial databases.<sup>5</sup>

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

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

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

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<sup>5</sup> See, for example, the concerns about cost and access raised by Melissa Barr, "Democracy in the Dark: Public Access Restrictions from Westlaw and LexisNexis" (2003) 11 Searcher 66.

<sup>6</sup> However, under ss. 800 and 802 of the *Criminal Code*, an accused *can* choose to be represented by an agent who is not a lawyer in summary criminal proceedings; however, the court will usually take steps to make sure the accused understands the consequences of doing so – see: *R. v. Romanowicz* (1999), 45 O.R. (3d) 506 (C.A.).

<sup>7</sup> 2003 FCT 568.

<sup>8</sup> *Ibid.* ¶ 4.

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

## 2.1 Mixed systems of law

Although there is much discussion in the literature about Canada’s bijuralism and the influence of the British common law and the French civil law on our legal system,<sup>10</sup>

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<sup>9</sup> Friedland Study, *supra*, Chapter 1, note 3 at 25-28 *et seq.*

<sup>10</sup> See, for example: Gerald Gall, *The Canadian Legal System*, 5th ed. (Toronto: Carswell, 2004) at 55-65 and 263-84; John E.C. Brierley, “Bijuralism in Canada” in *Contemporary Law: Canadian Reports to the*

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

### 2.1.1 The British Influence

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

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

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

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

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

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

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<sup>12</sup> (U.K.) 14 Geo. III, c. 83.

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

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

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

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

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

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

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<sup>14</sup> Fyson et al., *ibid.* at 10.

<sup>15</sup> Patrick Fitzgerald and Barry Wright, *Looking at Law: Canada’s Legal System*, 5th ed. (Toronto: Butterworths, 2000) at 24.



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

### **2.1.2 The French Influence**

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

. . . Québec, and therefore Canadian, bijuralism offers particular challenges to a number of constituencies functioning within the legal community – to legal education whether for teachers or students, to legal practitioners whether notaries or lawyers, and to judges whether in Québec or federal courts called upon to apply Québec and federal law. Bijuralism makes for complex law . . . .

At another level, as well, the historical genealogy of the Québec-Canadian bijuralism also supposes, as already suggested, an ability to be comfortable in two languages, French and English, in so far as current Québec or federal law may still require a return to unilingual continental French or English historical sources. The present climate of language debate in Canada, and especially in

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

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

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

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

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

<sup>16</sup> E.C. Brierley, *supra* note 3 at 38.

<sup>17</sup> Roderick A. Macdonald, “Legal Bilingualism” (1996-97) 42 McGill L. J. 119) at 127. See also Marie-Claude Gervais and Marie-France Séguin, “Some Thoughts on Bijuralism in Canada and the World” at Department of Justice Canada, Publications – Available online: <[http://canada.justice.gc.ca/en/dept/pub/hfl/fasc2/fascicule\\_2a.html](http://canada.justice.gc.ca/en/dept/pub/hfl/fasc2/fascicule_2a.html)>.

<sup>18</sup> Macdonald, *ibid.* at 149-50.

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

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

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

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<sup>19</sup> Section 113, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.; the *Manitoba Act, 1870* (U.K.), 33 Vict., c. 3, s. 23; the *Constitution Act, 1982*, s. 18, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

<sup>20</sup> R.S.O. 1990, c. F-32.

<sup>21</sup> Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 1999) at 90.

<sup>22</sup> See, for example, David J. Heller, "Language Bias in the Criminal Justice System" (1995) 37 Crim. L.Q. 344.

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

### 2.1.3 The Aboriginal Influence

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

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

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

## 2.2 Complexities within the Canadian Legislative Scheme

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

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<sup>25</sup> *Constitution Act, 1867* (U.K.), *supra* note 12.

<sup>26</sup> See ss. 92A and 95, *ibid.* See also Ted Tjaden, *supra*, Chapter 1, note 2 at 55.

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

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

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

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<sup>27</sup> D.T. MacEllven et al., *supra* note 3 at 33.

<sup>28</sup> Friedland study, *supra*, Introduction, note 3 at 27.

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

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

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

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

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

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

<sup>30</sup> Wendy Hubley and Micheline Beaulieu, "Locating Canadian Orders in Council" (2001) 26 Can. L. Libraries 8 at 10.

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

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

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

<sup>32</sup> Roach, *ibid.* at 11.

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



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

## **2.3 The Court System and the Impact of the Common Law**

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

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

### **2.3.1 Multiple court systems**

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

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

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

From a judicial point of view, there are numerous practical problems caused by litigants who represent themselves . . . . Frequently these people have a lack of knowledge of the law. Some have read self-help books, researched the law or obtained legal advice but usually they have no idea of the legal principles involved in an application . . . .

The lack of knowledge of court procedure is even more problematic. Frequently on motions, affidavit evidence does not include all the necessary information.<sup>36</sup>

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

<sup>36</sup> Trussler, *supra* note 2 at 564.

### 2.3.2 The Chaotic Nature of the Common law

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

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

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

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<sup>37</sup> See Gerald Gall, “Chapter 11: The Doctrines of Precedent and Stare Decisis” in *The Canadian Legal System*, *supra* note 10.

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

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

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

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<sup>38</sup> *Incorporated Council of Law Reporting v. Federal Commissioner of Taxation* (1971), 125 C.L.R. 659 at 668.

<sup>39</sup> Leon Getz, “The State of Law Reporting in Canada” (1979) 37 Advocate 243.

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

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

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

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

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

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

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

### **2.3.3 Move to Online Judgments**

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

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<sup>42</sup> Tjaden, *ibid.* at 135-36.

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

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

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

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

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<sup>43</sup> The topic of proprietary databases and access issues they potentially raise are dealt with in Chapter 5.

<sup>44</sup> *Supra* note 39 at 245.

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

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

## 2.4 Consequences of Complexity of the Canadian Legal System

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

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<sup>45</sup> *Supra*, Chapter 1, note 35.

<sup>46</sup> Prior to CanLII, case law on the Internet was only available on individual court websites which would require separate searches for each court.



- **Challenges of legislative research:** Due to the complexities discussed above regarding Canada's legislative system, there are a number of consequences that negatively impact the ability to easily access legislation:
  - It is hard for the average person to determine whether particular legislation will be governed by federal or provincial legislation or by municipal bylaw.
  - Bilingual legislation requires additional translation which leads to potential differences between English and French versions and added costs and time delays.
  - Queen's Printers, as official publishers of legislation, are notorious for delays in publishing; as such Queen's Printer versions of legislation are often out-of-date and hard to use.
  - Regulations and orders-in-council are particularly difficult to research because they are officially consolidated so infrequently or, in the case of orders-in-council, sometimes not even published.
  - Free government online legislative databases are frequently not up-to-date.
  - Free government online legislative databases ordinarily do not have historical versions of legislation thereby making it necessary to go to a large academic or courthouse law library to conduct historical legislative research.
  
- **Case law and its problems:**
  - Case law is inherently chaotic in its organization, which makes it difficult to research; the multiple levels of court and types of court add to this chaos, as does the periodic need to research case law outside of Canada.
  - Many judicial decisions are reported in print case law reporters, but these are usually held only by large academic law libraries or courthouse libraries.
  - Tools used to find cases by topic, such as the *Canadian Abridgment*, are usually print-based and also only held by large libraries.
  - Free online sources of case law, such as CanLII, tend to only have current cases without much of an archive of older cases which still might have precedential value.
  - Noting up cases using free resources is difficult at best; print noter-uppers will also ordinarily only be held by large law libraries.

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

- **High cost of the legal system**

- The high cost of the legal system makes it difficult for the average person to be able to afford a lawyer; there are often limitations on having a non-lawyer act on behalf of a litigant.
- The complexities of the legal system and legal research make it difficult for the average person to represent themselves at trial or on other legal transactions.

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

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

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

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

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<sup>47</sup> Katsh, *supra*, Introduction, note 8 at 86.

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

## Chapter 3

### **The Market for Law-Related Information in Canada: The History of Legal Publishing in Canada**

*No one – layman or lawyer – can have reasonably full knowledge of how the law affects what he or his neighbours are doing without recourse to reports of judicial decisions as well as to the statutes of the realm.<sup>1</sup>*

- 3.1 The History of Law-Related Publishing in Canada
- 3.2 Growth and Consolidation within the Legal Publishing Industry
- 3.3 Impact of the Canadian Law-Related Publishing Market on Access to Information

It was argued in Chapter 1 that access to law-related information is – or should be – a fundamental right. Access, however, by definition assumes a body of law-related information that can be accessed:

It is fundamental to any legal system that the law be available in a timely fashion, in a citeable form to facilitate its use, and in a complete form to provide certainty; be adequately indexed and organized to ensure access; be widely distributed and available through the society to support the idea of fairness and justice; and be understandable through the use of appropriate language as well as through the availability of analyses of it.<sup>2</sup>

As discussed in Chapter 1 and 2, there are various types of law-related information. Two of the main types of law-related information – legislation and case law – are initially first officially generated by the government through legislatures and the

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<sup>1</sup> Sachs, L.J., *The Incorporated Council of Law Reporting for England and Wales v. Attorney-General and Another*, [1972] Ch. 73 at 92.

<sup>2</sup> Paul T. Murphy, “The Role of Publishing Houses in Developing Legal Research and Publication in Canada” in *Contemporary Law: Canadian Reports to the 1990 – International Congress of Comparative Law, Montreal, 1990* (Cowansville, Qué.: Éditions Yvon Blais, 1992) 732 at 733.

courts. The government also publishes a variety of other law-related information written by government employees, Ministers of the Crown and employees of Crown corporations. However, private legal publishers play a very important role in the creation of law-related information in Canada, including the publication of (unofficial) legislation and case law and secondary legal resources such as books and journals that explain or comment on the law. In this chapter I will examine the legal publishing industry in Canada with a view to seeing how access to law-related information is affected by several factors unique to the industry in this country and common to the legal publishing industry throughout the world. Among other things, it will be seen that the relatively small market in Canada for legal materials has negatively impacted access and affected the types of law-related materials that get published by private publishers. First, I will review the history of law-related publishing in Canada followed by a review of the growth of the industry into the modern age, growth which has resulted in the consolidation of the major legal publishers into three families of companies. I conclude with a brief overview of the impact that some of the unique features of the Canadian legal publishing industry have had on access to law-related information.

### **3.1 The History of Law-Related Publishing in Canada**

Fortunately, the history of legal publishing in Canada has been well documented, particularly by Canadian law librarians.<sup>3</sup> My review will therefore be brief and focus on those historical aspects that impact access to law-related information.

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<sup>3</sup> See, for example, the individual chapters in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997).

In early colonial days, there was not much of a domestic publishing industry at all; instead, reliance was placed on importing books from Britain or the United States:

From the outset the book trade was organized to import books and periodicals, just as other mercantile activities brought in manufactured goods: this was a corollary of being a colony, which existed to absorb excess populations and to serve as a market for home products, as well as to ship out raw materials. Since most British North Americans were farmers and woodsmen with neither the cash nor the inclination to buy books, a handful of booksellers imported works for a small group of readers who were chiefly government servants, garrison officers, the clergy, teachers, merchants, and ladies. These were the people, most of them city dwellers, with the time and means for serious or leisure reading, even in adversity.<sup>4</sup>

As might be expected, due to the small population of early colonists and a relatively low literacy rate, the market in colonial Canada for books was very small. Many early booksellers went broke due to the small market for books.<sup>5</sup> The small size of the market in Canada for law-related materials that existed in early days has not really changed all that much over the last 200 years; the market in Canada remains small, segmented and quite specialized.

The first printing press in Canada started operations in Halifax in 1751, two years after the city was established as a garrison and a General Court established. The second printing press arrived in Québec in 1764; their initial uses were primarily for government printing:

The printing press was not brought to Canada in 1751 and 1765 to enlarge the literary and philosophical horizons or to spread the word of God, and certainly not to advance the cause of free speech and democracy, even though in time it became an important instrument for all those causes. It came as an adjunct to the military and civil authorities, to uphold law, order, and good government through the dissemination of official newspapers and proclamations.<sup>6</sup>

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<sup>4</sup> George L. Parker, *The Beginnings of the Book Trade in Canada* (Toronto: University of Toronto Press, 1985) at 13.

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

<sup>6</sup> *Ibid.* at 24-25.

These presses, and the printers who operated them, would also publish materials that were not necessarily law related:

Out of such early printing offices came not only government documents and handbills, statutes and reports of trials, but also the miscellany of printed products that small communities would need – anything from school books to sermons, business forms, almanacs and news sheets.<sup>7</sup>

In fact, many of the early publishers relied on their printing contracts with the government as the official King's Printer to survive the otherwise unpredictable nature of publishing and bookselling:

For generations, . . . government patronage was the key to survival. All six governments needed a printer for the official gazette and a steady flow of proclamations and statutes, and eventually for the annual journals of the councils and assemblies. In return the printers obtained commissions as King's Printers, which carried either an annual salary or payment for each order.<sup>8</sup>

One early method by which laws were made available in early Canada, at a time when literacy rates were low, was through the use of an official "crier," a practice dating back as far as 1541 in England where town criers would be appointed to read important government announcements aloud in public squares:

The saide clerkes . . . shall . . . appoint a criar to make proclamacions, and to call the iuries, and to do other thinges as becometh a criar of a court to do.<sup>9</sup>

Posting new promulgated laws on the church door was another method of publication. In 1753 in Nova Scotia, for example, *An Act Declaring What Shall be*

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<sup>7</sup> Vivienne Denton, "Canadian Law Publishers: A Look at the Development of the Legal Publishing Industry in Canada" in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 16.

<sup>8</sup> *Ibid.* at 26.

<sup>9</sup> 1541 Act 33 Hen. VIII, c. 12 §19.

*Deemed a Publication of the Province Laws*<sup>10</sup> states that “for the Future, Notice being given in the *Nova Scotia Gazette*, or other publick News Paper, or by affixing such Notice on the Church Door at Halifax” shall be deemed to be a “full and proper” publication of such law. Proof of this practice is the publication of certain police regulations in 1809 in Québec when the official public crier is purported to have published the regulations by reading them aloud and then posting them on the Church door, confirmed by his marginal notes on the posted regulations:

I do hereby certify that I have on the 28th day of February, the 1st & 2d March 1809, published the within Regulations of Police in English and French Language throughout all the City of Montreal and the Suburbs, and on the 2d & 3d March, being two market days, on three different places on the old Market place only, each day. Montreal 3d March 1809.<sup>11</sup>

It has been suggested that governments in early Canada used their control over their printers as a form of censorship and control; if the government did not like other material that the printer was publishing, the printer risked losing the patronage and going out of business:

Governments saw their printers as public relations instruments and often required them . . . to post a bond for security and to ‘submit the perusal of the proposed contents [of the newspaper] to the Magistrates in the said Court of Sessions . . .’ Swift and effective punishment took the form of loss of patronage, a call to the Bar of the Assembly for a humble apology to the House, or even a term in prison without trial.<sup>12</sup>

It appears that American publishers during this same time were subject to much less censorship or control by the government, a factor that likely relates to cultural and political differences between the two countries, something which will be touched upon in Chapter 4 on the discussion of Crown copyright:

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<sup>10</sup> 11. Geo. 3 c. 19.

<sup>11</sup> Source: Library and Archives Canada, “Impressions: 250 Years of Printing in the Lives of Canadians – Judicial and Political” at 3. Available online: <<http://www.collectionscanada.ca/2/10/h10-223-e.html>>.

<sup>12</sup> *Supra* note 4 at 26.



Throughout the eighteenth century a different state of affairs existed in the American colonies, which had been founded for a variety of reasons, some of them by religious and political dissenters from the Old World, others by private commercial adventurers. Yet no matter what their spiritual or secular origins, each colony had an elected assembly that managed its own internal business and political affairs with a freedom not given to the inhabitants of Acadia, Newfoundland, or New France.<sup>13</sup>

By the early 1800's, government libraries were being started and were captive purchasers of law-related materials. Legislative libraries began in what is now Québec (1791), Ontario, Charlottetown (1826) and St. John (1832).<sup>14</sup> The first law libraries in Canada were established in Halifax and Ontario in 1838,<sup>15</sup> but as has been noted "[s]ince these collections were closed to the general public or available only to citizens of the provincial capitals, readers therefore had to find other ways of getting books and sharing their costs."<sup>16</sup>

### **Legal Publishing in the Maritimes**

Nova Scotia continued to be an important early source of law-related publishing. In 1814, Butterworths (England) published the *Vice-Admiralty Reports*, the first ever volume of reported cases of common law in Canada.<sup>17</sup> In 1832-33, Joseph Howe of Halifax published the 4-volume *An Epitome of the Laws of Nova Scotia* written by Nova Scotian scholar, lawyer and politician Beamish Murdoch, described as Nova Scotia's

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<sup>13</sup> *Ibid.* at 10.

<sup>14</sup> Denton, *supra* note 7 at 18; Parker, *supra* note 4 at 95.

<sup>15</sup> Denton, *ibid.*

<sup>16</sup> *Supra* note 4 at 95.

<sup>17</sup> Jane MacDonald, "Law Reporting in Nova Scotia and Newfoundland: A History" in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 118 at 119. Article also published in (1994) 19 Can. L. Libraries 7.

“Blackstone.”<sup>18</sup> D.C. Harvey notes that it was remarkable that Murdoch was only thirty-two at the time the *Epitome* was published; equally remarkable was that it was published at all given the limited market – a single province – for such a work.<sup>19</sup> Murdoch’s effort made him a pioneer in legal publishing in Canada, although it does not appear that this publication had much effect outside of Nova Scotia:<sup>20</sup>

[T]he fact remains that no single writer, before or since Murdoch, attempted an epitome of all the laws of Nova Scotia or of any other Canadian province. Murdoch therefore stands as a pioneer in the field of rendering provincial laws intelligible to the general community; and he speaks to us out of the leisure and faith of the last century with haunting importunity.<sup>21</sup>

In 1877, the first volume of the *Nova Scotia Reports*, covering cases from 1834 to 1851, was published by James Thomson with the second volume being published in 1855 by Alexander James, covering the years 1853 to 1855. Although Thomson and James purport to have published these volumes due to the importance of making cases available to the public, it has been pointed out that they likely expressed these sentiments in order to guarantee their payment for their efforts:

Jennifer Nedelsky, in her comprehensive work on law reporting in the Maritimes, goes into great detail about the government’s involvement in reporting Nova Scotia cases. The earliest reported cases in the province were published on the initiative of individuals who believed it was necessary to make reports of cases available to the bar and the public. The government provided a wage for these men, although Nedelsky’s research shows the money was often appropriated unwillingly.

Both Thomson and James mention in their prefaces that it was necessary for the public to have access to the decisions of the courts of Nova Scotia. James comments, “by bringing the proceedings of our Courts more directly within the influence of public opinion, it will tend to foster and preserve a good understanding, between the public at large, and those engaged in the administration of the laws.” Nedelsky questions whether the reporters actually

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<sup>18</sup> D.C. Harvey, “Nova Scotia’s Blackstone” (1933) 11 Can. Bar. Rev. 339.

<sup>19</sup> *Ibid.* at 340.

<sup>20</sup> Bora Laskin, “Legal Scholarship and Research in Canada” (1970) 4 Gazette 42 at 43-44.

<sup>21</sup> *Supra* note 18 at 344.

believed the general public had an interest in the activities of the court, or if James and Thomson were indulging in rhetoric to convince the legislature of the importance of making this information available (and thus ensuring the reporters were paid a salary to do the work).<sup>22</sup>

In 1866, Carswell took over publication of the *Nova Scotia Reports* but the government still had authority to appoint the official court reporter under s. 7 of the *Judicature Act*.<sup>23</sup> MacDonald points out that the provincial Law Society also had a role in legal publications under s. 63 of the *The Barristers and Solicitors Act*,<sup>24</sup> a situation similar to that in New Brunswick, Ontario and other provinces:

The first law reports in each province were typically funded and promoted by the law society. Early court reporters appointed by the government or by local law societies found printers locally for their reports, often using the King's Printer or a local newspaper office.<sup>25</sup>

In New Brunswick, Sadler notes that “[l]aw reporting in New Brunswick in the early years was a mixture of private and public enterprise.”<sup>26</sup> Legislation provided for the appointment of court reporters in New Brunswick:

[I]t shall be the duty of such reporter by his personal attendance or by any other means in his power, to obtain true and authentic reports of such opinions, decisions and judgments; and such reporter shall publish not less than two hundred copies of the same in pamphlets after each term of the said Court.<sup>27</sup>

A number of individual lawyers over time were appointed as court reporters. Sadler discusses the importance with which these endeavours were regarded by noting that the

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<sup>22</sup> *Supra* note 17 at 120.

<sup>23</sup> S.N.S. 1886, c. 50, s. 7.

<sup>24</sup> S.N.S. 1899, c. 27, s. 63.

<sup>25</sup> *Supra* note 7 at 17.

<sup>26</sup> John Sadler, “Maritime Entrepreneurism: The History of Law Reporting in New Brunswick and Prince Edward Island” in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 106 at 107. Article also published in (1993) 18 Can. L. Libraries 106.

<sup>27</sup> *An Act to Provide for Reporting and Publishing the Decisions of the Supreme Court*, S.N.B. 1836, c. 14.

preface to Volume 3 of the *Nova Scotia Reports* commented on the importance of “chronicling the evolution of New Brunswick law as distinct from British and American”<sup>28</sup>:

To its practitioners, law reporting was more than a means of earning extra income. It was viewed as a public service. Until the government-sponsored system died out in 1929 a total of thirteen men were appointed as reporters. On average they spent 10 years in the post. All were lawyers, most were native born New Brunswickers, and many went on to distinguished careers within and outside the legal profession. Several became judges, others pursued journalism or entered politics.<sup>29</sup>

In 1879, Carswell took over the publication of the *New Brunswick Reports*.

In colonial Newfoundland and Prince Edward Island, which did not have a large military presence or a civil bureaucracy, eking out a living as a printer was extremely difficult in the late 1700’s since their “isolated farmers and fisherman . . . had little need for printers’ services.”<sup>30</sup> Even more recently in those provinces, there has been very little case law reporting likely due to the small size of the market there:

It is unclear why Prince Edward Island never developed a more sustained set of indigenous reports. One likely possibility is that the small size of the market made the venture commercially unattractive. It has been suggested that the provincial bar was able to get by without formal reports by obtaining decisions directly from the courts either informally or on a subscription basis.<sup>31</sup>

Carswell also started the *Eastern Law Reporter* which ran from 1906 to 1914 and included cases from Nova Scotia, New Brunswick and Prince Edward Island but it was

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<sup>28</sup> John Sadler, *supra* note 26 citing G. Marquis, “‘A Hard Disciple of Blackstone’: David S. Kerr, 1809-1886” (1986) 35 U.N.B.L.J. 182 at 183.

<sup>29</sup> *Supra* note 26.

<sup>30</sup> *Supra* note 4 at 34.

<sup>31</sup> *Supra* note 26 at 108.

discontinued, presumably because it was unprofitable.<sup>32</sup> More recently, in the 1960's, Maritime Law Book started publishing its own set of provincial case law reports for the Maritimes, a reporter series that eventually spread to all jurisdictions across the country.

## Ontario

In Ontario, the 1823 *An Act Providing for the Publication of Reports of the Decisions of His Majesty's Court of King's Bench in this Province*<sup>33</sup> provided for the publication of case law in the province. The preamble to this Act describes the reality that the cost of case law reporting would exceed any revenues generated by the publication:

Whereas from the infant state of this colony, the publication of the decisions of his Majesty's court of king's bench in this province *would be attended with more expense than the probable sale of reports thereof would compensate*, whereby individuals are prevented reporting the same; and *whereas it is extremely desirable for the information of the public, that some public record of the judicial opinion of the judges of the said court should be kept . . .* [emphasis added]

However, “the early Ontario reporters had trouble making ends meet and the reports were sporadic,”<sup>34</sup> a situation similar in other provinces. In Ontario, as with other provinces in the West, the provincial Law Society also played a role in the publication of case law, a role that continues to today. Under Bylaw 23 of the Law Society of Upper Canada<sup>35</sup>, the Law Society continues to be obliged to provide copies of the *Ontario Reports* to each of its members and “may make provision for the distribution of copies of reasons for judgment on such terms as Convocation may from time to time determine.”

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<sup>32</sup> *Supra* note 17 at 121.

<sup>33</sup> 4 Geo IV, c. 3 (1823).

<sup>34</sup> *Supra* note 7 at 17.

<sup>35</sup> Law Society of Upper Canada, “Bylaw 23 – Publications of Case Law.” Available online: <[http://www.lsuc.on.ca/services/bylaw\\_23.jsp](http://www.lsuc.on.ca/services/bylaw_23.jsp)> (Last amended: May 28, 1999).

Early Ontario case law reporters included *Taylor's King Bench Reports* (1823-1827) and *Draper's King's Bench Reports* (1828-1831), named after their reporters; both sets of reporters lost money.<sup>36</sup> Other earlier reporters, published by the Law Society, included *Upper Canada Queen's Bench Reports* (U.C.Q.B.), the *Upper Canada Chambers Reports* (U.C. Chamb.), the *Error and Appeal Reports* (U.C. E & A.) and the *Upper Canada Chancery Reports* (U.C. Ch.).<sup>37</sup> The *Ontario Appeal Reports* (1872) and the *Ontario Reports* (1882) both became the *Ontario Law Reports* (1900-1931), after which time the current *Ontario Reports* began (1932 to current). The Law Society has contracted out the publication of the *Ontario Reports* to a number of different publishers, including Canada Law Book in the early days, followed by Carswell for awhile. Currently, it is being published by Butterworths. It is suspected that the publisher makes a profit from the advertisements that appear in the weekly softcover versions of the *Ontario Reports*.<sup>38</sup>

One negative effect of the Law Society's role in publishing case law in Ontario is that the Ontario provincial government has neglected its own obligations to make case law more widely available:

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<sup>36</sup> Anne Matthewman, "Volumes of History: The Legal Profession and the Development of Law Reporting in Ontario" in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 80 at 82. Article also published in (1996) 21 Can. L. Libraries 7.

<sup>37</sup> *Ibid.* at 83.

<sup>38</sup> *Ibid.* at 89.

The involvement of the profession both monetarily and editorially has meant that the Ontario government, and more specifically the Ministry of the Attorney General, has had very little to do with case reporting. Over the years various articles and reports have decried this seeming lack of interest and also the lack of monetary support. In 1891, T.G. Browning stated that the government should recognize its obligation and rather than the profession having to do so, pay for the publication of reports since, “It is the public weal, the general administration of justice, that calls for the preservation of precedents, creates the necessity for their publication.” Browning’s pleadings were in vain. Many years later in the *Report on the Administration of Ontario Courts* the Commission authoring the report made the recommendation that the Law Society and the profession should not have to bear the costs of case reporting. Citing the administration of justice in its reasoning the members of the Commission said “we believe that some form of subsidization is both necessary and desirable.”<sup>39</sup>

## Québec

Legal publishing in Québec has also been a mixture of public and private enterprise. Tanguay and Boyer<sup>40</sup> describe three major phases of legal publishing in Québec:

(i) **the publishing “free for all” (1727-1891)**: during this period, case law was published in newspapers and various nominate reporters. Legislation in 1850<sup>41</sup> imposed a levy on all Québec lawyers to fund publication of law reports, the *Lower Canada Reports*.<sup>42</sup>

(ii) **the organizational period (1892-1973)**: This period was marked by “the collective efforts at rationalization and organization of case law publishing and

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<sup>39</sup> *Ibid.* at 81.

<sup>40</sup> Guy Tanguay and Daniel Boyer, “Annals of Québec Case Law Reporting” in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 92. Article also published in (1994) 19 Can. L. Libraries 186.

<sup>41</sup> *An Act to Assign Fixed Annual Salaries to Certain Officers of Justice in Lower Canada and to Form a Special Fund out of the Salaries, Fees, Emoluments and Pecuniary Profits Attached to their Offices*, Prov. C. 1850, c. 37.

<sup>42</sup> *Supra* note 40 at 94.

dissemination by the bar” (including the publication, for example, of the *Rapports judiciaires officiels de Québec*) and “the flourishing of individualistic and idiosyncratic digests” (including the *Annuaire de jurisprudence due Québec*)<sup>43</sup>

(iii) **the period of systemization (1974-current)**: A significant event during this period was the creation in 1976 of the *Société québécoise d’information juridique* (SOQUIJ), a Crown corporation whose statutory mandate is to “cooperate with the Québec Official Publisher in publishing judicial decisions rendered by the courts and the quasi judicial tribunals of Québec.”<sup>44</sup> SOQUIJ makes decisions available in print (including the case law reporter *Recueil de jurisprudence du Québec*) and through an online database subscription; it is self-financed through sales of its products and services.<sup>45</sup>

## Western Provinces

Early law reporting in the West first started with each of the provincial Law Societies: in British Columbia the Law Society was the publisher of the official law reports from 1867 to 1947, in Alberta from 1907 to 1932, Saskatchewan from 1907 to 1931 and Manitoba from 1883 to 1963.<sup>46</sup>

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<sup>43</sup> *Ibid.* at 96.

<sup>44</sup> *An Act respecting the Société québécoise d’information juridique*, R.S.Q. 1977, c. S-20, s. 21.

<sup>45</sup> See “SOQUIJ: An Overview” Available online: <<http://www.soquij.qc.ca/societe/english.html>>.

However, a recent government news release, discussed *infra* in the final conclusions section of this thesis, mentions the possible dissolution of SOQUIJ in favour of the provincial government directly publishing legislation and case law, leaving it up to the private sector to provide added value law-related materials.

<sup>46</sup> Denton, *supra* note 7 at 18.



Fraser, writing about early legal publishing in British Columbia recounts the tale told by Mr. Justice H.P.P. Crease in a letter in 1877 in which the judge describes the ordeals of going on the judicial circuit by packhorse, sometimes traveling hundreds of miles to arrive at the next town. The letter describes the supplies necessary for the trip, including a portable law library:

The Judge has to carry with him for himself and his attendant and packer, tents, baggage, food, cooking utensils, and camp equipage of every kind, and blankets; ford rivers, scale mountain-sides, camp and sleep out seven and six weeks at a time, sometimes subject to an Egyptian plague of mosquitoes.

The Supreme Court Judge as a matter of absolute necessity has to carry with him, in addition to the above, all Law Books he will require in every branch – Chancery, Probate, Common Law . . . some 500 lbs., with freight at 25 cents per lb.<sup>47</sup>

When Butterworths (U.K.) decided to open a Canadian office in Winnipeg in 1912, this marked an important beginning of modern legal publishing in Canada:

The year of Butterworth's entry into Canada, 1912, was a banner year in Canadian legal publishing. It also marked the beginning of the *Dominion Law Reports* by the Canada Law Book Company, and of the *Western Weekly Reports* by Burroughs & Co. of Calgary. Burroughs had recently broken away from Canada Law Book to set up his own company. In 1919, he started the ambitious publication of the *Canadian Encyclopedic Digest (Western)*.<sup>48</sup>

In most cases, the discontinuance of the publication by the Law Societies of case law reports in the early to mid 1900's was filled by existing commercial publications, such as the *Western Weekly Reports* (Carswell) and the *Dominion Law Reports* (Canada Law Book). But eventually, more recent provincial law reports were published again for

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<sup>47</sup> Joan N. Fraser, "Case Law Reporting in British Columbia" in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 43 at 45. Article also published in (1993) 18 Can. L. Libraries 47.

<sup>48</sup> Ken Whiteway, "Prairie Quires: The History of Law Reporting in Manitoba and Saskatchewan" in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 69 at 70. Article also published in (1993) 18 Can. L. Libraries 7.

each of the provinces, e.g., the *British Columbia Law Reports* (Carswell) and the *Alberta Reports* (Maritime Law Book), to name a few examples.

### 3.2 Growth and Consolidation within the Legal Publishing Industry

By the turn of the last century, the major legal publishers that still exist today (albeit in slightly different corporate format) – Carswell, Butterworths, and Canada Law Book – started to expand their catalogues of publications and assert their presence in the market over smaller publishers. By 1929, G.F. Henderson was lamenting the “very high cost of legal literature” in Canada,<sup>49</sup> but was hopeful that the then recently launched *Canadian Encyclopedic Digest* would be a valuable addition to the legal literature and be supported generally by the profession. But even during the first half of the 20th century, Canadian law books were primarily British. In 1952, the Managing Director of Sweet & Maxwell mentioned the small size and regionalized nature of the Canadian legal market as a reason why there were still so few domestically written and published legal treatises:

We have felt for some years that something could be done to help the Canadian practitioner by producing English standard works, either with separate notes giving references to the appropriate Canadian law, or with special supplements, and we have discussed the suggestion with our Canadian associates in Toronto. Nothing has so far come of it because of the conviction on the part of the Canadian publishers *that such a course would have little or no effect on the sale of books in Canada, and we must say that our own inquiries . . . supported the publisher's view.*

*It is obvious that whatever scheme is adopted is bound to be fairly expensive in editorial fees and in additional printing costs, and unless we can see a reasonable chance of recovering these by a substantial expansion of the Canadian market, we do not feel justified in going to the additional expense of the Canadian market . . . .*

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<sup>49</sup> G.F. Henderson, “Condensing the Law” (1929) 7 Can. Bar. Rev. 60.

*Further complications are, of course, bound to arise from the fact that there is not one single jurisdiction in Canada, and that the laws of the various provinces frequently vary, so that for the Canadian lawyer it will often be necessary to provide perhaps five or six separate statements on the position in the various provinces.*

. . . .

We have also considered the possibility of publishing separate editions of some of our text-books for the Canadian market, but we have, like the Canadian publishers, thought that *the Canadian market is too small in most cases to support a separate edition.*<sup>50</sup> [emphasis added]

Four years later, in 1956, a Canadian Bar Association Committee on Legal Research bemoaned the sad state of the legal publishing in Canada and the lack of a domestic legal literature and a body of legal scholarship that was still far too small for a country such as Canada:

[T]he Canadian legal order is now developing its own distinctive characteristics more rapidly than we are analysing and recording that development. The result is that in too many fields of law (speaking of the common-law provinces) we are dependent on an English text for a Canadian solution, and, while in some cases that will be sufficient, in an increasing number it is becoming quite inadequate. Canada should by now have passed beyond her present degree of dependence upon Halsbury's Laws of England and its converter volumes. In Quebec there has been a considerable volume of legal writing on the basic civil law in recent years, but here too there are many gaps and many new legislative fields unilluminated by scholarship.<sup>51</sup>

By 1970, Bora Laskin, then a judge of the Ontario Court of Appeal, described the legal literature landscape in Canada as improving in some areas but still lacking a wide body of Canadian-published legal treatises on a number of Canadian topics:

The past ten years has seen an increase in the number of legal periodicals published in Canada; in the gross but not relative (to the number of full-time law teachers) in volume of scholarly writing; and in the number of graduate and research programmes offered in Canadian law schools. It would have been odd were it otherwise. Case law books have proliferated, some monographs have been written, research projects on a variety of problems are engaging many law

<sup>50</sup> M.W. Maxwell, "Encouraging Canadian Law Books" (1952) 30 Can. Bar. Rev. 956.

<sup>51</sup> "Report of the Committee on Legal Research" (1956) 34 Can. Bar. Rev. 999 at 1017.

teachers, but Canadian texts on such basic subjects as torts, contracts, criminal law, and administrative law, to mention a few that are needed are still to be written for the common law lawyer. The civilians in Quebec are a little better off in this respect.<sup>52</sup>

Some Canadian legal texts were published during that era in the area of mining, shipping and railway law because of the unique Canadian circumstances for these topics, but in other areas – particularly common law areas – reliance was still made on British authorities, especially since the Canadian market was so small:

None [i.e., Canadian legal texts] were needed as badly in the old common law fields where English texts were in adequate supply. Unless the Canadian text was first class, and able to compete in a wider market, there did not seem to be much point in providing more of the same under a Canadian imprint . . . .<sup>53</sup>

There are three main reasons for the growth in Canadian legal literature over the last 40 years: (i) the rise of modern legal education and the move to a more academic or scholarly form of legal education has meant that more law professors and law students were writing law-related publications; (ii) in recent times there has been a growth in interdisciplinary and multidisciplinary research across all fields of study including the notion of “law as a social phenomena”; this has also resulted in more law-related publications; and, (iii) the introduction of the *Charter* in 1982 has also resulted in an increase in legal and scholarly writing due to the *Charter*’s impact on a broad segment of society.<sup>54</sup> However, during the past forty years, the “situation for Canadian legal publishing remains essentially the same as it did in 1977, with a relatively small market, high production costs and regionalization.”<sup>55</sup>

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<sup>52</sup> *Supra* note 20.

<sup>53</sup> *Ibid.* at 45.

<sup>54</sup> Neil A. Campbell, “A Survey of Canadian Legal Bibliography” in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 1 at 10. Article also published in (1996) 21 Can. L. Libraries 241.

<sup>55</sup> *Ibid.* at 9.

In the last few decades, the major Canadian legal publishers started to acquire smaller “niche” publishers. For example, Carswell – one of the oldest legal publishers in Canada has acquired a number of small companies in addition to being acquired itself. In 1913, Sweet & Maxwell (U.K.) became a part owner of Carswell. More recently, in 1987, Thomson acquired Carswell and Sweet & Maxwell (and West Publishing in 1996). In 1991, Carswell merged with another Canadian publisher, Richard De Boo. Carswell also acquired a Québec publisher, Les Editions Yvon Blais, in 1997. Likewise, Butterworths Canada, itself owned by international conglomerate Reed Elsevier, acquired Canadian database provider Quicklaw in 2002. The parent company of CCH Canadian – Wolters Kluwer – has recently acquired a number of other legal publishers, including Aspen Law and Kluwer Law International.

This same consolidation that was happening in Canada was also happening in the United States and elsewhere with the “the continual monopolization and internalization of the legal publishing industry.”<sup>56</sup> Currently, the bulk of legal materials and legal information published in the private sector in Canada and around the world emanates from one of three “family” of companies:

- **The Thomson Corporation** (Canada): Major legal publishers that are part of the Thomson family include West (and Westlaw), Sweet & Maxwell, Carswell, Bancroft-Whitney, Clark Boardman Callaghan, Foundation Press, Lawyers Co-op, and Warren Gorham & Lamont.
- **Reed Elsevier** (Holland): In the Reed Elsevier family are the following major legal publishers: LexisNexis, Butterworths, Quicklaw, Lancaster House, Tolley Publishing, Mathew Bender, Shepard’s and Michie.

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<sup>56</sup> *Ibid.* at 2 and 11.

- **Wolters Kluwer** (Holland): Major legal publishers that are part of the Wolters Kluwer family include CCH, Prentice Hall, Kluwer Law, Little, Brown & Company, Aspen Law, Wiley Law Publications.

These three major “parents” of legal publishing in the United States (and around the world) – Thomson, Reed Elsevier and Wolters Kluwer – control 90% of the legal publishing business in the United States.<sup>57</sup> Similar data does not appear to be available for the Canadian market where these three companies also dominate a large part of the market; the experiences in Canada are very similar to the experiences in the United States, albeit on a smaller scale:

The history of legal publishing in the United States mirrors that of the publishing industry as a whole. In the beginning there were many publishers, mostly local, who catered to their particular market. There were many reasons for this including the difficulties of transportation and communication. As the nation spread across the continent the numbers grew. But, as transportation and communication improved, it became possible for publishers to serve markets far removed from their home office. Consolidation was inevitable and continues. Multimedia conglomerates dominate information delivery and publishing.<sup>58</sup>

In Canada, the three major law publishers in the private sector that are part of these “Big 3” families – Carswell, Butterworths Canada and CCH Canadian – also dominate a large part of the market. Small publishers who have “survived” independent of these three include Canada Law Book (although there was a failed merger attempt at one point with Reed Elsevier in 1996),<sup>59</sup> Emond Montgomery Publications (although they are now a “division” of Canada Law Book)<sup>60</sup> and Irwin Law (although at one point they were part

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<sup>57</sup> John Dethman, “Trust v. Antitrust: Consolidation in the Legal Publishing Industry” (2002) 21 Legal Ref. Serv. Q. 123 at 124.

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

<sup>59</sup> Denton, *supra* note 7 at 21.

<sup>60</sup> Canada Law Book, “Associated Companies.” Available online: <<http://www.canadalawbook.ca/acomp.html>>.

of the Quicklaw family, but when Quicklaw was acquired by LexisNexis Canada, Quicklaw divested itself of Irwin Law due to *Competition Act* concerns).<sup>61</sup>

### 3.4 Impact on Access to Information

It could be argued that the legal publishing industry in Canada – both the private and public and non-profit publishing sectors – adequately serves the needs of most practicing lawyers. For example, lawyers are able to purchase, use or access a variety of legal materials, both primary and secondary resources. For lawyers who do not have their own print collection of resources, they are usually able to subscribe to the commercial online legal databases or use the print (and online) resources at a local courthouse law library, an option not always available to non-lawyers.<sup>62</sup> And for the cost of online searches, lawyers are generally able to conduct their online searches on a “break even” basis by passing the costs of the online searches to the client and ultimately to the losing side in a lawsuit.<sup>63</sup> However, even for some lawyers, the situation is still far from ideal, although it has likely improved slightly in the last twenty years:

The problem of research time is more serious in Canada than it is in the United States or England. There can be but few lawyers here who would not agree that the means of access to judicial decisions in this country are woefully inadequate. The indexes, digests, citators and abridgments are, at best, crude, and the textbook literature is, in most fields, limited. Research in this country is more

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<sup>61</sup> News release, “LexisNexis Butterworths Canada Completes Acquisition of Quicklaw” (16 July 2002). Available online: <<http://www.lexisnexis.ca/about/releases.php#news1>>.

<sup>62</sup> The Great Library of the Law Society of Upper Canada, for example, attempts to restrict access to “members” only. The primary function of the Great Library is “to meet the legal research and information needs of Law Society members by providing access to information, documents and services necessary to the practice of law” (see The Law Society of Upper Canada, “Great Library – Access & Use” (Last updated: December 17, 2004). Available online: <[http://library.lsuc.on.ca/GL/about\\_access.htm](http://library.lsuc.on.ca/GL/about_access.htm)>.

<sup>63</sup> See Lisa A. Peters, “Recovery of Legal Research Expenses in Taxations and Assessments of Costs” (1997) 55 Advocate 79. See also Section 1.1.2, Ted Tjaden, “Recovery of costs and disbursements for legal research” in *Legal Research and Writing*, 2nd ed. (Toronto: Irwin Law, 2004).

difficult, takes longer, is more costly and more frustrating than it is in most other places.<sup>64</sup>

For the layperson, there are a number of factors identified above and summarized below that are endemic to the Canadian legal publishing industry that act as barriers to access to law-related information:

- **Delays in official publications of legislative material:** The federal and most provincial governments are unacceptably slow in ensuring that print or online versions of legislation are current and up-to-date. The exception to this is Ontario's e-laws project, which provides free access to Ontario statutes and regulations that are current and up-to-date within 24 hours.<sup>65</sup> The federal government legislative website, by way of contrast, is generally several months out-of-date. Print versions of legislation published by the official government Queen's Printer are notoriously out-of-date, with annual statutes sometimes not being published for 8 to 12 months after the end of a session or calendar year:

The government does a poor job of providing access to its publications and data bases. Little effort is put into marketing. It is often difficult to know how to obtain access. There are often considerable time delays in publishing legal information.<sup>66</sup>

- **Lack of "official" status of online government versions of legislation:** Despite the convenience and low cost for government to publish legislation online, the continuing reluctance of the federal and provincial governments to make their online version an "official" version forces users to rely on the print-based

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<sup>64</sup> Getz, *supra*, Chapter 2, note 39.

<sup>65</sup> Ontario, "E-Laws – Home Page." Available online: <<http://www.e-laws.gov.on.ca>>. The E-laws website is discussed in more detail in Chapters 5 and 6.

<sup>66</sup> Denis Marshall, "Crown Copyright: Navigating the Waters" (1993) 18 Can. L. Libraries 175 at 176.



“official” Queen’s Printer version, which will often be out-of-date and not consolidated. The federal government, for example, has the following disclaimer on their legislative website:

The Department of Justice Canada assumes no responsibility for the accuracy or reliability of any reproduction derived from the legislative material on this site. The legislative material on this site has been prepared for convenience of reference only *and does not yet have official sanction*. For all purposes of interpreting and applying the law, users should consult:

- the Acts as passed by Parliament, which are published in the “Assented to” Acts service, Part III of the Canada Gazette and the annual Statutes of Canada, and
- the regulations, as registered by the Clerk of the Privy Council and published in Part II of the Canada Gazette.

The above-mentioned publications are available in most public libraries.<sup>67</sup>

This reluctance to make online versions of legislation official apparently stems from a concern over security and tampering with the data.<sup>68</sup> However, given the ability to verify online sources from other print sources, this risk is not very realistic and is overly cautious, especially since the risk of forgery exists even in a print only environment:

It is contended that the potential for deliberate manipulation of text, to commit fraud or with some other evil intent, is much exaggerated. This potential has always existed with print-based legislation, but, as is the case with print-based text, there are simply too many alternative sources that can be used for verification. Such an act could only be successful by alteration of the text on the government server, which will be well protected by fire-walls and backups.<sup>69</sup>

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<sup>67</sup> Department of Justice Canada, “Laws – Note from the Department of Justice” (Last updated: 7 March 2005). Available online: <<http://laws.justice.gc.ca/en/note.html>>.

<sup>68</sup> Nicholas Pengelley, “A Not Unhappy Place: Web-based Legislation in Australia and Canada” (2001) 26 Can. L. Libraries 139 at 142.

<sup>69</sup> *Ibid.*

- **No online historical legislation:** Although computer technology and the Internet have made it easy for government to publish their legislation online, to date, what is generally available by governments is only the current version of the legislation. There are little or no archival or historical versions of legislation online.<sup>70</sup> As such, a person needing to research anything other than the current version of a statute or regulation generally has no choice but to use print resources, which may not be easily available except for at major academic or courthouse law libraries. Given the declining costs of digitizing print material and making it searchable and browsable, there really is no excuse for governments not making older legislative material available online.
- **Unavailability of some case law:** Although most – but not all – Canadian courts are making their recent decisions freely available online, either through their own websites or on CanLII, Canadian administrative tribunals have been much slower to do so. Not much has improved since Murphy’s description of the situation in 1997:

An unpublished review of provincial administrative boards . . . for the Canadian Law Information Council counted some 1,260 “law making” boards in the ten provinces and [the then] two territories. There would seem to be insufficient economic incentive to publish the vast majority of this law. It remains available in a spotty manner, usually through the board by writing or phone for a specific decision. Unfortunately, the decisions are usually not indexed.<sup>71</sup>

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<sup>70</sup> One exception to this is the Alberta Heritage Digitization Project’s Retrospective Law Collection available at <[http://www.ourfutureourpast.ca/law/law\\_home.asp](http://www.ourfutureourpast.ca/law/law_home.asp)> where Alberta statutes have been digitized from 1906 to 1990 and made available online at this site for free, with plans to digitize retrospective bills and *Gazettes* – see Ted Tjaden, *supra* note 5 at 60. In addition, the Law Library Microform Consortium – or LLMC – has digitized Ontario statutes to the turn of the century as part of their British North America historical database, but access is by subscription; the site is not freely available.

<sup>71</sup> *Supra* note 2 at 738-39.

- **Poor indexing of online case law by the courts:** Where courts do make their recent decisions available online on their court websites or on CanLII, there is little or no indexing done of the decisions by topic. This forces the user to either search by keyword or to browse by case name or date. Compared to using print indexes like the *Canadian Abridgment*, this is not always a satisfactory situation since it makes it extremely difficult to find prior cases on similar facts or issues.
- **Lack of depth of online case law:** Although the move by Canadian courts to put their judgments online for free is laudatory (and likewise the development of free online case law databases by CanLII), free online case law in Canada is in almost all situations only for very recent decisions. There is no “archive” or historical collection of Canadian case law freely available online provided by the government or available through CanLII. For a legal system that relies on past precedents, the result is that a researcher cannot rely solely on the free online versions of cases but must resort to print copies in law libraries or access the commercial online databases which tend to have better archives of older cases. The situation in the United States, also lamented for the lack of free archival case law, in fact is much better than the situation in Canada, but even in the United States, the lack of older case law freely online is a problem:

Many [U.S.] court Web sites provide access to current case law, but sites generally go back only a few years and documents may require downloading onto a hard drive or a disk, something not always possible on public library Internet terminals. I surveyed each state’s case law Web site via FindLaw and found that most state databases don’t include opinions prior to 1995. The oldest database is Oklahoma, with cases from 1919 on. California starts in 1934, and Hawaii in 1989. Six states include opinions from 1990 to 1994. A seventh state, Ohio, has opinions from 1990 on for the Eighth District Court of Appeals, but most Ohio appellate courts start in 1997. The Ohio Supreme Court site directs users

to the FindLaw Web site for older cases, as the court only archives current cases. Although the FindLaw site archives Ohio Supreme Court material back to 1997, for appellate court cases it links to the official appellate court Web site.<sup>72</sup>

- **Secondary resources aimed at primarily lawyers not consumers:** In part because the Canadian market is so small, there is very little return for Canadian legal publishers to sell law-related textbooks to the general consumer market. As such, their sales of print legal materials (such as books, journals and encyclopedias) are primarily to practicing lawyers and law libraries. The result of this is that books and other materials that do get published on legal topics tend to be geared in terms of style and comprehension levels towards the professional market and not the average citizen.
- **Legal materials are expensive:** There are more than twice as many lawyers in California than all of Canada.<sup>73</sup> This results in a very small market in Canada with relatively specialized demand for materials that tend to be high-priced (since in Canada the “profitability of legal materials is not derived from a high volume of sales or low prices”<sup>74</sup>):

More importantly, for the investors in law publishing, is the known fact that professionals are willing to pay high prices for the necessary tools of their trade. As far back as 1956, a Canadian Bar Association Committee on Legal Research reported that the market for legal materials was willing to tolerate high prices; lowering prices would have no effect on sales. Quality and utility were of uppermost importance.<sup>75</sup>

<sup>72</sup> Barr, *supra*, Chapter 2, note 5 at 68.

<sup>73</sup> There are approximately 83,000 lawyers in Canada (Federation of Law Societies of Canada Homepage <<http://www.flsc.ca>>); California, on the other hand, had 190,000 members as of January 2003 (“State Bar of California: What Does it Do? How Does it Work?” Available online: <<http://www.calbar.ca.gov/calbar/pdfs/whowhat1.pdf>>).

<sup>74</sup> Lisa Moran, “The Legal Publishing Industry in Canada, 2000: Challenges and Opportunities” (2000) 25 Can. L. Libraries 152 at 157.

<sup>75</sup> *Ibid.* at 154.

Realistically, the average person needing to research a legal problem will not be able to buy his or her own research materials and will need to use a law library. Depending on location, a law library with print materials may not be easily available and may have restrictions on access, aside from the problem of actually being able to use and understand the materials once in the library. The cost of some important reference tools – such as the *Canadian Abridgment*, the best case law finding tool – is even expensive for all but specialized law libraries to purchase and keep updated through supplements.

- **Secondary resources limited by professional market demand:** Because the market for legal publications in Canada is so small and because the main market for legal publishers are practicing lawyers, this results in there being fewer secondary resources (such as books) in areas or on topics where there may be less market demand by lawyers, such as in areas of consumer law.<sup>76</sup> One consequence of this is that the content of books will be on topics of interest to practicing lawyers, topics which may not coincide with the needs of the average consumer. There are, for example, annotated *Personal Property Security Act* publications but no annotated *Consumer Protection Act* publications:

Commercial publishers do not, however, necessarily give the legal system what it “needs” in terms of publications. Rather, publishers are focused on what they believe the market will buy. The audience to which a publication is directed influences a number of factors including: the form of publication, quality of print, type of binding, length of the book, etc. Further, legal publication is complicated through being divided by jurisdiction into larger markets for federal legal materials and the larger

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<sup>76</sup> *Supra* note 2 at 736.

provinces' materials, on the one hand, and small markets for the less populated provinces, on the other hand.<sup>77</sup>

In addition, although Irwin Law and Self-Counsel Press fill some of the market for self-help guides, the larger legal publishers have relatively few of their monographs aimed at general consumers.

- **Regionalization/Divided markets:** Because the majority of Canadian lawyers practice in Ontario and British Columbia<sup>78</sup> and because Toronto and Vancouver are two major financial centres in the country, secondary resources involving issues of provincial law tend to focus on the law and legal developments for Ontario or British Columbia (and Alberta, to a lesser extent). This results in there being less incentive for publishers to publish materials for small populations, such as Prince Edward Island or Saskatchewan, for example. Regionalization also negatively impacts less-populated areas, which tend to have smaller courthouse libraries or other facilities with law-related information:

A final weakness is in the county court libraries in small centres. In large urban areas small firms can fall back on the law society or law school library. Their confrères in the small centres, however, complained of being at a disadvantage. Often it was pointed out that the library is incomplete and the library staff lacking in both quantity and quality.<sup>79</sup>

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<sup>77</sup> *Ibid.* at 740.

<sup>78</sup> There were 10,799 members of the Law Society of British Columbia as of March 31, 2005 (Law Society of British Columbia, "About the Law Society – Overview," Available online: <[http://www.lawsociety.bc.ca/about\\_law\\_society/body\\_about\\_statistics.html](http://www.lawsociety.bc.ca/about_law_society/body_about_statistics.html)>) and 34,600 members in the Law Society of Upper Canada as of December 31, 2003 (Law Society of Upper Canada, "2003 Performance Highlights," Available online: <[http://www.lsuc.on.ca/news/pdf/arep\\_full03.pdf](http://www.lsuc.on.ca/news/pdf/arep_full03.pdf)>) for a total of 45,399 lawyers of approximately 83,000 lawyers overall in Canada, *supra* note 74.

<sup>79</sup> Department of Justice Canada, *Operation Compulx: Information Needs of the Practicing Lawyer* (Ottawa: Department of Justice, 1972) at 13.

- **Expensive products:** Also because of the small market in Canada for legal publications, and because the market is aimed at professionals, legal publications are not as price-sensitive as they might otherwise be; this has resulted in legal publications being very expensive and out of the reach of many persons:

It is gospel in the law library community that the consolidation of legal publishing into two or three conglomerates has increased the costs of acquisition beyond what is reasonable and, certainly, beyond what the economy had experienced. The publishers, of course, respond that the users, including libraries, are getting much more “added value” than more than justifies cost increases. It seems likely that they are both right from time to time and work to work. It is likely that cost escalation will continue. These conglomerates have paid and will continue to pay high prices for acquisitions as they seek economies of scale and market share. Academic law librarians must remember that practicing lawyers are the market. They are notoriously unconcerned with the cost of their research tools. Publishers say that they provide “need to know” information. If you drive a cab, you must buy gas. If you want to practice law, you must have up-to-date, reliable information. No one has accused the publishers of failing to provide that. As long as they do, they can charge what the “practicing lawyer” market will pay. And that market will set the pricing.<sup>80</sup>

- **Low return on investment affects publications:** It is also reasonable to assume that the relatively small market for legal publications in Canada means that certain materials are not going to get published or frequently updated due to the cost of publication and the low return on investment. One example of this appears to be the failure by Carswell to continue updating critically important titles within its *Canadian Encyclopedic Digest*. For example, the following relatively key titles were last updated 6 or more years ago (with the date of last-update as of May 2005 show in parentheses after the title):

Constitutional law (Last updated: 1986)  
 Criminal Offences (Last updated: 1999)  
 Human Rights (Last updated: 1996)

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<sup>80</sup> *Supra* note 57 at 143.

Bankruptcy (Last updated: 1998)

It is a serious problem that such an important topic as constitutional law is close to twenty years out-of-date given the enactment of the *Charter* in 1982 and the lack of current commentary in the encyclopedia on this topic.<sup>81</sup>

- **Increase of electronic materials creates a digital divide:** As mentioned, private publishers are increasingly taking advantage of online technologies to publish law-related material online. However, as also mentioned, these commercial databases are not freely available and it is likely difficult for most members of the public to use these databases:

Print materials continue to be a necessity where public access is the responsibility of the library. Online services may be reserved for professionals or students, but print resources can provide access to the law for the general public. Libraries are supposed to support a democratic society by providing free access to information. Greater reliance on computers, at the expense of print, will exacerbate inequalities of access, which will also affect the quality of performance of small law firms with limited financial means.<sup>82</sup>

Even law libraries may have difficulty in licensing these databases for use by any “walk in” patron:

Although many courts now publish case law on the Internet for free, thousands of older cases are not available to those who cannot pay. Hundreds of public libraries across the country provide online access to their patrons in an attempt to bridge the digital divide, covering all areas of information need. Yet often these public libraries are not allowed to offer access – free or fee – to legal subscription databases maintained by

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<sup>81</sup> It could be argued that the information in these out-of-date titles within the *Canadian Encyclopedic Digest* can be found in other publications. Carswell, for example, publishes a current loose-leaf monograph by Professor Hogg entitled *Constitutional Law of Canada*, regarded by many as one of the best books on this topic. However, to the extent that the *Canadian Encyclopedic Digest* purports to be a “complete statement of the law” that is “updated annually or as necessary with new case law or legislative developments delivered by means of its supplement” (the product description on the Carswell website at <http://www.carswell.com>), something is not right.

<sup>82</sup> *Supra* note 74 at 156.



the two largest legal vendors in the U.S. And those same vendors also constitute the largest publishers of legal materials in print. Amidst a growing wealth of free, reliable information on the Internet, there is a poverty of access to the decisions and opinions of the courts that protect our liberties.<sup>83</sup>

As such, “digital drift” poses potential barriers to certain types of law-related information, a topic discussed in more detail in Chapter 5.

In response to the position of West that it at one point owned its citations and page numbering in its cases, the American Association of Law Libraries lobbied the U.S. government for policy changes, expressing its concern over monopolization of law-related information:

[I]t is a fundamental part of our belief that no one should own the law, either outright or in practical effect. Regrettably, the assertion of ownership of some parts of the published case law together with the requirements of courts and others to cite to certain privately published versions of the case law, have, in practical effect, given one publisher substantial control over the legal information market.<sup>84</sup>

In response, the U.S. government noted its concern over the impact of possible monopolization of law-related information and that it would evaluate the possibility of a public-domain database for law-related information:

The Justice Department today said it would explore ways to improve public access to federal court opinions, especially by computer, to make legal research more affordable for scholars, public interest groups and users of electronic information. Currently, most electronic research is done by leasing access to privately owned systems, such as WESTLAW and LEXIS, that electronically search through data bases of federal cases and other materials.

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<sup>83</sup> Barr, *supra*, Chapter 2, note 5 at 67.

<sup>84</sup> American Association of Law Libraries on DOJ Legal Procurement, Letter from Robert Oakley for the AALL to Attorney General Reno, Available online: <<http://lists.essential.org/1995/info-policy-notes/msg00087.html>>, cited by Dethman, *supra* note 57 at 134-35.

Attorney General Janet Reno said that the Department had received considerable correspondence from members of the legal community concerned about the high cost of electronic access to judicial opinions and the present proprietary system most often used to cite federal cases. Reno said the Department is evaluating various existing non-proprietary methods of citing cases to develop a unified, comprehensive approach acceptable to federal and state courts, attorneys and legal researchers. The Department is also exploring the possibility of a public-domain data base of federal and state judicial opinions.<sup>85</sup>

It does not appear that anything concrete arose from this government press release that proposed a public domain database of federal and state court decisions.

Dethman points out that the government subsequently approved the takeover of West (and Westlaw) by The Thomson Corporation (despite its initial concerns about monopoly control), and that the approval was granted on the promise by West to make its claim of a proprietary interest in its page numbering available to others by license (which was likely inevitable in any event – proven to be so in later court decisions discussed in the next chapter).<sup>86</sup>

- **Risks of monopolization affecting cost and ownership of information:** An obvious concern is that the consolidation within the legal publishing industry may reduce competition and thereby raise the cost of legal materials and negatively impact access to that information:

Much of the concern in the law library community regarding the consolidation in the legal publishing business centers on two issues. One is fairly obvious and immediate: cost. The other may have even more importance on the level of public policy: sovereignty and the public's access to the law under which it lives.<sup>87</sup>

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<sup>85</sup> Department of Justice, Press Release (2 September 1994). Available online: <[http://www.usdoj.gov/opa/pr/Pre\\_96/September94/501.txt.html](http://www.usdoj.gov/opa/pr/Pre_96/September94/501.txt.html)>, partially cited by Dethman, *supra* note 57 at 134.

<sup>86</sup> Dethman, *supra* note 57 at 135.

<sup>87</sup> *Ibid.* at 143.

In addition to concerns over rising costs, Dethman in the passage above raises a concern about sovereignty – the article was written shortly after the September 11, 2001 terrorist attacks in New York – at a time when issues of sovereignty were perhaps more pressing with some Americans being concerned that West and Westlaw were now owned by Thomson, a “Canadian” company. Although sovereignty is likely not too pressing a concern in Canada (due to restrictions on foreign ownership of publishing companies), the prospect of private control of public information is perhaps more of an issue, a topic discussed in Chapter 5.

## **Conclusions**

Throughout the history of Canadian legal publishing, a number of similar themes appear – that the market for law-related publications in Canada is comparatively small and regionalized; that most law-related publications are geared towards practicing lawyers and not the general public; and that law-related publications in Canada tend to be quite expensive. Academic and courthouse law libraries are an excellent repository of law-related publications but they may not always be geographically convenient for everyone, and some persons may feel intimidated to use them or may likely in fact have difficulty in using the materials without adequate training.

In the last twenty years or so, there has been an increasing move by the commercial legal publishers and by governments and others to publish law-related information online. As will be discussed further in Chapter 5, the “digital drift”, that is, the move by commercial publishers to publish materials on online databases controlled

by subscriptions and passwords, means that, practically speaking, only lawyers with clients who can afford the online search costs will be able to take advantage of the valued-added features on these online products. The move by the Canadian Legal Information Institute (CanLII) to publish recent Canadian case law and legislation online for free is laudable but represents only a relatively small portion of law-related information with there being little or no historical legislation or case law being freely available online. Since some of these consequences negatively impact access to law-related information, steps can and should be taken to better utilize the Internet to improve access, steps that will be discussed further in Chapter 6 and the final conclusions to this thesis.

Although the focus of this chapter was on the private legal publishing field because of their impact on the industry and access to law-related information, governments also have a significant impact on access. In the next chapter, I review the concept of Crown copyright law as a factor that has retarded access to law-related information.

## Chapter 4

### The Impact of Crown Copyright on Access to Law-Related Information

*On the face of it, two relatively small doctrines, Crown prerogative and Crown copyright, have determined our public policy on the publication of, and access to, legal information. These doctrines control ownership in statutes, regulations, judicial decisions and decisions of administrative boards. Ownership means controlling the publication and distribution of this information, whether in print or electronic form. It means control over access to the “law of the land.”<sup>1</sup>*

- 4.1 The History of Crown Copyright in England and Canada
- 4.2 Ownership of Government Information in the United States
- 4.3 Impact of Crown Prerogatives and Crown Copyright on Access to Information

In Canada, the federal and provincial governments own and control the printing of legislation, judicial decisions and other law-related government information. This ownership and control stems from two sources: royal prerogatives and Crown copyright. The royal prerogatives date back hundreds of year to the time when English sovereigns ruled the land and controlled such things as printing and publishing. Crown copyright stems from legislation. Under s. 12 of the *Copyright Act*,<sup>2</sup> the government owns copyright to any work prepared or published by or under the direction or control of the government:

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall

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<sup>1</sup> Marshall, *supra* Chapter 3, note 66 at 175.

<sup>2</sup> R.S.C. 1985, c. C-42.

continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

On the face of it, the language in s. 12 would not necessarily seem to include judicial decisions to the extent that judges might be seen as ordinarily *not* being under the direction or control of the government. Despite this, it is clear that the federal and most provincial governments regard judicial decisions as being caught by Crown copyright, as evidenced by their copyright notices claiming copyright in judicial decisions.<sup>3</sup>

This provision for Crown copyright – which has been described as a “legislative monstrosity”<sup>4</sup> and an example of “atrocious drafting”<sup>5</sup> – was modeled on the 1911 British statute<sup>6</sup> as were at one point similar provisions in former colonies, including Australia<sup>7</sup> and New Zealand.<sup>8</sup> Not all governments in the world claim copyright in their work, however.<sup>9</sup> In the United States, for example, there is no Crown copyright – government works in the United States are, as a general rule, in the public domain.

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<sup>3</sup> See the *Reproduction of Federal Law Order* and Ontario’s policy on Crown copyright discussed *infra*, notes 58 and 59 where the respective governments assert Crown copyright in judicial decisions.

<sup>4</sup> Comments of counsel in argument in *Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd.* (1938), S.R.N.S.W. 195 at 258, cited by Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* (Ottawa: Consumer and Corporate Affairs Canada, 1981) at 49.

<sup>5</sup> Patent and Trademark Institute of Canada, Brief submitted to the federal government in response to: *Copyright in Canada: Proposals for a Revision of the Law*, (26 January 1978), cited by Barry Torno, *ibid.*

<sup>6</sup> *Copyright Act*, 1-2 Geo. V, c. 46, s. 18.

<sup>7</sup> *Copyright Act 1968* (Cth.), ss. 176-182A. In April 2005, the Copyright Law Review Committee, appointed by the Australian Attorney-General, has recommended abolition of Crown copyright in legislation, case law and other government law-related information – see: Copyright Law Review Committee, *Crown Copyright* (April 2005). Available online: <<http://www.ag.gov.au/agd/www/Clrhome.nsf>>. These recommendations will be discussed in more detail in the final conclusions section of this thesis.

<sup>8</sup> *Copyright Act 1994* (N.Z.), 1994/93, s. 26, but by s. 27, legislation and judicial decisions are in the public domain.

<sup>9</sup> Including the United States, France, Belgium, Italy, Finland, Austria, Denmark, Spain, Germany and Switzerland – see André Françon, “Crown Copyright in Comparative Law: the French Model, Continental Europe and the Berne Convention” (1996) 10 I.P.J. 329.

Since copyright law has the potential to restrict use of information through providing a monopoly to the copyright owner for the reproduction of the work, Crown copyright has the potential to greatly impact access to government and law-related information. In this chapter, I briefly review the history of Crown copyright in Britain and Canada, which takes us to a review of the royal prerogatives and Crown copyright. The focus here will be on the origins and purpose of the concept and the preservation or protection of prerogative rights or “privileges” given to the Crown in the statute. I follow this with a comparison of the situation of government-produced information in the United States with a discussion of how differences in policy in the United States have affected access to law-related information in America. I conclude with an analysis of the impact of Crown copyright in Canada on access to law-related information.

#### **4.1 The History of Crown Copyright in England and Canada**

To understand the extent of the current rights of the federal and provincial governments in Canada to ownership of government information, a starting point would be s. 12 of the *Copyright Act*, above. However, since section 12 of the Act preserves pre-existing Crown “rights or privileges” (in the phrase “Without prejudice to any rights or privileges of the Crown”), it is first useful to review the extent of these Crown “rights or privileges,” which arise from the royal prerogative from medieval England.

##### **The royal prerogative**

The royal prerogative has been described as the “common law powers” of the Crown, those “powers or privileges that are unique to the Crown” that have not been taken away by statute.<sup>10</sup> Bradley and Ewing describe the royal prerogative in similar terms:

. . . the Sovereign and the Crown enjoyed certain powers, rights, immunities and privileges which were necessary to the maintenance of government and which were not shared with private citizens. The term prerogative is used as a collective description of these matters. Blackstone referred to prerogative as “that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity”.<sup>11</sup>

The royal prerogatives have been described by the Supreme Court of Canada as not being personal to the sovereign but as “great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people, and not, as it is said, ‘for the private gratification of the sovereign’ – they form part of and are generally speaking as ancient as the law itself.”<sup>12</sup> In *Attorney-General v. De Keyser’s Royal Hotel*,<sup>13</sup> the House of Lords adopted Dicey’s definition of prerogative powers:

The prerogative is defined by a learned constitutional writer as ‘The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.’<sup>14</sup>

As mentioned, the royal prerogative in Canada (and elsewhere in Commonwealth countries) is now subject to Parliamentary laws:

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<sup>10</sup> Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 15-16. See also, Austin F. Marshall and Heidi H. Francis, “Crown” in Vol. 8 *Canadian Encyclopedic Digest* (Toronto: Carswell, 1997) §20-79.

<sup>11</sup> A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 13th ed. (London: Pearson Education, 2003) at 245-46.

<sup>12</sup> *R v. McLeod*, [1883] 8 S.C.R. 1 at ¶22.

<sup>13</sup> [1920] A.C. 508.

<sup>14</sup> *Ibid.* at 526.



As indicated, the royal prerogative is now subservient to the wishes of Parliament. That is, Parliament may expressly abolish or restrict prerogative rights, whether or not this is coupled with a grant back to the Crown of statutory powers with respect to the same subject matter.<sup>15</sup>

Even though “it is not possible to give a complete catalogue of prerogative powers”<sup>16</sup> that have survived to modern times, a number of them do relate to law-related information and the administration of government<sup>17</sup>:

- **Powers relating to the legislature:** In Canada, for example, the Governor-General (or provincially, the Lieutenant-Governor) officially opens Parliamentary sessions, reads the Throne speech and prorogues Parliament.
- **Powers relating to the judicial system:** There is power in the Crown to pardon convicted offenders. In addition, the Attorney-General represents the Crown as “*parens patriae*.”
- **Powers relating to foreign affairs:** The Crown has power under this aspect of royal prerogative to make of treaties and declare war, for example.
- **Powers relating to armed forces:** The sovereign is commander-in-chief of the armed forces.<sup>18</sup>
- **Appointments and honours:** “On the advice of the prime minister or other ministers, the sovereign appoints ministers, ambassadors, judges, governor generals, lieutenant governors and certain holders of public office, including the members of royal commissions.”<sup>19</sup>
- **Immunities and privileges:** This aspect of the prerogative is that statutes do not bind the Crown unless by express statement or by necessary implication.
- **Prerogative in time of emergency:** Bradley and Ewing suggest that the extent of this power is not well defined and would be usually exercised only in times of war or national emergencies; the question remains whether the Crown must compensate its subjects when this power is exercised to appropriate property, for example.<sup>20</sup>

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<sup>15</sup> Torno, *supra* note 4 at 4.

<sup>16</sup> *Supra* note 11 at 248.

<sup>17</sup> The list provided and the descriptions are summarized from Bradley and Ewing, *ibid.* at 248-53 and use their headings or categories, as do Torno, *supra* note 4 at 4-5, and Hogg and Monahan, *supra* note 10 at 18-19.

<sup>18</sup> *Ibid.* at 250.

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

<sup>20</sup> *Ibid.* at 250-51.

- **Miscellaneous prerogatives:** Bradley and Ewing list a number of miscellaneous powers, including “the creation of corporations by royal charters; the right to mine precious metals; coinage; the grant of franchises, for example, markets, ferries and fisheries; the right to treasure trove; the sole right of printing or licensing others to print the Authorized version of the Bible, the Book of Common Prayer and state papers; and the guardianship of infants.”<sup>21</sup> While a number of these powers likely apply to the Crown in Canada, it is unlikely that the right of printing the Bible extends to the Crown in Canada.<sup>22</sup>

These prerogative rights for printing and publishing extends to Canada and other Commonwealth colonies that adopted the common law of England.<sup>23</sup>

### **Prerogative right versus a property right**

There is some debate in the case law and secondary literature regarding whether the Crown’s right to control printing is a prerogative right or is more correctly characterized as a property right.

In *R. v. Bellman*,<sup>24</sup> a case involving a prosecution for rum-running off the shores of the Bay of Fundy, one of the issues was the admissibility of Canadian hydrographic charts (to prove the accused was within Canadian waters). At trial, the accused was acquitted in part because the trial judge refused into evidence the maps proffered by the Crown. On appeal, this was found to be in error and a new trial was ordered. Because the maps were prepared under government authority, they were held to be official and hence admissible as a result. In coming to this conclusion, the court reviewed the prerogative

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<sup>21</sup> *Ibid.* 253.

<sup>22</sup> See John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2003) at §18:3(b).

<sup>23</sup> *Ibid.* at §18:3(a).

<sup>24</sup> [1938] 3 D.L.R. 548 (N.B.C.A.).

right of the Crown over printing and concluded the printing admiralty charts were a “property” right in the Crown:

Until the question was raised in this case, I do not suppose that any one ever doubted the admissibility of an Admiralty chart in evidence, yet it is difficult to find any distinct authority upon the subject. Investigation carries us back to the invention of printing, the claim subsequently made by the Crown to a prerogative control over the exercise of that art and the licensing of printers by the ill-famed Court of Star Chamber. Constitutional changes have shattered the idea of prerogative *but there remains in the Crown the sole right of printing a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive. By the time of Lord Mansfield the idea of prerogative had pretty well disappeared and the King’s exclusive right was put on the ground of property.*<sup>25</sup>  
[emphasis added]

Later though the court appears to base the Crown’s powers on both a property right and a prerogative power:

If, then, at common law the King’s right did not cease upon publication as that of a subject would but for the *Statute of Anne*, the Crown must have, in its own publications, an effective copyright at common law, *whether based upon prerogative or property or both*. The reason underlying the King’s right is given in the case of *Manners, et al. v. The King’s Printers* (1828), 2 State Trials N.S. 215, 3 Bligh N.S. 391. This case raised the question of the prerogative right of the Crown in England and Scotland to grant the exclusive right to print the Bible, the Confession of Faith and the Longer and Shorter Catechisms. It was held that such right existed. In the Court of Session Lord Hermand said that it was admitted *that the King had the sole right of printing Proclamations and Acts of Parliament and that the principle upon which he enjoys this prerogative is in order that they may be preserved and published in a pure and correct state.*<sup>26</sup>  
[emphasis added]

Fox suggests that the purpose of the prerogative for printing was not necessarily a property right but instead was a duty to ensure that the works in question were correct<sup>27</sup> and falls within one of the duties of the chief executive officer over the acts of the legislature:

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<sup>25</sup> *Ibid.* at 553.

<sup>26</sup> *Ibid.* at 555.

<sup>27</sup> Harold G. Fox, “Copyright in Relation to the Crown and Universities with Special Reference to Canada” (1947) 7 U.T.L.J. 98 at 110.

But although the power of the crown and its prerogative over the printing of public documents and acts of parliament as well as of works of religion seems never to have been seriously questioned, it has been rested by judges upon different principles. Some have based it upon property, as, e.g., in the case of the translation of the bible having been actually paid for by James I. Others have referred to the vesting of the prerogative in the king with reference to his character as head of the church. *The better opinion seems to be that it is referred to another consideration, namely, to the character of the duty imposed upon the chief executive officer of the government, to superintend the publication of the acts of the legislature, and acts of state of that description, and also of those works upon which the established doctrines of our religion are founded – that is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative.*<sup>28</sup>

## Statutes

The exclusive privilege of the Crown to print statutes was first recognized in *The Stationers v. The Patentees about the Printing of Roll's Abridgment*.<sup>29</sup> In that case, it was held that a patent for printing “law books” was validly granted by the King due to his prerogative right to control the publishing of books. The argument was that the “King hath a general prerogative at common law” and that this prerogative over printing is “necessary as to religion, conservation of the publique peace, and necessary to preserve good understanding between King and people.”<sup>30</sup> As stated by McKeown, “[f]rom that time on, the prerogative right of the Crown to the exclusive printing of Acts of Parliament, Orders-in-Council, state papers, and other public documents appears never to have been successfully contested.”<sup>31</sup>

## Judicial decisions

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<sup>28</sup> *Ibid.* at 114.

<sup>29</sup> (1666), Cart. 89. See also McKeown, *supra* note 22 at §18:3(c).

<sup>30</sup> *Ibid.* at 90.

<sup>31</sup> McKeown, *supra* note 22 at §18:3(c).

However, some debate exists whether the Crown prerogative extends to judicial decisions.<sup>32</sup> While Vaver concedes that the Crown prerogative over judicial decisions may have existed at the time of the reign of Charles II, he refers to a number of 19th century English cases where copyright in court reports was acknowledged to be in the court reporter with there being no mention of a Crown prerogative.<sup>33</sup> The preferred view, he submits, would be for judicial decisions to be regarded as being in the public domain as a matter of public policy.<sup>34</sup> Other commentators, however, argue that the royal prerogative does likely extend to control over the publication of judicial decisions. Snow, for example, suggests that the nature and importance of judicial decisions are really no different than legislation and that the same public policy reasons should apply in favour of a Crown prerogative to control accuracy in the publication of official material:

If Fox was right in expressing the view that the continuing justification for the printing prerogative lies in the duty of the Crown to ensure complete accuracy in the publication of official Acts, then surely the reasons is still valid today as regards judgments as well as statutes . . . . [T]here is greater merit in the view that judgments are just as much the expression of the law as these other legislative and executive acts, and deserve as much protection if the exclusive printing prerogative is put on public policy grounds.<sup>35</sup>

Snow went on to argue that if the prerogative is regarded more as a “property” right, the claim to control over the printing of law reports is weakened and could likely only rest on the weaker argument that judges are ultimately paid by the Crown and “he who pays for a service acquires ownership in the product.”<sup>36</sup> Torno also argues that the royal prerogative applies to judicial decisions.<sup>37</sup> Likewise, Fox has also suggested that since judges are

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<sup>32</sup> *Ibid.* at §18:3(d).

<sup>33</sup> David Vaver, “Copyright and the State in Canada and the United States” (1996) 10 I.P.J. 187 at 190, note 6.

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

<sup>35</sup> Gérard Snow, “Who Owns Copyright in Law Reports?” (1982) 64 C.P.R. (2d) 49 at 64.

<sup>36</sup> *Ibid.* at 65.

<sup>37</sup> Torno, *supra* note 4 at 52.

paid by the Crown that copyright in their official pronouncements resides in the Crown, which would be a more preferable situation than copyright residing in each individual judge.<sup>38</sup> However, Fox has since softened that position based on the argument that the recent development of a strong body of cases upholding judicial independence makes it difficult to argue that judges are under the direction or control of the government.<sup>39</sup> The preferable position, I would submit, since it is important that court decisions be as widely disseminated as possible, is for judgments to be in the public domain, or, at a minimum, not to be subject to Crown copyright or Crown prerogative. This issue is discussed further in section 4.3.

### **Control of printing by the Crown**

Whether the power of the sovereign to control printing of judicial decisions was a prerogative power or not, it is clear that in the early days of printing in England the Crown exercised very tight control over all printing, a control that amounted to censorship:

It did not take long after the invention of printing for English monarchs to exercise complete control over the printing trade. The official reasons for the interference were to protect English trade from foreign competition and to prevent the proliferation of heretical and seditious opinions, but the licensing scheme set up for this purpose was also a convenient source of profit to the ruling monarch and his favourites.<sup>40</sup>

The first Royal Printer appeared in 1485 and “from 1518 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books or books of

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<sup>38</sup> *Supra* note 27 at 116.

<sup>39</sup> *Supra* note 22 at §18:5(g).

<sup>40</sup> *Supra* note 35 at 61.

stated kinds.”<sup>41</sup> It appears that “privileges became a source of considerable profit to the Crown and in time were used as an instrument of censorship by the authorities.”<sup>42</sup>

In 1538, Henry VIII issued a lengthy proclamation banning the printing of books unless by license with the Crown due to the increase of “wrong teaching and naughty printed books.”<sup>43</sup> The proclamation also banned the importation of books into England upon the “pains that the offenders . . . shall not only incur and run into his grace’s most high displeasure and indignation but also shall lose and forfeet unto his majesty all his or their good and chattels and have imprisonment at his grace’s will.”<sup>44</sup>

In the early days, this control remained quite strong and continued through to the establishment by Queen Mary of the creation of the Crown of the Stationers’ Company in 1557. Printers with the Stationers’ Company were given exclusive printing rights; they were also given enforcement rights to crack down on unlawful printing and “the Company’s strength was dependent in large part upon its alliance with the official censorship”<sup>45</sup>:

In 1557, the desires of the booksellers and the desires of the crown coincided. The crown perceived the need to gain greater control over “the dangerous possibilities of the printed word” and so granted a royal charter to the Stationers’ Company that limited most printing to only members of the company. This charter also empowered the company to search out and destroy “unlawful” books, which gave the guild the public enforcement mechanism for its private law. If a

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<sup>41</sup> Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967) at 3.

<sup>42</sup> Kevin Garnett and Gillian Davies, *Copinger & Skone James on Copyright*, 14th ed. (London: Sweet & Maxwell, 2002) at §2-9.

<sup>43</sup> Proclamation of 16 November 1538, reprinted in Paul L. Hughes and James F Larkin, *Tudor Royal Proclamations*, Vol. 1 (New Haven, Yale University Press, 1964) at 270. See Kaplan, *supra* note 39 at 3. A similar proclamation was issued 8 July 1546 by Henry VIII particularly in relation to religious material due to the spread of “sundry pernicious and detestable errors and heresies” that were being published – see Hughes and Larkin, *ibid.* at 373.

<sup>44</sup> Hughes and Larkin, *ibid.* at 271.

<sup>45</sup> Kaplan, *supra* note 41 at 37.

nonmember was printing a work that had been registered with the company by a member, the nonmember could now be stopped. It also meant that if a work which was disagreeable to the crown was being published, it too could be stopped. This arrangement provided the crown with added policemen to enforce its goal to control printed works. Censorship was born.<sup>46</sup>

The Crown regularly enforced its relatively absolute control over printing through prosecutions in the Star Chamber:

It was the declared object of the Crown at that time to prevent the propagation of the reformed religion, and it seems to have been thought that this could be brought about most effectively by imposing the severest restrictions on the publishing trade and the press to prevent the publishing of seditious and heretical books and pamphlets. Until 1640, the Crown, using the Star Chamber as its instrument, rigorously enforced several decrees and ordinances of that Chamber regulating the manner of printing, the number of presses permitted to operate throughout the Kingdom, and prohibiting all printing against the force and meaning of any of the statutes or laws of the realm. This restrictive jurisdiction was enforced by the use of summary powers of search, confiscation and imprisonment, free of any obstruction from Parliament.<sup>47</sup>

However, the English Revolution brought major changes to all aspect of life in England, including uprooting its legal system and lessening the monopoly by the Crown over printing:

In 1640, however, the Star Chamber was abolished; with the Cromwellian revolution, the King's authority was set at naught; all the regulations of the press, and restraints previously imposed upon unlicensed printers by proclamations, decrees of the Star Chamber and charter powers given to the Stationers' Company were deemed, and certainly were, illegal. The scandalous nature of some libellous publications induced Parliament to pass an ordinance in 1643 which prohibited printing, unless the book was first lawfully licensed and entered in the register of the Stationers' Company.<sup>48</sup>

By 1695, however, the "system had fallen into disrepute because the power of members of the Stationers' Company to claim copyright in perpetuity had led to high prices and a

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<sup>46</sup> Lydia Pallas Loren, "The Purpose of Copyright" (2002) 2 Open Spaces Quarterly. Available online: <<http://www.open-spaces.com/article-v2n1-loren.php>>.

<sup>47</sup> Garnet and Davies, *supra* note 42 at §2-10.

<sup>48</sup> *Ibid.* at §2-12.



lack of availability of books.”<sup>49</sup> The British Parliament allowed the licensing regime in effect to lapse, which greatly opened the publishing industry, so much so that the stationers lobbied Parliament for some form of statutory protection,<sup>50</sup> which resulted in the *Statute of Anne*,<sup>51</sup> regarded as the first form of modern copyright legislation:

The power of censorship and press control through the Stationers’ Company copyright lasted for over 150 years. Finally, in the early 1700’s parliament refused to continue to support the monopoly that the stationers had enjoyed for centuries and the power of censorship that the crown had enjoyed along with it.<sup>52</sup>

There was “no official censorship in England after that time, although there were various ways in which printers and news vendors could be harassed by fines, imprisonment, or the pillory for libels against the state.”<sup>53</sup>

Although censorship by the Crown through its prerogative powers or statutorily awarded Crown copyright has largely abated, instances of censorship do exist and will be discussed in section 4.3 below.

### **Statutory Crown copyright**

Section 12 of the *Copyright Act* legislates Crown copyright but refers to only the rights and privileges of the “Crown” and works of “Her Majesty.” By statutory definition under the *Interpretation Act*, these terms mean by extension the *federal* government and there is no specific mention whether the rights and privileges of *provincial* governments

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<sup>49</sup> *Ibid.* at §2-13.

<sup>50</sup> Kaplan, *supra* note 41 at 6-7.

<sup>51</sup> 8 Anne, c. 19 (1710).

<sup>52</sup> *Supra* note 46.

<sup>53</sup> Parker, *supra*, Chapter 3, note 4 at 11.

survive the Act or whether the provisions of s. 12 bind provincial governments. Despite this potential ambiguity, it has been suggested that clearly the provisions of s. 12 also extend to provincial governments:

[I]t appears that the reference to the “Crown” in the Act refers to the Crown in the Right of Canada and the Crown in the Right of each of the provinces, depending on the circumstances. Although there are no cases specifically dealing with s. 12, there are a number of decisions of the Supreme Court of Canada which support this approach.<sup>54</sup>

Concerns have also been expressed over the breadth in s. 12 of the phrase “where any work is, or has been, *prepared or published by or under the direction or control of Her Majesty or any government department*”: “If those ‘or’s’ are truly conjunctive, that phrase of 24 words potentially includes 24 classes of material.”<sup>55</sup> The words “prepared or published” would likely include unpublished materials and the words “direction or control” are quite broad and might work to the detriment of freelancers preparing reports for the government in that copyright would likely vest in the government.<sup>56</sup> Although s. 12 limits the length of statutory Crown copyright to 50 years in most cases, the Crown prerogative by way of comparison extends in perpetuity and is not limited by rights under the *Copyright Act*.<sup>57</sup>

In what might be seen as a move towards a softening of the federal government’s insistence on Crown copyright over law-related information, the federal government recently proclaimed the *Reproduction of Federal Law Order*<sup>58</sup> which allows cases and

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<sup>54</sup> McKeown, *supra* note 22 at §18:2(a).

<sup>55</sup> Vaver, *supra* note 33 at 191.

<sup>56</sup> Torno, *supra* note 4 at 48-52.

<sup>57</sup> McKeown, *supra* note 22 at §18:4(e).

<sup>58</sup> SI/97-5.

legislation issued under authority of the federal government to be freely used so long as any reproductions are accurate and not represented as official versions:

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

The Ontario government also has a policy on copyright of legal materials that allows any person “to reproduce the text and images contained in the statutes, regulations and judicial decisions without seeking permission and without charge” but the materials “must be reproduced accurately and the reproduction must not be represented as an official version.” A copyright notice in favour of the Queens Printer for Ontario must also be provided.<sup>59</sup> It is unclear to what extent litigants before the courts are placing the copyright notice on versions of cases or statutes provided to the courts.

Thus, to sum up for now, as a general statement, it can be said that the Canadian federal and provincial governments have prerogative power of the publication of legislation. Whether the Crown prerogative also extends to the control of printing of court decisions is less clear; some commentators, such as Torno, argue that the prerogative applies to judicial decisions;<sup>60</sup> regardless, the federal and most provincial claims claim a statutory copyright in judicial decisions in addition to statutory Crown copyright for other government-produced materials.

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<sup>59</sup> See: Government of Ontario, “Policy on Copyright On Legal Materials.” Available online <<http://www.gov.on.ca/MBS/english/common/copypolicy.html>> (last modified: 2 December 2004).

<sup>60</sup> Torno, *supra* note 4 at 44-45.

## 4.2 Ownership of Government Information in the United States

The position in the United States, by way of contrast, is quite different from the position in Canada. The American federal government does not have copyright in judicial opinions or legislation and other products of the federal government.<sup>61</sup> Section 105 of the U.S. *Copyright Act*<sup>62</sup> has statutorily codified this position in the following terms:

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

Prior to the current statutory codification of this position, American courts historically denied copyright protection in court decisions or legislation for the federal – and state – governments.

### No Copyright in Judicial Decisions (U.S.A.)

In *Wheaton v. Peters*,<sup>63</sup> for example, the United States Supreme Court were called upon to decide whether Wheaton (and his assignees) had copyright in *Wheaton's Reports*, a collection of U.S. Supreme Court decisions in circumstances when Peters “republished” these decisions in his own form of court reports, the *Condensed Reports*. In denying the plaintiff's arguments in favour of a natural right to copyright based on the common law,

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<sup>61</sup> Howard B. Abrams, *The Law of Copyright* (St. Paul, Minn.: West, 1991-) at §2:48; Raymond T. Nimmer, *Information Law* (Boston: Warren, Gorham & Lamont, 1996) at §3:28.

<sup>62</sup> 17 U.S.C. 105.

<sup>63</sup> 33 US 591 at 668 (1834).

the court held that Wheaton could have no valid copyright in court decisions and that there was no infringement as a result:

[N]o reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.<sup>64</sup>

The U.S. Supreme Court extended this holding to state judicial decisions in *Banks v. Manchester*.<sup>65</sup> In that case, Banks (and his brother) were appointed by state statute as the official reporters for Ohio. Under that authority, they published the *Ohio State Reports*. Suit was brought against Manchester who had copied those decisions and republished them in the *American Law Journal*. In denying the claim for infringement, the court held that the judge was not an “author” in the traditional sense of copyright law due to the nature of judicial decisions and the need for the public to be able to access judicial decisions:

In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note, be regarded as their author or their proprietor, in the sense of section 4952, so as to be able to confer any title by assignment on the state, sufficient to authorize it to take a copyright for such matter, under that section, as the assignee of the author or proprietor. Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and headnotes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*, 8 Pet. 591, that no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. *The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.*<sup>66</sup> [emphasis added]

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

<sup>65</sup> 128 U.S. 244 (1888).

<sup>66</sup> *Ibid.* at 253.

In coming to this conclusion, the court cited in approval the decision of *Nash v.*

*Lathrop*,<sup>67</sup> an earlier case in which the court denied the official state reporter an exclusive copyright in judicial decisions:

The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public. It is its duty to provide for promulgating them; while it has the power to pass reasonable and wholesome laws regulating the mode of promulgating them, so as to give accuracy and authority to them.<sup>68</sup>

Two other “classic” cases in this area are the decisions of the United States Supreme Court in 1888 in *Callaghan v. Myers*,<sup>69</sup> and the Federal Court of Appeal in 1911 in *Banks Law Publishing Co. v. Lawyers’ Co-operative Publishing Co.*<sup>70</sup>

In *Callaghan*, at issue was the scope of copyright in the volumes of the *Illinois Supreme Court Reports*. The copyright in volumes 1 to 31 of the reports were owned by Callaghan & Co., while the copyright in volumes 32 to 46 were owned by Myers. Callaghan wanted to publish an entire set of the reports but refused to pay Myers’ asking price for permission to use his materials. Instead, Callaghan reprinted the entire set but made minor variations in the headnotes in Myers’ volumes. In this situation, the court

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<sup>67</sup> 142 Mass. 29, 6 N. E. Rep. 559 (1886).

<sup>68</sup> *Ibid.* at 35.

<sup>69</sup> 128 U.S. 617 (1888).

<sup>70</sup> 169 F. 386 (2d Cir. 1909) (per curiam), appeal dismissed per stipulation, 223 U.S. 738 (1911).

ruled that Callaghan had infringed Myer's copyright. At first blush, this would appear to contradict the holding in *Wheaton v. Peters* and *Banks v. Manchester*. However, as has been pointed out,<sup>71</sup> the court's ruling was premised on the fact that Myers' volumes had some original content (e.g., headnotes):

Thus, while the Court had permitted in *Manchester* the copying of judicial opinions first reported by a competitor, in *Callaghan* it refused to countenance reproduction of the prior volumes themselves, where such a taking would encompass more than the public domain matter.

Unhappily for the sake of clarity, *Callaghan* also contained a fleeting observation which suggested that arrangements and pagination were copyrightable – an observation contradicted by other aspects of the Court's opinion – which obscured the decision's fundamental consistency with *Wheaton* and *Manchester*.<sup>72</sup>

In the *Banks Law Publishing* decision, the defendant republished United States Supreme Court decisions from the plaintiff's volumes. Banks Law Publishing alleged that the defendant infringed the plaintiff's copyright "arising out of the arrangement of the cases, the division into volumes, the table of cases, and the numerical or star pagination to indicate where in the official reports the different cases and points decided may be found."<sup>73</sup> The court ruled that this alone was insufficient to warrant copyright protection; as a result, there was no infringement:

It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing) and paging the volumes – things essential to be done to produce the volumes – are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter. A different question would be presented if, for instance, infringement of the headnotes, or syllabuses, index

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<sup>71</sup> L. Ray Patterson and Craig Joyce, "Monopolizing The Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations" (1989) 36 U.C.L.A. L. Rev. 719 at 744-45.

<sup>72</sup> *Ibid.* at 744.

<sup>73</sup> *Supra* note 70, 169 F. 386 (2d Cir. 1909).

digest, synopses of arguments or statements of the cases, or an abridgment thereof were claimed.<sup>74</sup>

On appeal, the decision of the trial judge was affirmed:

We concur with [the trial judge] in his reasoning and conclusion that the arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details.<sup>75</sup>

This exception that provides copyright protection for “valued-added” annotations to judicial decisions was used by West some 80 years later to argue that they had copyright in the organization and structure of its national reporter system, including the page numbering. West’s argument was actually upheld by the 8th Circuit Court of Appeals (in Minnesota, where West has its headquarters):

West’s arrangement is a copyrightable aspect of its compilation of cases, that the pagination of West’s volumes reflects and expresses West’s arrangement, and that MDC’s intended use of West’s page numbers infringes West’s copyright in the arrangement.<sup>76</sup>

However, in two more recent rulings in a dispute between Matthew Bender and West in the 2nd circuit (New York), an opposite result was reached. In *Matthew Bender & Co. v. West Publ’g Co.*,<sup>77</sup> it was held that the “value-added” features provided by West to the judicial decisions lacked sufficient creativity to attract copyright protection. These valued-added features included (i) the arrangement of information specifying the parties, court, and date of decision; (ii) the selection and arrangement of the attorney information; (iii) the arrangement of information relating to subsequent procedural developments such as amendments and denials of rehearing; and (iv) the selection of parallel and alternative

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 at 1233 (8th Cir. 1986).

<sup>77</sup> 158 F.3d 674 (2d Cir. 1998).



citations.<sup>78</sup> Likewise, in *Matthew Bender & Co. v. West Publ'g Co.*,<sup>79</sup> the court rejected West's claim for copyright in the "star pagination" system it uses in the online versions of judicial decisions (to indicate the equivalent page number in the print version of its case report, e.g. "[\*78]"):

At issue here are references to West's volume and page numbers distributed through the text of plaintiffs' versions of judicial opinions. West concedes that the pagination of its volumes – i.e., the insertion of page breaks and the assignment of page numbers – is determined by an automatic computer program, and West does not seriously claim that there is anything original or creative in that process . . . . Because the internal pagination of West's case reporters does not entail even a modicum of creativity, the volume and page numbers are not original components of West's compilations and are not themselves protected by West's compilation copyright.<sup>80</sup>

Thus, in the United States, there is no copyright in judicial decisions, but there may be copyright in valued-added features that publishers add to the text of judicial decisions.

### **No copyright in statutes (U.S.A.)**

Likewise, in the United States, there is no copyright in legislation. In *Davidson v. Wheeler*,<sup>81</sup> the plaintiff, as the official state reporter appointed under statute, sought an injunction to restrain the defendant from "publishing and exposing for sale" two books that contained the laws of Minnesota. In refusing the injunction, the court emphasized the public nature of the laws and that anyone, including the defendant, was free to publish them:

They obtained no exclusive right to print and publish and sell the laws of the state of Minnesota, or any number of legislative acts. The materials for such publication are open to the world. They are public records, subject to inspection

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<sup>78</sup> *Ibid.* at 681.

<sup>79</sup> 158 F.3d 693 (2d Cir. 1998).

<sup>80</sup> *Ibid.* at 699.

<sup>81</sup> 27 F. 61 (C.C.D. Minn. 1866).

by every one, under such rules and regulations as will secure their preservation. They may be digested or compiled by any one, and it is true such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis; but such compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him.<sup>82</sup>

Likewise, in *Howell v. Miller*,<sup>83</sup> the court, relying in part on the holding in *Banks v. Manchester* that there is no copyright in state judicial decisions, extended the principle in that case to state statutes, which were also held to be in the public domain:

It was suggested in argument that no one can obtain the exclusive right to publish the laws of a state in a book prepared by him. This general proposition cannot be doubted. And it may also be said that any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book be the property of the state or the property of an individual.<sup>84</sup>

In *Howell*, the court did acknowledge that copyright could exist in the “value-added” annotations that a publisher might make to the statutes but that anyone was free to use and copy the statutes themselves.<sup>85</sup>

More recently, in *Deaton v. Kidd*,<sup>86</sup> the plaintiff sought a copy of Missouri state statutes on computer tape in ASCII format that the government otherwise sold to the highest bidder. “Sunshine laws” in that state required each public governmental body to “make available for inspection and copying by the public of that body’s public records.”<sup>87</sup> Taking note of the importance of having information in “electronic format,” the appeal court affirmed the decision of the trial judge and ordered the government to provide the statutes in ASCII format to the plaintiff:

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<sup>82</sup> *Ibid.* at 62.

<sup>83</sup> 91 F. 129 (6th Cir. 1898).

<sup>84</sup> *Ibid.* at 137.

<sup>85</sup> *Ibid.* at 139.

<sup>86</sup> 932 S.W. 2d 804 (Mo.App. W.D. 1996).

<sup>87</sup> *Ibid.* at 806.

Whether the Revised Statutes are public records is an easy question given a legal system which charges the public with having a knowledge of the law and proclaims that ignorance of the law is no excuse for its violation. As the trial court notes, “it is hard to think of a more important public record than the general laws of the state.”

This court’s analysis is not affected by the fact that the public record at issue is on computer tape. Concerning public records, the legislature has recognized the increasingly important role of computers and electronic media. Section 610.029 provides that “a public governmental body is encouraged to make information available in useable electronic formats to the greatest extent feasible.”<sup>88</sup>

At trial,<sup>89</sup> the judge noted the added advantages of having this information in electronic format, advantages that include having information in an up-to-date, consolidated format and information that is searchable by keyword:

The Revised Statutes on computer disk have additional features not offered by the book form. The annual computerized version integrates previous supplements into the main body of the Revised Statutes. There is no need to compare the hardbound books with the soft cover supplements. The computerized version allows the user to search all volumes in seconds by key word, phrase or statute number. The user is no longer limited by the index or his knowledge of where to look in the Revised Statutes to find particular topics.<sup>90</sup>

Thus, as a result of these decisions and the provisions in s. 105 of the U.S.

*Copyright Act*, the American position is relatively clear – case law and legislation as produced by the courts and legislators are in the public domain and may be copied or re-published by anyone. Vaver speculates on several likely reasons for the U.S. position on making government material public domain: the government does not need the traditional “incentives” provided by copyright to generate the work; the people pay the salaries of governments and judges, so the law belongs to the people; the material is important and unique so access should be made easily available; and it avoids the risk, albeit unlikely in

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

<sup>89</sup> *Deaton v. Kidd*, 1994 WL 722795 (Mo.Cir. Nov 21, 1994) (NO. CV193-1426CC).

<sup>90</sup> *Ibid.* at 2.

today's world, that the government would use its control as censorship or for patronage.<sup>91</sup>

Price echoes these reasons in more detail:

In summary, then, copyright in "government publications" has been denied because:

1. In a democracy where the widest possible public dissemination of materials of public interest is considered vital:
  - a. expositions of the law (statutes, judicial opinions and legislative histories) cannot be copyrighted because everyone is presumed to know the law and no one can be given a monopoly on publishing these expositions.
  - b. materials generated by government employees and initially printed by the government should be given the widest, least expensive distribution, which is possible only if no one can monopolize the publication or republication of an item.
2. The Government should frankly recognize and openly appropriate the money to cover the cost of its public documents; and the public should not have to pay twice, once through appropriations and then again through royalties.
3. Employees cannot claim property in their work because it belongs to their employer, the public at large, and should therefore be in the public domain.
4. Government employees cannot be compensated twice for material produced in the scope of their official duties. Their only source of compensation can be their employer.
5. Government facilities may not be used for private gain; any such use will result in the forfeiture of the rights to any property so produced.<sup>92</sup>

However, recent decisions involving state model codes have questioned the reasoning used by American courts in the past in rulings that have stated that these materials are in the public domain. Although perhaps less of a phenomenon in Canada, there appears to be a growth in the United States on the reliance of governments to allow private bodies to develop model codes in their areas of expertise and to then officially adopt those codes as regulations. Under the foregoing principles, one might assume that,

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<sup>91</sup> Vaver, *supra* note 33 at 192-95.

<sup>92</sup> Brian Price, "Copyright in Government Publications: Historical Background, Judicial Interpretation and Legislative Clarification" (1976) 74 Mil. L. Rev. 19 at 36, cited by Torno, *supra* note 4 at 44.

once enacted by the state, these regulations also form part of the public domain. However, in several U.S. decisions, courts have upheld copyright in favour of the private body that originated the model code, despite its subsequent adoption as official legislation.

### **Copyright in privately-developed model codes (U.S.A.)**

In *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*,<sup>93</sup> for example, the court held that used car valuations in the “Red Book” that were mentioned by or used in various state insurance statutes or regulations did not mean that the data in the Red Book had entered into the public domain. In that case, MacLean Hunter, since 1991, published the Red Book, a listing of used car valuations based on the publisher’s predictions and expert judgment on the likely value of individual used cars. CCC Information Services, a database provider, had been inputting large portions of the Red Book into its database and publishing it to its own customers. CCC Information Services sought and was granted at trial a declaration that it incurred no copyright liability for its use of the data from the Red Book. On appeal, however, the Court of Appeals, 2nd circuit (Connecticut) reversed this holding and upheld the copyright of Maclean Hunter in its Red Book. In ruling the copyright valid, the court was satisfied that the Red Book met the *Feist*<sup>94</sup> requirement of originality in a number of ways: through dividing the national used car market into regions (because the value of used cars varied from region to region); through the selection and manner of presentation of optional features for inclusion; through its use of 5,000 mile increments to adjust values; through the use of the abstract concept of

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<sup>93</sup> 44 F.3d 61 (2d Cir. 1994).

<sup>94</sup> *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991).

“average” vehicle in each category; and through the selection of the number of years’ models to include.<sup>95</sup>

The court, however, rejected the argument of the database provider who had copied the Red Book that the data had entered into the public domain by reason of it being used as a standard in various state insurance statutes and regulations:

We disagree also with the district court’s ruling sustaining CCC’s affirmative defense that the Red Book has fallen into the public domain. The district court reasoned that, because the insurance statutes or regulations of several states establish Red Book values as an alternative standard, i.e., by requiring that insurance payments for total losses be at least equal either to Red Book value or to an average of Red Book and Bluebook values (unless another approved valuation method is employed), the Red Book has passed into the public domain. The argument is that the public must have free access to the content of the laws that govern it; if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection.

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We are not prepared to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright. While there are indeed policy considerations that support CCC’s argument, they are opposed by countervailing considerations. For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution. We note also that for generations, state education systems have assigned books under copyright to comply with a mandatory school curriculum. It scarcely extends CCC’s argument to require that all such assigned books lose their copyright – as one cannot comply with the legal requirements without using the copyrighted works. Yet we think it unlikely courts would reach this conclusion.<sup>96</sup>

Likewise, in *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*,<sup>97</sup> the United States Court of Appeal, Ninth Circuit (California) upheld the copyright owned by the American Medical Association (“AMA”) in the Physician’s Current Procedural Terminology

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<sup>95</sup> *Supra* note 93 at 67.

<sup>96</sup> *Ibid.* at 73.

<sup>97</sup> 121 F.3d 516 (9th Cir. 1997).

(“CPT”), a publication created in the 1960’s that identifies more than six thousand medical procedures and provides a five-digit code and a brief description for each procedure.<sup>98</sup> In 1977, the Health Care Financing Administration (“HCFA”) was instructed by Congress to enact a billing code system that could be used for Medicare. Rather than create its own system, HCFA contracted with the AMA to use the CPT as its code in return for HCFA’s agreement to only use the CPT as the official billing system. The CPT was subsequently enacted into regulations.<sup>99</sup> The plaintiff publisher, Practice Management, sought a declaration that AMA’s copyright in the CPT was invalid once it became enacted as a regulation (since it wanted to re-sell the CPT in one of its own publications and was unhappy with the price at which AMA would license it for that purpose).<sup>100</sup> Although the court held that AMA had engaged in copyright misuse in its license with HCFA in exchange for the HCFA to not use a competing system, the court did confirm the CPT did not enter the public domain when it was enacted as a regulation. In so holding, the court reasoned that the grounds in *Banks v. Manchester* for holding that judicial opinions are in the public domain did not apply in this case because the author (i.e., the AMA) was not a public official in the same way that a judge is:

Practice Management’s argument that the CPT became law and entered the public domain when HCFA by regulation required its use rests ultimately upon *Banks v. Manchester* . . . which held that judicial opinions are uncopyrightable. Banks in turn rests upon two grounds, neither of which would justify invalidation of the AMA’s copyright.

The first ground for the Banks holding that judicial opinions are not subject to copyright is that the public owns the opinions because it pays the judges’ salaries . . . .

The first ground is clearly not applicable to the CPT. The copyright system was not significant in *Banks* because judges had no proprietary interest in their

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<sup>98</sup> *Ibid* at 517.

<sup>99</sup> 48 Fed.Reg. 16750, 16753 (1983); 50 Fed.Reg. 40895, 40897 (1985).

<sup>100</sup> *Supra* note 97 at 518.

opinions. The copyright system is of central importance in this case because the AMA authored, owns, and maintains the CPT and claims a copyright in it.

The copyright system's goal of promoting the arts and sciences by granting temporary monopolies to copyrightholders was not at stake in *Banks* because judges' salaries provided adequate incentive to write opinions. In contrast, copyrightability of the CPT provides the economic incentive for the AMA to produce and maintain the CPT.<sup>101</sup>

In addition, the court rejected the publisher's argument that the CPT, as law, should be accessible to all persons and hence in the public domain:

The second consideration underlying *Banks* — the due process requirement of free access to the law — may be relevant but does not justify termination of the AMA's copyright. There is no evidence that anyone wishing to use the CPT has any difficulty obtaining access to it . . . . Practice Management is not a potential user denied access to the CPT, but a putative copier wishing to share in the AMA's statutory monopoly. Practice Management does not assert the AMA has restricted access to users or intends to do so in the future.

The AMA's right under the *Copyright Act* to limit or forgo publication of the CPT poses no realistic threat to public access. The AMA has no incentive to limit or forgo publication. If the AMA were to do so, HCFA would no doubt exercise its right to terminate its agreement with the AMA. Other remedies would also be available, including "fair use" and due process defenses for infringers . . . .<sup>102</sup>

The court appeared to be concerned that if privately authored model codes were put into the public domain on being adopted by a government that this would create a disincentive for such organizations to invest in developing these codes:

As the AMA points out, invalidating its copyright on the ground that the CPT entered the public domain when HCFA required its use would expose copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation. Non-profit organizations that develop these model codes and standards warn they will be unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency.<sup>103</sup>

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.* at 519.

<sup>103</sup> *Ibid.* at 518-19.



However, in *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*,<sup>104</sup> the United States Court of Appeals, Fifth Circuit (Texas) came to the opposite conclusion of these two decisions by holding that the building codes developed by Southern Building Code Congress International, Inc. (“SBCCI”), a non-profit organization, entered the public domain when those codes had been formally adopted by various cities throughout Texas. In that case, a member of the public – Veeck – became frustrated that the codes were not more easily accessible, and after purchasing the codes on disk from SBCCI (pursuant to a license agreement that had restrictions on copying), Veeck published the codes for these towns on his own website, making them freely available.

SBCCI had unsuccessfully tried to “bifurcate” the holding in *Banks* by arguing that the two rationales for the ruling in *Banks* – that judicial decisions are in the public domain – did not apply to it. First, SBCCI argued that the court in *Banks* held that judicial decisions did not attract copyright because judges’ salaries were paid from public funds, unlike their authors who were not paid from public funds for developing building codes. The court rejected this argument, however, as being too narrow a reading of *Banks*; instead, the court reasoned that the “judge as author” argument in *Banks* was really an argument of “judges on behalf of citizens as authors” and that the “metaphorical concept of citizen authorship” of the law, together with “the very important and practical policy that citizens must have free access to the laws which govern them” were the governing principles.<sup>105</sup> SBCCI’s second argument – that *Banks* based its ruling of no copyright in judicial decisions on the need for cases to be available to the public – was that its building codes were available to the public and that this concern in *Banks* did not apply to it. The court

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<sup>104</sup> 293 F.3d 791 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003).

<sup>105</sup> *Ibid.* at 798.

also rejected this argument, recognizing the difficulty in being able to “reconcile the public’s right to know the law with the statutory right of a copyright holder to exclude his work from any publication or dissemination”<sup>106</sup>:

Since a copy of the codes is available for inspection and individual copying in a public office, SBCCI contends that the obligations of due process are fulfilled.

We disagree that the question of public access can be limited to the minimum availability that SBCCI would permit. *Banks* does not use the term “due process.” There is also no suggestion that the *Banks* concept of free access to the law is a factual determination or is limited to due process, as the term is understood today. Instead, public ownership of the law means precisely that “the law” is in the “public domain” for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse. If a citizen wanted to place an advertisement in a newspaper quoting the Anna, Texas building code in order to indicate his dissatisfaction with its complexities, it would seem that he could do so. In our view, to say, as *Banks* does, that the law is “free for publication to all” is to expand, not factually limit, the extent of its availability.<sup>107</sup>

As such, when “Veeck copied only ‘the law’ of Anna and Savoy, Texas, which he obtained from SBCCI’s publication, and when he reprinted only ‘the law’ of those municipalities, he did not infringe SBCCI’s copyrights in its model building codes.”<sup>108</sup>

In distinguishing the decisions from the other Courts of Appeals, the court in *Veeck* reasoned that in those cases the codes and standards were adopted by reference and not by “wholesale adoption of a model code promoted by its author . . . precisely for use as legislation.”<sup>109</sup>

Academic commentary on *Veeck* is divided. Deutsch, for example, argues that if the Supreme Court does revisit the issue in the future in terms of constitutional principles,

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<sup>106</sup> *Ibid.* at 799.

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

<sup>108</sup> *Ibid.* at 800.

<sup>109</sup> *Ibid.* at 804.

it is more likely to affirm the principles in *Veeck* in favour of the public right to access laws.<sup>110</sup> Deutsch also suggests that the court would likely not be persuaded by the arguments put forth by the non-profit organizations that without copyright protection they would lack the incentive to produce such beneficial works:

[T]he Supreme Court is less likely than the *Veeck* minority to accept the unproven “horrible” paraded by SBCCI: that without the incentive of copyright protection, no model building codes would be created.

The Court has shown a healthy skepticism in copyright cases toward such dire predictions in the absence of convincing proof. It may well agree with *Veeck*’s conclusion that the engineers, suppliers and contractors who draft model codes have a stronger incentive than copyright to keep producing such codes: the profit that they earn when the legal standards for building, plumbing, electrical, and other work are uniform throughout the region.<sup>111</sup>

The decision in *Veeck* has also been applauded for its view of “citizen-authorship” as a proper devolution by government for the private drafting of a model code, something which allows citizens to “reclaim the law.”<sup>112</sup> Tones argues that there are sufficient incentives – such as the benefit of clear standards for its members to apply to their professions and the ability to publish value-added materials that explain the codes or standards – separate from copyright royalties for non-profit organizations to continue to draft model codes and that the importance of access to the law justifies the ruling in *Veeck*.<sup>113</sup> By way of contrast, others have argued that the holding in *Veeck* definitely creates disincentives for such private bodies to promulgate model codes.<sup>114</sup> The *Veeck*

<sup>110</sup> Andrew L. Deutsch, “Is There Enforceable Copyright in ‘The Law’?” (2002) N.Y.L.J. 4.

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

<sup>112</sup> Shubba Ghosh, “Copyright as Privatization: The Case of Model Codes” (2003-2004) 78 Tul. L. Rev. 653 at 723; see also Shubba Ghosh, “Legal Code and the Need for a Broader Functionality Doctrine in Copyright” (2003) 50 J. Copyright Soc’y U.S.A. 71.

<sup>113</sup> Jessica C. Tones, “Copyright Monopoly vs. Public Access – Why the Law Should Not Be in Private Hands” (2005) 55 Syracuse L. Rev. 371 at 392-94.

<sup>114</sup> See, for example, Maryjane Boone Bonfield, “Can the Law be Copyrighted?” (2003) 56 S.M.U. L. Rev. 1025 and Katie M. Colendich, “Who Owns ‘The Law’? The Effect on Copyrights When Privately-Authorized Works are Adopted or Enacted into Law” (2003) 78 Wash. L. Rev. 589.

decision does not appear to have been considered in any Canadian decisions; it is also not clear how often the issue of copyright over privately-authored codes would arise in Canada since they appear to be used much less frequently here as official legislation. The website of the Canadian Commission on Building and Fire Codes (CCBFC) states that the CCBFC “develops the national model codes through a consensus-based process that relies on the voluntary contributions of public and private sector experts from across Canada” and that “seven standing committees review and develop proposed technical changes to the codes before they are submitted for public review.”<sup>115</sup> The changes must then be approved by the CCBFC before publication by the National Research Council. For the model codes that do exist with the input of the private sector, it appears that the Canadian government is claiming copyright in those materials.<sup>116</sup>

### 4.3 Impact of Crown Prerogatives and Copyright on Access to Information

That a historical artifact such as Crown prerogative with is “confusing legacy”<sup>117</sup> would hover over current Canadian law says something about our country’s loyalty to the homeland and our British heritage. Given changing times, many have begun to question the appropriateness or rationale of continuing to retain such an ancient doctrine:

The “legislative monstrosity” with its “atrocious drafting” sits there in its pristine glory and, in the waning years of Elizabeth II, decisions made by Charles II’s judges are still relied on by the governments of Canada and the provinces to support their claims of copyright. The smell of the crumbling pages of 17th century law reports hangs over the dancing pixels on the electronic highway.<sup>118</sup>

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<sup>115</sup> Canadian Commission on Building and Fire Codes, “Canada’s Code Development System” (undated). Available online: <[http://www.nationalcodes.ca/ccbfc/ccds\\_e.pdf](http://www.nationalcodes.ca/ccbfc/ccds_e.pdf)>.

<sup>116</sup> National Research Council of Canada, “National Code Documents – Important Notices” (16 July 2002). Available online: <[http://www.nationalcodes.ca/disclaimer\\_e.shtml](http://www.nationalcodes.ca/disclaimer_e.shtml)>.

<sup>117</sup> A phrase used by Torno in the title of his study on Crown copyright, *supra* note 4.

<sup>118</sup> Vaver, *supra* note 33 at 192.

Traditionally, the government has not done well as a provider of law-related information, due to a number of reasons, including delays in publications:

The government does a poor job of providing access to its publication and data bases. Little effort is put into marketing. It is often difficult to know how to obtain access. There are often considerable time delays in publishing legal information. Publications and data bases are often not user friendly. There is the danger that the government may grant exclusive licenses to the private sector, in effect creating a monopoly over certain types of legal information.<sup>119</sup>

The obvious impact of Crown prerogatives and Crown copyright on access to information is that it creates a culture of control by the government. While there have been only a few examples of actual censorship by the government using this control, the cultural effect is broader and potentially more nefarious for creating a climate of “father (or mother) knows best” and taking the power away from people and vesting it in the government over such an important and necessary information source such as legislation and case law.

Although there are several reasons to possibly justify retaining Crown prerogatives or Crown copyright over law-related materials,<sup>120</sup> perhaps the strongest justification is the need to ensure the integrity and accuracy of legislation and judicial decisions.<sup>121</sup> Given that it was suggested above that one of the reasons for the prerogative power was the duty of the monarch to ensure the laws were accurately represented, this argument perhaps has some validity. Or does it? In a jurisdiction where there is no Crown copyright, such as the United States, shouldn't there be evidence of abuses and risks of

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<sup>119</sup> Marshall, *supra* Chapter 3, note 66 at 176.

<sup>120</sup> Danielle Bouvet, “Crown Copyright: A Quest for a Peaceful Harbour” (1993) 18 Can. L. Libraries 187.

<sup>121</sup> *Ibid.*

inaccurate legislation or case law permeating throughout the jurisdiction? However, there is no evidence that this is a problem in the United States, calling into question the concern over accuracy as justifying the policy for Crown control. Vaver also makes the point in his usual humorous fashion that there is always a risk of some inaccuracies whether it is the government providing the information or the private sector:

The reason for the Crown's having the right is said to be ensure accuracy – the same reason that justified the British Crown's claim to control publication of the authorized version of the English and Scottish Bibles. The fear was someone might publish the Ten Commandments with a few choice revisions: miss out a “not” here and there, and where would society be? (Perhaps a great deal more interesting, but certainly not the exemplar of “peace, order and good government” the British upper classes expected of others, if not of themselves.) This reason assumes the infallibility of government printers and the relative sloppiness of private sector publishers; neither charge is entirely true today.<sup>122</sup>

Another, often unstated, rationale for the retention of Crown copyright over legislation and case law is the potential for licensing revenue that it generates:

More recently, governments have tried to justify their claims on straight fiscal grounds: to make money off the commercial publication of statutes. At least within the federal bureaucracy, there is a lively debate about the propriety of this between the supporters of the treasury board and those officials who believe in open government. So far, abstract democratic ideals have found it hard to grapple with a mentality favouring deficit reduction and “user pays” principles.<sup>123</sup>

As recently as 1990, a federal Treasury Board management advisory document instructed federal employees to assert Crown copyright over government-produced material, including statutes, regulations, orders-in-council and judicial decisions.<sup>124</sup> It has been suggested by at least one critic that the goal was to “create mechanisms for regulating

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<sup>122</sup> David Vaver, “Copyright Inside the Law Library” (1995) 53 *The Advocate* 355 at 357.

<sup>123</sup> *Ibid.*

<sup>124</sup> Appendix C of *Treasury Board Manual* (Ottawa, Treasury Board Canada, 1978), cited by Ronald G. Atkey, “Crown Copyright in Primary Legal Materials: The Government's Secret Plan to Impose User Fees” (1993) 18 *Can. L. Libraries* 192.

access and charging rates to citizens.”<sup>125</sup> At one point, both the province of Manitoba and Saskatchewan charged a fee for anyone to access the current version of its legislation online, with the “free” version being much more out-of-date. McMahon documents this practice, noting the ridiculousness of the practice of trying to charge fees and how little revenue it actually generated:

The provinces of Saskatchewan and Manitoba, among others, charge fees for access to their statutes. Andrew Hubbertz, Head of Government Publications for the University of Saskatchewan Libraries, wrote about this issue recently. He noted that Manitoba is offering access to its statutes for an annual subscription of \$275, while Saskatchewan is charging \$95 per year. He reports that Saskatchewan has sold a total of 570 subscriptions, some of which are trial or complimentary subscriptions. Of the 570, fully one-third were purchased by Saskatchewan government agencies. Hubbertz wrote that whenever government sells information, the sales almost always follow this pattern:

- Governments never recover more than a small fraction of the cost of providing the service, often netting out at zero or less when overheads like marketing and negotiating of license agreements are factored in;
- Governments would rather sell information at a high price to a small number of “must have” users, than at a low price to many users;
- Government itself is the largest consumer of government information.

Hubbertz asks:

Given free access, the statutes and regulations could be made available online in schools and libraries throughout the province, and in every home or office with a computer and an Internet connection. Does anyone know of a cheaper or more cost-effective way to promote democracy?<sup>126</sup>

## Censorship and Control

There have been a number of instances in recent years where the government has sought to enforce its Crown prerogative or Crown copyright in law-related material or relied upon its powers in defence of its actions. In most of these cases, presented below

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<sup>125</sup> Atkey, *ibid.* at 193.

<sup>126</sup> Tom McMahon, “Improving Access to the Law in Canada with Digital Media” (1999) 16 Government Information in Canada. Available online: <<http://www.usask.ca/library/gic/16/mcmahon.html>>.

chronologically, one could reasonably question whether the government actions were motivated by censorship and fear of embarrassment or from the lure of the potential revenue from the use of the information in question.

In *The Attorney-General v. Butterworth & Co. (Australia) Ltd.*,<sup>127</sup> the Attorney-General for New South Wales sought an injunction against the defendant publisher to stop its publication of the statutes of New South Wales in a publication entitled *The Public Acts of New South Wales*. The defendant's publication contained the laws but also had its own added-value features, including annotations, a subject index and an organization by subject, none of which existed in the government's version. The government asserted both its prerogative and statutory rights. The court, in awarding the injunction to stop the defendant's publication, reviewed the old English cases involving the Crown's prerogative right to publish statutes and determined that the Crown, in fact, did have a prerogative right to control the publication of statutes. The court specifically rejected the argument that the prior publication of the statutes by the Crown put the material into the public domain. Furthermore, the court held that sections in domestic legislation that gave the public the right to inspect the statutes and make copies of them did not extend to give a person the right to publish the legislation in competition with the government:

It seems to me that the extent of the interest which a member of the public has in inspecting the Statutes enrolled and recorded in the office of the Registrar-General is to inform himself of the state of the law with a view to knowing his right and liabilities, or of being in a position to advise others, and to make such copy or copies as will suffice to keep himself so informed; it cannot, in my view, extend to allowing him to deprive the Crown of its proprietary rights in the nature of copyright, or to affect them except to that limited extent.<sup>128</sup>

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<sup>127</sup> *Supra* note 4.

<sup>128</sup> *Ibid.* at 257.



The court went on, in *obiter*, to rule that the Crown's statutory copyright also applied (in addition to a prerogative power) and would have supported an injunction to restrain the defendant from publishing its material:

I can see no reason . . . why the right in question should not be regarded as vested in the one, indivisible and ubiquitous Crown in right of the State; nor why, if not so vested, such right might not be asserted by [the Attorney-General]; but . . . it is not necessary to express a final opinion on this point, although my view is that, if the [Attorney-General] had not succeeded on the prerogative, he would have been entitled to succeed, although to a limited extent, on the Statute.<sup>129</sup>

One can reasonably assume that as a result of this decision, Butterworths (and other legal publishers) were forced into entering licenses with the government to be able to include statutes (and possibly case law) in their publications (and it appears that licensing of government information continues in Canada today).<sup>130</sup> This Australian case does not appear to have been considered in any Canadian decisions. Compare this to the situation in the United States. On cases with almost identical facts discussed above – *Davidson v. Wheeler* and *Howell v. Miller* – the publishers were free to use the text of the official state statutes and re-publish them with added features, all without the need for permission or royalty payment. The U.S. position is clearly preferable. However, given the wording of s. 12 of the *Copyright Act* and the historical impact of Crown prerogative, it is unlikely that a Canadian court would judicially override the legislation and historical convention to rule that statutes and case law are in the public domain.<sup>131</sup> As such, legislated reform

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<sup>129</sup> *Ibid.* at 259.

<sup>130</sup> The Ontario government, for example, charges royalties of 15% to 40% on information it produces for publishers who want to reprint it – see Jim Middlemiss, “Government’s Jump to CD-ROM Raises Publisher’s Ire” *The Financial Post* (25 April 1995).

<sup>131</sup> Although see the discussion of *CCH Canadian Ltd. v. Law Society of Upper Canada*, *infra*, note 148, where the Supreme Court of Canada strongly endorsed users’ rights in relation to law-related materials and maybe left the door open for an argument to be made that case law, at least, is in the public domain.

may be needed to abolish Crown copyright and prerogative in legislation and case law in Canada, which would be both a theoretical/symbolic gesture indicating the importance of such information to a free and democratic society in addition to creating incentives for Canadian publishers to provide value-added information incorporating such information. Patterson and Joyce note, for example, that, after the decision in *Wheaton v. Peters*, publishers scrambled to publish case law reporters once the monopoly over reporting had been removed; this resulted in more publications being available to the public at a lower cost.<sup>132</sup> Marshall makes a similar point, that “having legal information in the public domain would encourage vendors to ‘add value,’ enhance competition, market the information to a larger audience and allow publishers to target special groups (e.g., educational users).”<sup>133</sup> Vaver points out that the government in fact benefits by providing free access to the publishers:

Full availability of government works may provide incentives to the private sector to add value by summarizing, interpreting, synthesizing, and criticizing the material and making this new product publicly available. This may benefit the government by making programs more comprehensible and accessible, without additional cost on public funds, to those members of the public particularly interested in the programs.

An idea like this, while not motivating the original policy of public domain, does describe one present effect of it. The presence of government copyright would marginally discourage this type of desirable private sector cooperation and so lessen the effectiveness of some programs.<sup>134</sup>

Vaver notes three relatively recent cases in which each of the Australian, Ontario and British governments have used their Crown copyright to suppress the publication by others of information that might be seen to be critical of government.<sup>135</sup> In *Australia v.*

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<sup>132</sup> *Supra* note 71 at 734; see also Vaver, *supra* note 33 at 196.

<sup>133</sup> Marshall, *supra* Chapter 3, note 66 at 177.

<sup>134</sup> Vaver, *supra* note 33 at 195.

<sup>135</sup> *Ibid.*, note 18.

*John Fairfax & Sons Ltd.*,<sup>136</sup> for example, the Australian government sought and obtained an injunction against a publisher who had published and who was proposing to continue to publish books that detailed Australian government foreign policy, especially as it related to the East Timor crisis of 1975-76. The books contained and referred to government documents, much of which the government claimed was confidential or cabinet-related. The court acknowledged the conflict between allowing free expression and the need to protect matters of state when public security is at issue:

It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.

Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.<sup>137</sup>

Despite this and the importance of the matter to public debate on the issues, the court ruled that the Crown's copyright in the documents entitled it to a continued injunction and that the publishers had no fair dealing defence nor was there a public interest exemption to allow use of the documents.

Similar results were reached in *A.-G. (Ont.) v. Gowling & Henderson*<sup>138</sup> regarding the government's attempt to block use of cabinet documents and prison manuals that prison guards and inmates were attempting to use to show that prison conditions violated the *Charter*. In granting the injunction in favour of the government, the court relied on

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<sup>136</sup> (1980) 32 A.L.R. 485 (Aust. H.C.).

<sup>137</sup> *Ibid.* at 492-93.

<sup>138</sup> (1984), 12 D.L.R. (4th) 623 (Ont. H.C.J.).

the decision in *Secretary of State for Defence v. Guardian Newspapers Ltd.*<sup>139</sup> in which the British government obtained an order for the return of defence ministry documents (relating to the government's decision to allow American cruise missiles to be housed on British soil) on the grounds that copyright in the documents vested in the Crown.

Although not a case involving Crown copyright, the decision in *Tolmie v. Canada (Attorney General)*<sup>140</sup> reflects the frustration that Canadians sometimes face in requesting information from the government that our American counterparts are able to take for granted in most circumstances. In *Tolmie*, the applicant applied under the *Access to Information Act* for a copy of the *Revised Statutes of Canada* in electronic form. In his request, he stated that “the preferred format is the existing WordPerfect 5.1 format that is presently used within Justice Canada for creating the Statutes. However, alternative formats such as the Folio format used on the CD-ROM produced for this purpose would be acceptable.”<sup>141</sup> Initially, in a letter to the applicant, the government resisted production of the machine readable version of the statutes on economic grounds: “The Department recognizes there are a number of businesses in Canada that specialize in providing access to databases of a legal nature. *Providing your company now with a copy of the Revised Statutes would jeopardize departmental plans to sell the information*”<sup>142</sup> [emphasis added]. At the hearing before the Information Commissioner, the government also argued that it was exempt from disclosing the information under s. 68(a) of the *Access to Information Act* on the basis that the information was already publicly available in print. On its facts, this case is almost identical to the *Deaton v. Kidd* decision above from

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<sup>139</sup> [1984] Ch. 156 (C.A.), aff'd on other grounds [1985] A.C. 339 (H.L.).

<sup>140</sup> [1997] 3 F.C. 893, 137 F.T.R. 309.

<sup>141</sup> *Ibid.* ¶ 2.

<sup>142</sup> *Ibid.* ¶ 3.

Missouri. However, unlike *Deaton*, the Canadian Federal Court denied the application on the basis that, under s. 68(a) of the Act, the Act did not apply since the material requested was already published material available for purchase by the public.

In *LawPost v. New Brunswick*,<sup>143</sup> the appellants, Lawpost and S. Bryant Smith, must be given credit for at least trying in their claim. They alleged that the government of New Brunswick violated their rights to freedom of the press, s. 2(b), and to life, liberty and security of the person, s. 7 under the *Charter* due to the governments use of Crown copyright to control the publication and distribution of legislation and case law. They sued a number of provincial government defendants, including the Province of New Brunswick, the Legislative Assembly of New Brunswick and its members as represented by the Speaker of the Legislative Assembly, the Court of Appeal of New Brunswick as represented by the Chief Justice of the Province, the Court of Queen's Bench of New Brunswick as represented by the Chief Justice of that Court, and the Provincial Court as represented by its Chief Judge. At trial, the pleadings were struck out against all of the defendants but the Province as disclosing no cause of action. This ruling was essentially upheld on appeal with the Court of Appeal ruling that the statement of claim did not disclose causes of actions against the defendants except for the province, and even with that claim, the court seems somewhat impatient by suggesting that the applicants "get on with their claim":

[I]n my opinion, it still does not disclose a cause of action against the Legislative Assembly or the three courts as defendants. The amendments attempt to create liability by claiming that the defendants acquiesced in the government's assertion of Crown copyright.

Further, Lawpost and Mr. Smith assert that the courts are obligated to be proactive in protecting the interests of the public on whose behalf the publishers purport to act. Judges are immune from suit for acts done in the performance of

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<sup>143</sup> (1999), 182 D.L.R. (4th) 167 (N.B.C.A.).

their judicial duties. The sources of the immunity are the common law and by statute. The ephemeral notion advanced by Lawpost and Mr. Smith is that the courts have a duty to act against the government claim of Crown copyright in order to protect the independence of the judiciary. The argument with respect to immunity from suit need not be pursued further; the claims simply do not disclose a cause of action. Moreover, the courts are not represented by the persons alleged, nor are the courts subject to suit.

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The proper party for Lawpost and Mr. Smith to pursue is the Province of New Brunswick. The appellants have included the Province in their lawsuit. They should get on with their claim.<sup>144</sup>

More recently, we are starting to see some change in the attitude of government and the courts towards these issues. In *Wilson & Lafleur ltée c. Société québécoise d'information juridique*,<sup>145</sup> the publisher Wilson & Lafleur sued SOQUIJ for its failure to provide it copies of all Quebec court decisions at cost instead of the selected cases that SOQUIJ made available at a flat rate of \$2.00 per page, which Wilson & Lafleur thought restrictive and excessive. This was, in other words, an instance of a government agency attempting to place restrictions on access to the law. Although the complaint was dismissed at trial, the Quebec Court of Appeal ruled in favour of Wilson & Lafleur, emphasizing the importance of access to the law for all persons:

In a state of law, where each individual is subject to and governed by statutes, regulations and, it must be admitted, precedent, it is essential that citizens be able to discuss and criticize these rules freely. Since the establishment of a true democracy requires that citizens be able to express their opinions and freely criticize the institutions governing them, and thereby participate in their evolution, it seems to us obvious that such discussion and criticism must also apply to the products of these institutions. In this case, this clearly refers to judicial decisions.<sup>146</sup>

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<sup>144</sup> Ibid. ¶8-9, 11.

<sup>145</sup> [2000] R.J.Q. 1086 (C.A.).

<sup>146</sup> Ibid. ¶ 25. Translated text from Daniel Poulin, "CanLII: How Law Societies and Academia Can Make Free Access to the Law a Reality" (2004) JILT. Available online: <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004\\_1/poulin/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/poulin/)>.

Stating the necessity of accessing court decisions, the court ruled that SOQUIJ must provide Wilson & Lafleur access to all the judgments given by the judicial courts of Québec to which it has itself access (§ 36) and ordered that his access be given on the basis of the actual costs incurred by SOQUIJ and not an artificially inflated price (§ 41). Poulin describes the positive effect this has had on access to Québec case law:

This Court of Appeal decision brought about major consequences regarding the conditions for access to judicial decisions in Quebec. In the following year, Quebec went from a place where free publication of law had made painfully little progress to eventually become the Canadian jurisdiction where case law is most accessible. More specifically, the Quebec government adopted a new policy and mandated that the Société québécoise d'information juridique set up a Web site offering free basic access to all decisions rendered by courts and tribunals in Quebec.<sup>147</sup>

Finally, and most recently, in *CCH Canadian Ltd. v. Law Society of Upper Canada*,<sup>148</sup> the Supreme Court of Canada addressed the issue of copyright in judicial decisions. Although the decision did not directly involve Crown copyright, the court's analysis of copyright in judicial decisions is useful for the present analysis. At issue in that lawsuit was whether the photocopying service provided by the Law Society's law library infringed the copyright of the plaintiff legal publishers in various legal publications, including their case law reporters.<sup>149</sup> In looking at the exercise of "skill and judgment" needed to compile reported judicial decisions, the Court concluded that the compilation of the headnotes, case summaries, topical index and reported judicial decisions in issue met this test and that the legal materials in this case were "original"

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<sup>147</sup> Poulin, *ibid.*

<sup>148</sup> 2004 SCC 13, rev'g [2002] 4 F.C. 213, 224 F.T.R. 111, 212 D.L.R. (4th) 385, 289 N.R. 1, 18 C.P.R. (4th) 161, 2002 FCA 187 (C.A.), rev'g [2000] 2 F.C. 451, (1999) 169 F.T.R. 1, 179 D.L.R. (4th) 609, 2 C.P.R. (4th) 129, 72 C.R.R. (2d) 139 (T.D.).

<sup>149</sup> For a detailed analysis of the decision, see Ted Tjaden, *supra*, Chapter 1, note 2 at 21-24. See also Daniel J. Gervais, "Canadian Copyright Law Post-CCH" (2004) 18 I.P.J. 131.

works covered by copyright.<sup>150</sup> However, although the court ruled that copyright existed in the publishers' works due to the value-added material and the skill and judgment used, the copying done by the Great Library was fair dealing with the publishers' works. From a researcher's point of view, the court's ruling that fair dealing must not be interpreted restrictively (§ 48) is welcome news, as is the ruling that the meaning of "research" must be given "a large and liberal interpretation" in order to ensure that users' rights are not unduly constrained, even where the research is "for profit" (as in the practice of law).<sup>151</sup> As part of its analysis, the court made the following comments which would seem to adopt the U.S. position of there being no copyright in the judicial reasons themselves:

*This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation – namely the headnote – are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.*<sup>152</sup>

However, it is not entirely clear that the court was going as far as adopting the U.S. position on this point. The analysis in this decision was as between the rights of the publishers (in their value-added features) and the rights of users (to copy the entire reasons, including the value-added features). The analysis was not as between publishers and the state or the judges as to who owns the text in the judicial reasons themselves. Thus, in the statement "it would not be copyright infringement for someone to reproduce

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<sup>150</sup> *Supra* note 148 ¶ 29-36.

<sup>151</sup> *Ibid.* ¶ 53.

<sup>152</sup> *Ibid.* ¶ 35.



only the judicial reasons” it is not clear if the reason for this is because such reproduction would be fair dealing or whether because the reasons are in the public domain. Given that the thrust of the decision dealt with fair dealing, it is likely that the Court’s reasoning is that reproduction of only a judge’s decision (without a publisher’s value-added commentary) would constitute fair dealing. At the same time, however, it could be open to interpretation that given the role of judges in society and the fact that they are not likely under the “direction or control” of the government for the purpose of s. 12 of the *Copyright Act*, the Court meant that the decisions are in the public domain. Because of the uncertainty, it may therefore be left for later decisions to determine this exact point. Regardless, the decision is a welcome trend towards user rights in relation to the use of law-related materials for the research purposes.

## Conclusions

Crown prerogative and Crown copyright have a long history in England and Canada. And although these doctrines remain dormant most of the time, they still influence access to law-related information in a number of ways. The American position, by way of contrast, is much more open and does not appear to have resulted in a plethora of inaccurate law-related information being circulated in the marketplace. Even though recent issues involving the Canadian government, such as the Gomery Commission<sup>153</sup> or the Arar Inquiry,<sup>154</sup> do not directly raise issues of Crown copyright, they do relate in a broader sense to the degree of control that the government should necessarily have over

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<sup>153</sup> Commission of Inquiry into the Sponsorship Program and Advertising Activities, “Home Page.” Available online: <<http://www.gomery.ca>>.

<sup>154</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, “Home Page.” Available online: <<http://www.ararcommission.ca/eng/index.htm>>.

information which affects its citizens and which may cast the government or its officials in a negative light. To the extent that Crown copyright or prerogative reserves to the government the potential for excessive control or censorship over law-related information that is in its possession, this is an unacceptable situation. Governments currently have a large number of exceptions in access to information legislation that can legitimately protect the disclosure of sensitive information. For government produced information that is law-related and needed by citizens to enforce or discover their legal rights, the added control provided by Crown copyright and prerogative is anachronous and can potentially lead to censorship. As such, Crown copyright and prerogative in legislation and case law and closely-related materials should be abolished, a position discussed in more detail in the Recommendations section in the final conclusions to this thesis. But first a look in the next chapter at another potentially retarding effect on access to law-related information – the commodification of information and the privatization of public goods that is an offshoot of the “shrinking” public domain in cyberspace.

## Chapter 5

### **The Shrinking Information Commons and Private Control of Public Goods: The Commercialization of the Internet**

- 5.1 The Promise of the Internet for Access to Information
- 5.2 Roadblocks on the Information Highway
- 5.3 The Impact of Canadian Government Information Policy

We have seen that, although access to law-related information is important, there are a number of factors that inhibit access to information. These factors include the complexity of the legal system in Canada, the nature of the relatively small commercial market for law-related information, and the impact of Crown copyright on retarding access to governmental law-related information. However, the Internet has had a dramatic impact on many aspects of modern life, including access to information. As a relatively inexpensive and ubiquitous medium, the Internet shows great promise to improve access to law-related information – it is relatively cheap for publishers to publish information online; publishing is instantaneous; and it is also interactive, allowing the user to easily link to other material. The Internet also shows great promise for developing countries with less well-developed infrastructures for print-based law-related materials; as such, it equally shows great promise in Canada to overcome some of the inhibiting factors discussed above. Despite the promises that new technologies and the Internet bring to accessing information, there are a number of factors that act as roadblocks or bottlenecks on the Information Highway. After a discussion of the promise of the Internet, I will briefly review some of these roadblocks, which relate in part to the

“commodification” of information, and which have the potential to shrink the public domain. A number of roadblocks include the impact of a digital divide resulting in some sectors of society not being able to take effective advantage of these technological developments; the trend towards intellectual property “overprotection”; contractual licensing terms and technology protections that result in digital lockdown; privacy concerns arising from the ubiquitous nature of the Internet itself and the ease by which persons can access information; and, finally, the ephemeral nature of the Internet itself, which results in online information not always being available in the same location due to changes in web addresses (and although this is not a “roadblock” per se, it does result in impeded access). In the final section of this chapter, I discuss how Canadian governmental information policies have compounded the issues beyond merely the claim to Crown copyright but also to other factors that act as retardants, including policies for “cost recovery” or “revenue generation” and other factors.

## **5.1 The Promise of the Internet for Access to Information**

To begin, though, is an overview of some of the possibilities that the Internet offers as a means of “sharing” information. At first blush, the ability to easily share information on the Internet may seem to challenge the viability of copyright protection itself since information on the Internet can be reproduced and broadcast at a very inexpensive and fast rate. In contrast, a print-based medium gave legal publishers a more stable print environment that they could more easily control; it was a regime where rampant copying was kept to a minimum due to the cost of reproducing print materials:

When information was embedded only in analog media, the friction of geography and the physical containers of creativity (paper, celluloid, audio tape) helped maintain a stable equilibrium. Copyright owners could earn a fair, enforceable reward for creativity and the public enjoyed stipulated rights of access, use, and reproduction of works. Marketplace arrangements and copyright law kept the interests of creators, media companies, and the public more or less in alignment, or at least stable.<sup>1</sup>

To the extent that control over a body of information is part of the definition of a profession,<sup>2</sup> the traditional print-based environment of law-related materials helped to reinforce the monopoly held by the legal profession over legal materials and created barriers for many laypersons (e.g., geographical barriers due to distance from law libraries or practical barriers due to the difficulty in using print materials). The complexity of the legal system and the relative difficulty of using print-related law materials contribute to a *de facto* control by the legal profession over this information:

Access to legal information in the print environment requires specialized training in research methods. Many feel that the legal profession's complex storage and retrieval techniques make lay people too dependent upon lawyers; the antidote consists of books and manuals that attempt to summarize various legal procedures in simple English. With print, in other words, the only practical means for reducing informational distance between citizen and the law is to create an alternative genre of literature that explains procedures and concepts in simpler language and that avoids traditional legal materials almost entirely.<sup>3</sup>

With digital technologies, however, there is some promise that the barriers between citizens and law-related information will be lessened, bringing the law directly to the people:

The new information technologies . . . do make it possible to break down information distances in ways that were not possible or economical with print. In an electronic information environment, there will be a different distance between legal and nonlegal information than there is in a print culture, and there will also be a different distances between those who have controlled legal information in the past (the legal profession), and those who have not (clients and citizens).<sup>4</sup>

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<sup>1</sup> David Bollier, "Why We Must Talk About the Information Commons" (2004) 96 Law Libr. J. 267 at 271.

<sup>2</sup> Katsh, *supra*, Introduction, note 8 at 83.

<sup>3</sup> *Ibid.* at 83.

<sup>4</sup> *Ibid.* at 84.

The ability to share information is one of the aspects of the Internet that make it a valuable “information commons.” Bollier identifies a number of features of the Internet that make it so:

- **openness and feedback** (the idea that the Internet – as an information commons – is largely democratic and invites sharing);
- **shared decisionmaking** (due to the “bottom-up” nature of the Internet and a lack of a central controlling mechanism);
- **diversity** (in that openness allows for diverse opinions which can lead to innovation);
- **social equity** (that a commons, by its very nature, is meant to “democratize social benefits”) and,
- **sociability** (that the Internet has the possibility of creating interactions between people that would not take place in person).<sup>5</sup>

In many developing countries, print-based law materials are not always readily or easily available (due primarily to cost and the lack of reliable publishing), something that negatively impacts access:

In some countries, the lack of a comprehensive and timely system for publishing laws has important consequences for the rule of law. Where the absence of private-sector law publishing is compounded by outdated and poor-quality official publication, knowledge of the law can depend largely upon personal contacts and proximity to the capital city, even for lawyers and judges. Where even judges cannot get access to current legal materials, it is unrealistic to expect lawyers or their clients to have an understanding of their applicable legal rights. Many developing countries lack the academic resources to produce legal textbooks – which play an important role in distilling, explaining, and commenting upon official law – even for judges.<sup>6</sup>

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<sup>5</sup> *Supra* note 1 at 275.

<sup>6</sup> Michael R. Anderson, “Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs” Institute of Development Studies Working Paper Series, Working Paper 178 (February 2003) at 19. Available online: <<http://www.ids.ac.uk/ids/law/lawwps.html>>.

The Internet opens up opportunities for those governments and nonprofit organizations within those countries to make law-related materials available online for free (or low cost). In Uzbekistan, for example, the Open Library for Legal Information project, sponsored by the government and the Soros Foundation, has created a series of Public Centres for Legal Information in various regional libraries throughout the country that provide free and equal access to the laws of Uzbekistan for all citizens, including those from distant and disadvantaged communities,<sup>7</sup> something that would not have been possible in the absence of the Internet and technological developments. Likewise, in East Africa, despite that region being influenced by the English common law, the production of print case law reporters is spotty at best; where law libraries do exist in that region, their collections of books are often woefully out-of-date.<sup>8</sup> However, several Internet-related projects in this region have sought to bring technological solutions to “bypass” generations of inadequate print-based materials to take advantage of CD-ROM and Internet technology to provide law-related information to lawyers in those regions.<sup>9</sup> Public interest groups within those regions use an even more basic form of technology – the radio – to provide public legal information to citizens who do not have access to computers.<sup>10</sup>

Canada, by way of contrast, as a developed country, has a relatively sophisticated technological infrastructure, with a large number of homes having access to the Internet

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<sup>7</sup> Maria S. Stalbovskaya, “The Practice and Perspective of Free Access to the Legal Information of Citizens of the Republic of Uzbekistan” (2002) 34 *Intl. Inform. & Libr. Rev.* 201.

<sup>8</sup> Dennis Aganyo Onwonga, “LawNet Initiative: A Case for the East African Legal Information Institute” (2003) (1) *JILT*. Available online: <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003\\_1/onwonga/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_1/onwonga/)>. See also Canadian Bar Association, International Development Program, “CBA East African Legal Research Training Sessions” (February 7 to 22, 2000). Available online: <<http://www.cba.org/cba/idp/Reports/EastAfricaQuicklaw2000.asp>>.

<sup>9</sup> Onwonga, *ibid.*

<sup>10</sup> Gary Cleveland, “Packet Radio: Applications for Libraries in Developing Countries” in *UDT Series on Data Communication Technologies and Standards for Libraries on IFLANET*, Report #5 (1993). Available online: <<http://www.ifla.org/VI/5/reports/rep5/rep5.htm>>.

and with free Internet being available in most public libraries. For example, Statistics Canada reports that an “estimated 7.9 million (64%) of the 12.3 million Canadian households had at least one member who used the Internet regularly in 2003, either from home, work, school, a public library or another location.”<sup>11</sup> The Canadian government in fact has been quite bullish on supporting an information society, identifying in 2001 the goal of “making broadband access widely available to citizens, businesses, public institutions and to all communities in Canada by 2004.”<sup>12</sup> But the promise has not yet been fully realized,<sup>13</sup> and although Canada has much better Internet access than many countries in the world, there is still some way to go and a number of “roadblocks” still remain on the Information Highway.

## 5.2 Roadblocks on the Information Highway

Even though Internet technology holds much promise to improve access and even comprehension of law-related materials, there are a number of legal and practical impediments that act as “roadblocks” or “bottlenecks” on the Internet with the potential to impede or retard access. The first potential hurdle is the “digital divide” that results in a large number of people not having the technology or skills to access online information. And with “digital drift” – the move away by many publishers from publishing in print to publishing online – the digital divide is a potentially serious impediment for some people to access information. Another impediment that has the effect of potentially “shrinking” or “enclosing” the public

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<sup>11</sup> Statistics Canada, “Household Internet Use Survey – 2003” in *The Daily* (8 July 2004). Available online: <<http://www.statcan.ca/Daily/English/040708/d040708a.htm>>.

<sup>12</sup> Government of Canada, “Speech from the Throne – 2001” (37th Parl., 1st Sess., 30 January 2001). Available online: <<http://www.parl.gc.ca/information/about/process/info/throne/index.asp>>.

<sup>13</sup> Heather Scofield, “Tobin’s Plan Loses in Budget” *The Globe and Mail* (October 13, 2001) A1.



domain – an effect felt particularly in an online environment – are current copyright laws and proposed amendments to copyright law that would broaden or extend copyright protections to owners of copyrighted information. Closely related to this is the trend by owners of online copyrighted information to not rely solely on copyright laws for protection of their information but to use contractual licensing terms and technological protections measures to control access to their information. As such a ubiquitous medium, the Internet also raises new privacy issues; in the context of access to information, this impact is felt regarding access to personal information that may appear in court judgments. Finally, as briefly mentioned, the danger that law-related information on the Internet is not as stable as law-related information in print raises a risk of the inability to easily access information that is no longer online.

### 5.2.1 Digital divide

*It is important to understand that lowering the barriers to Internet access is helpful to everyone in the context of gaining easier access to information. An argument can be made that every individual should have the right to access information - regardless of disability, economic situation, or geographic location. Without this realization there will be no consistent progress in the effort to provide global access.<sup>14</sup>*

Despite there being a relatively high level of Internet use and availability in Canada, a “digital divide” or gap still remains, something which results in lower income families having less access to these new technologies. Data from Statistics Canada in

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<sup>14</sup> The Internet Society, Christine Maxwell, ed., “Global Trends that will Impact Universal Access to Information Resources” – Submission to UNESCO at 2.1 (15 July 2000). Available online: <<http://www.isoc.org/isoc/unesco-paper.shtml>>.

*Unveiling the Digital Divide*,<sup>15</sup> for example, suggest that income levels continue to be an important factor in the digital divide, with lower income families having less access:

Clearly, penetration increases across incomes, but it also increases substantially by the level of education, the presence of children and urban areas within each level of income. This is true whether home-use or use from any location is concerned. The latter is considerably higher, indicative of the importance of alternative access points (work, school, library, community resources).<sup>16</sup>

Matters involving legal research are often personal in nature and to the extent that home-use of the Internet is less prevalent for lower income families, this results in having to use publicly available Internet access points, which might not always been conducive for legal research on personally sensitive issues:

Where people access cyberspace is important to our examination of the implications for legal services. Legal matters often require both privacy, as discussed above, and convenience (physical proximity and timely availability). Computer access at work may not be useful if the employee needs to conduct either legal research or seek advice, particularly considering the fact that 63 percent of companies monitor employees' computer use. If schools or libraries are very distant, closed after normal business hours, or severely limit computer time, access to legal services at these places may be impossible, and when convenient, communication using school or library (i.e. government) machines can hardly be considered private. Thus, access to the Internet at home is very important, so we will define the digital divide as the gap between those who have access to the Internet at home and those who do not.<sup>17</sup>

In the United States, the statistics appear to mirror those in Canada with Internet penetration being the lowest in states dominated by Native Americans and poor rural populations.<sup>18</sup> To the extent that aboriginal people fall disproportionately into lower income brackets in Canada,<sup>19</sup> they are also negatively impacted by the digital divide,

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<sup>15</sup> George Sciadas, *Unveiling the Digital Divide* (Ottawa: Statistics Canada. 2002), Available online: <<http://www.statcan.ca/english/research/56F0004MIE/56F0004MIE2002007.pdf>>.

<sup>16</sup> *Ibid.* at 6.

<sup>17</sup> Mark Lloyd, *supra*, Introduction, note 2 at 525.

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

<sup>19</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 5 – “Renewal: A Twenty-Year Commitment” (Royal Commission on Aboriginal Peoples: Ottawa, 1996) at 24.

lagging behind other Canadians in being able to access information online, with the divide being strongest for remote and Northern Aboriginal communities.<sup>20</sup> The digital divide also negatively impacts children from lesser developed countries where home Internet access remains significantly divided along race and income lines with lesser developed countries being less likely to also provide Internet access for children in schools.<sup>21</sup> Regarding children, Canada is a signatory to the United Nations *Convention on the Rights of the Child*<sup>22</sup> and has ratified the Convention on December 13, 1991. Article 17 of the Convention in fact imposes positive obligations on governments to “ensure that the child has access to information and material from a diversity of national and international sources.”<sup>23</sup>

Costs are a related factor affecting access to online law-related information, particularly for the value-added information provided by the “for profit” private legal publishers, resulting in the reality that many laypersons will not have access to these sources of “commercial” online law-related information. Moreover, law libraries will often have difficulty in trying to license these online commercial databases on behalf of the public (referred to as “walk in traffic” in the library industry):

Commercial online services are expensive and the costs are borne much more easily by large firms than by small. Commercial databases, search tools and compilations are also very expensive and, as noted earlier, can only continue to exist in a firm’s collection so long as the ongoing licence fees are paid. As publishers move away from print versions to CD-ROM versions of certain materials, the cost burden becomes even more severe for libraries and smaller law firms.<sup>24</sup>

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<sup>20</sup> Aboriginal Canada Portal, *2003 Report on Aboriginal Community Connectivity Infrastructure* (5 May 2004). Available online: <<http://www.aboriginalcanada.gc.ca/acp/site.nsf/en/ao28080.html>>.

<sup>21</sup> Susanna Frederick Fischer, *supra*, Chapter 1, note 2 at 479.

<sup>22</sup> 28 May 1990, Can T.S. 1992 No. 3 (entered into force 2 September 1990).

<sup>23</sup> See Margaret Ann Wilkinson and Lynne (E.F.) McKechnie, “Implementing the Information Rights of Canadian Children (2003) 20 C.F.L.Q. 429 at 449.

<sup>24</sup> Teresa Scassa, “The Best Things in Law are Free? Towards Quality Free Public Access to Primary Legal Materials in Canada” (2000) 23 Dal. L.J. 301 at 328.

But costs alone are not the only potential “divide” to accessing information online; if the information being accessed is designed poorly, that information may be inaccessible for that reason as well:

Global access itself is not enough. Cost of access has to come down to where not just the elite in emerging nations can afford to get on the Internet. The issues of inaccessible design should be addressed. Once the access is available then the content should be usable by all. Access to the Internet without the ability to use the content is a hollow shell. Access to the Internet without the ability to use the features or participate in e-commerce is nothing more than lip service to the idea of universal access.<sup>25</sup>

In addition, it appears that disabled persons are more likely to be negatively impacted by the digital divide when online information is published without taking into account the challenges that blind, deaf or movement-impaired persons might encounter when using the Internet:

The benefits of addressing the problems of inaccessible design extend to include all people, including the community of people with disabilities. (About 10% of the world’s population are disabled, with a disproportionate amount falling into the poor population in emerging economies). It is imperative that there be some way to insure that people with disabilities in the developing world are not separated from everyone else. There must not be even more of a Digital Divide opened between people with disabilities and the efforts to provide Internet access to all in emerging economies. Once it is understood that accessible design is always in synch with low technology solutions, then big steps can be made to help everyone gain access to the information society.<sup>26</sup>

The barriers that disabled persons may face when trying to access online law-related information can related to both hardware issues (the need for computers with special features) and software issues (the way in which online information is designed and coded):

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<sup>25</sup> *Supra* note 14 at 2.1.

<sup>26</sup> *Ibid.*

While experiencing the general problems of finance and training, the disabled are also faced with further, specific barriers to accessibility. Even if a person can access the necessary hardware and software to go online, this may prove fruitless if the required websites are not designed with a view to being universally accessible. Certain screen readers (software which allows the blind or partially sighted user to hear the content of a website and to be guided through the navigation of the site) cannot process information presented entirely graphically, for example, via an image map which does not contain the necessary 'alt' tags (tags embedded in the HTML of a site which show text relevant to the image when the cursor hovers over it). Another very frequently employed way of presenting information on a website, the Portable Document Format (PDF) presents specific problems with access. Difficulties can be encountered by those using screen readers if, as one example among many, the PDF contains solely text that has been scanned into the file which has not been converted into 'real text,' readable by screen reading technology.<sup>27</sup>

One example, however, where the needs of disabled persons have been taken into account in the design of a website for law-related information is the Ontario government's e-Laws website containing Ontario statutes and regulations for free.<sup>28</sup> The site has been designed "to improve accessibility for people with disabilities who use alternative software and other adaptive technologies to access the Internet."<sup>29</sup>

Another challenge is that information online often lacks the context that is there when using print resources. An online database of full-text court decisions that is only searchable by keyword provides no up front "clues" as to what sort of cases might be in the database. This forces the user to be knowledgeable in the search terms being used; it also forces the user to be able to accurately interpret the search results, something which may not always be easy to do:

Electronic sources of information, at least at present, contain little to suggest a framework or organizational structure for law. This is not surprising since, as will be described later, the task of organizing material in cyberspace is as often the

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<sup>27</sup> Catherine Russell, *supra*, Chapter 1, note 2 at 239.

<sup>28</sup> See Queen's Printer for Ontario, "E-Laws: Ontario Statutes and Regulations." Available online: <<http://www.e-laws.gov.on.ca>>.

<sup>29</sup> Government of Ontario, "Ministry of Consumer and Business Services: 2003-04 Accessibility Plan." Available online: <<http://www.cbs.gov.on.ca/mcbs/english/ODAPlan2004.htm>>.

job of the user as it is of the supplier of information. Today's electronic services often fill the screen with information and data but provide no visual feedback to the user that compares to that conveyed by the spatial configuration of the print library. The electronic sources tell the user how many "hits" there have been, how many sources of information contain a certain word or concept, but almost nothing else.<sup>30</sup>

### 5.2.2 Risk of IP "overprotection"

Although many would argue that the continued extension of intellectual property protection will aid innovation and act as further incentives for creators to create new products, others have argued that these trends are "overprotection" and actually harm the public good by shrinking the public domain and in fact hinder innovation. While the motivation of copyright owners (typically large corporations) to protect their investments is understandable, the impact of these protections filters down to impact all types of copyrightable works, including those relating to law-related information:

Content gatekeepers, for their part, are seeing their traditional business models and market dominance challenged by new ways of doing business (and gift-economy alternatives). Most are eager to eliminate or limit alternative channels for creating, distributing, and using content. They want to re-enthroned a strict market regime for content and domesticate the free-for-all unleashed by the Internet and other digital technologies.

The proprietary world of centrally distributed content has a well-developed language and ideology to express its commercial interests in this new world: copyright, patent, and trademark law. And for the most part, these legal regimes generate important benefits for the public: investment in innovation, productivity, and economic growth. But it is also true that user, creator, and noncommercial constituencies have interests that intellectual property law increasingly does not foster or protect. Intellectual property legal regimes often constrict the flow of information by making markets less open and competitive. They often limit the legal rights and economic power of creators while bolstering those of giant content distributors. They can hinder individuals from freely creating and sharing their works outside of the marketplace.<sup>31</sup>

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<sup>30</sup> Katsh, *supra*, Introduction, note 8 at 70.

<sup>31</sup> *Supra* note 1 at 272.

Some of the major trends towards intellectual property protection are occurring in the United States. It remains to be seen whether these protections will extend to Canada, but given the overall trend towards international harmonization of intellectual property laws and the political pressure that the American government may be able to put on the Canadian government, it is not entirely clear that Canada would escape these trends. In the United States, for example, the *Sonny Bono Copyright Term Extension Act* (“CTEA”)<sup>32</sup> and the *Digital Millennium Copyright Act* (DMCA)<sup>33</sup> are two recent, controversial legislative amendments that extend the protection of copyright owners. CTEA, for example, extends the term of copyright protection from “life of the author plus 50 years” to “life of the author plus 70 years.” This has resulted in works that otherwise would have entered the public domain from remaining under copyright protection:

Public access and use of content are being privatized and commercialized in other ways. In 1998, Congress passed the Sonny Bono Copyright Term Extension Act and added twenty years to the copyright protection of works produced after 1923. Tens of thousands of works such as *The Great Gatsby*, the film *The Jazz Singer*, and works by Robert Frost and Sherwood Anderson will remain in private hands and not enter the public domain until 2019. The Act is a clear case of corporate welfare for major corporations and amounts to a tax on the public and authors who want to use the public domain to create new works.<sup>34</sup>

The DMCA, likewise, extends protection to owners of software content by forbidding any circumvention of copyright protection systems in that “No person shall manufacture, import, offer to the public provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a

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<sup>32</sup> Pub. L. 105-298 (27 October 1998).

<sup>33</sup> Pub. L. 105-304 (28 October 1998).

<sup>34</sup> *Supra* note 1 at 278.

work protected under this title.”<sup>35</sup> The effect of such legislative amendments is to restrict the free flow of information in favour of protecting content owners, many of whom are large corporations or publishers:

By allowing content owners to lock up digital text, the DMCA effectively eliminates the public’s fair-use rights, which have historically allowed people to quote and reuse works in other venues. It also overrides the first-sale doctrine, the legal rule that allows people to share the books or videotapes they buy with whomever they want. By strictly controlling the flow of works in society to serve private commercial ends, the DMCA is a direct affront to the First Amendment. The law prevents citizens from freely sharing and quoting works except in the manner prescribed by the copyright owner. It also allows large copyright industries to stifle competition and innovation and prevent the widest possible distribution of creative works, which is, of course, the very purpose of the Constitution’s copyright law – to advance and diffuse knowledge.<sup>36</sup>

In the Canadian context, the recent “Interim Report on Copyright Reform - Report of the Standing Committee on Canadian Heritage” (the “Bulte Report”) acknowledged that “the Internet represents the most significant new medium to reach and teach Canadians of all ages at home and abroad, copyright legislation should facilitate new Internet opportunities for culture, education and innovation.”<sup>37</sup> However, the Report recommended an extensive collective licensing regime for online distance educational materials and electronic interlibrary loans, a regime that would greatly add to the bureaucracy of copyright administration. In response to this, the Canadian Internet Policy and Public Interest Clinic has advocated that the Canadian government not take additional steps that would limit the flow of electronic information:

Research in Canada is currently inhibited by a prohibition against libraries providing patrons with a digital copy of material obtained electronically from another library via inter-library loan. Instead, the library must make a single print copy of the material for the patron. The rule is meant to prevent unauthorized distribution of the material by library patrons. It has the effect of putting

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<sup>35</sup> Section 1201(b), *supra* note 33.

<sup>36</sup> *Supra* note 1 at 277.

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



Canadian researchers at a disadvantage to those in other jurisdictions where electronic delivery of copyrighted material is permitted.

Libraries should be permitted to deliver electronic copies of electronic materials to library patrons, without having to pay for the right to do so. Libraries should not have to pay for the right to distribute electronic copies of materials to patrons that they are permitted to distribute in hard-copy form for free. Increasing the cost of access to library materials by Canadians is not in the public interest.<sup>38</sup>

Fortunately, it appears that the Canadian government is backing away from much of the Bulte Report to take a more balanced approach to digital copyright.<sup>39</sup> However, it does appear that the Canadian government is still considering some form of technological protection measures (i.e., protection against anticircumvention devices), something which could have the effect of giving copyright owners complete “digital lockdown” on their products, even those products containing public domain information. This trend is alarming and risks locking down digital content and denying legitimate access to materials that are “locked” by a technological protection measure. Professor Geist has been particularly critical of this trend and is concerned about the negative impact that technological protection measures would have if implemented in Canada:

The experience with technological protection measure legal protection in the United States, which enacted anti-circumvention legislation as part of the Digital Millennium Copyright Act (DMCA) in 1998, demonstrates the detrimental impact of this policy approach — Americans have experienced numerous instances of abuse that implicate free speech, security, user rights under copyright, and fair competition

From a traditional copyright perspective, anti-circumvention legislation, acting in concert with technological protection measures, has steadily eviscerated fair use

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<sup>38</sup> See Canadian Internet Policy and the Public Interest Clinic, “CIPPIC/PIAC Response to the May 2004 Standing Committee on Canadian Heritage *Interim Report on Copyright Reform*” (June 21, 2004) at 5-6. Available online: <[http://www.cippic.ca/en/news/documents/Response\\_to\\_Bulte\\_Report\\_FINAL.pdf](http://www.cippic.ca/en/news/documents/Response_to_Bulte_Report_FINAL.pdf)>. However, on June 20, 2005, the federal government introduced Bill C-60, *An Act to Amend the Copyright Act* that would add to the existing *Copyright Act* in newly created sections 34.01 and 34.02 provisions to prohibit removal or alteration of rights management information or circumvention of technological protection measures.

<sup>39</sup> Canadian Heritage, Copyright Policy – Copyright Reform Process: “Government Statement on Proposals for Copyright Reform - March 2005” (March 24, 2005). Available online: <[http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/index\\_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/index_e.cfm)>.

rights such as the right to copy portions of work for research or study purposes, since the blunt instrument of technology can be used to prevent all copying, even that which copyright law currently permits. They also have the potential to limit the size of the public domain, since in the future work may enter public domain as its copyright expires, yet that content may be practically inaccessible as it sits locked behind a technological protection measure.

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In fact, the time has come for all Canadians to speak out and to tell the responsible ministers along with their local MPs what is increasingly self-evident. Canada does not need protection for technological protection measures. In order to maintain our personal privacy, a vibrant security research community, a competitive marketplace, and a fair copyright balance, we need protection *from* them.<sup>40</sup>

The risk is that “the unrestricted use of technological protection measures (let alone the legal protection of them) could cause cultural and scientific knowledge to be locked away forever, as technologies for accessing the protected data become obsolete.”<sup>41</sup>

### 5.2.3 Contractual and licensing restrictions

In situations where intellectual property laws may be inadequate to protect publishers of online information, these publishers increasingly resort to using other mechanisms to control access to and use of their information. These mechanisms, based in contract law, include the requirement for users to register and pay fees to access their databases and to agree to license terms restricting on how information may be accessed and used. As Samuelson suggests, the commercial online environment can in fact be seen to pose more restrictions on access than a traditional print environment where the patron could ordinarily walk into the library (for free) and pull off any book from the shelf and read or copy it (within the limits of fair dealing):

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<sup>40</sup> Michael Geist, “‘TPM’s: A Perfect Storm for Consumers” *Toronto Star* (31 January 2005). Available online: <[http://www.michaelgeist.ca/resc/html\\_bkup/jan312005.html](http://www.michaelgeist.ca/resc/html_bkup/jan312005.html)>.

<sup>41</sup> *Supra* note 38 at 2.

Besides, in some respects, public access to legal information may be more restrictive in the electronic environment than before. The major commercial legal databases restrict the classes of people who can access them (e.g., students of a subscribing law school). In addition, these services charge relatively high prices to individual users. Many print law libraries, by contrast, have long been open to the public for free. And print libraries have live librarians to aid user searches, whereas electronic databases do not.<sup>42</sup>

For most commercial law-related databases online, the user is required to have agreed to the terms of what are typically quite stringent provisions:

A preferred industry strategy seeks to lock up content through click-through licenses (for Web pages) and shrink-wrap licenses (for software). Even though contract law requires a meeting of the minds on the terms for any contract, these click-wrap contracts are typically inequitable, one-sided deals that are deemed to be “accepted” if a consumer opens the shrink-wrap cellophane of a software box or clicks through an opening home page. The contracts may coerce users into fairly extreme agreements, such as prohibiting users from sharing the software, requiring legal complaints to be filed in the company’s court district rather than the consumer’s, and preventing the user from criticizing the software in print.<sup>43</sup>

Paragraph 1.1(c) of the LexisNexis Quicklaw Academic Services license agreement,<sup>44</sup> for example, requires the user to delete from their hard drive downloaded material within 90 days of downloading it. Paragraph 1.4 restricts the downloading, printing or use of text of public domain material on the same terms as the text of its own copyrighted material:

[LexisNexis Canada] makes no claim to ownership of Copyright in text that is in the public domain or is subject to Crown Copyright, but you agree nevertheless not to download, print or use such materials except in accordance with the terms and conditions set forth herein.

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<sup>42</sup> Pamela Samuelson, “The Quest for Enabling Metaphors for Law and Lawyering in the Information Age” (1996) 94 Mich. L. Rev. 2029 at 2055.

<sup>43</sup> *Supra* note 1 at 278.

<sup>44</sup> LexisNexis Quicklaw Academic Services License Agreement (6 October 2004) (database: ERD). Available on Quicklaw: <<http://ql.quicklaw.com>>.

As already mentioned, the impact of the trend towards contractual licensing protection and control will negatively impact public law libraries due to the practical difficulty in public law libraries being able to license these products for “walk in traffic”:

Public libraries and universities are likely to be the first to experience the harmful effects of this controlled, pay-per-use universe of information generation and distribution. These institutions are rightly celebrated for providing the raw knowledge resources for authors to browse and experiment, excerpt and modify, and create anew. But if more of these resources are strictly commodified and made available according to ability-to-pay principles, then the traditional practices of authorship will be seriously compromised and the very character of American life would change radically.<sup>45</sup>

Katsh repeatedly suggests that new technologies and the digitization of law-related information will “open up the door” for the average person to better access law-related information:

WESTLAW, for example, now allows legal information to be obtained by asking questions in ordinary English into a microphone attached to the computer. Further questions can be asked in response to what the computer displays on the screen. This is different from the kind of interaction that lawyers formerly experienced in a law library, and, indeed, *it opens up possibilities for nonlawyers to obtain information in ways not previously possible.*<sup>46</sup> [emphasis added]

However, he does not address the fact that the average person will not easily be able to obtain access to private (and expensive) databases of this information. Although data does not appear to be easily available on the percentage of licensed users of Westlaw who are nonlawyers, it is questionable whether there would every be widespread use of these commercial databases by nonlawyers due to their cost and – despite Katsh’s claim for ease of use – due to the training needed to effectively use the databases and interpret search results. Samuelson seems to share these doubts on this point:

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<sup>45</sup> *Supra* note 1 at 280.

<sup>46</sup> Katsh, *supra*, Introduction, note 8 at 17 *et seq.*

Katsh is surely right that digital networked environments have enhanced public access to legal information, and that this trend will likely continue. He also may be right that lawyers whose work largely involves finding information in books for their clients may be put out of work as these materials go on-line. Most lawyers, however, need not worry. Digital technologies will not significantly reduce the information distance between ordinary people and the law as much as Katsh predicts. People hire lawyers because they believe the lawyers will know how to extract the right needle from the right haystack of legal information. This ability requires more than knowing how to use the West key number system; it also requires a set of conceptual, analytic, and judgment skills that lawyers learn through complex pattern-matching exercises in law school and law practice. Few ordinary people possess these skills.<sup>47</sup>

#### **5.2.4 Privacy restrictions**

The very “openness” of the Internet has raised an issue of privacy involving access to court decisions and information found in court files, including docket information and pleadings. The issue arises most commonly in family law litigation where the interests of child are often involved. When decisions are posted on free websites such as the court decisions database of the Canadian Legal Information Institute (CanLII), the ease of access and keyword searching means that any person with Internet access can access the information, whereas in a “print-based” environment, restrictions are often placed by the court registry that family law court files can only be accessed by the parties or their lawyers in order to protect confidential information and information that may impact on children. In a print-based environment, the physical necessity of often having to attend at the courthouse to inspect a court file often meant that most court files would not be regularly searched. As courts move to publish their decisions online or to make them available to others to publish, care must be taken that personal or confidential

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<sup>47</sup> *Supra* note 42 at 2054-55.

information is not included with those decisions, especially when the online versions of the decisions are much more accessible and also searchable by keyword:

The limited nature of “traditional” forms of access can be illustrated by one of the surprising consequences of “freeing” the law as discovered by both AustLII and LII. The availability of searchable online databases of primary legal materials has given rise to new privacy concerns that did not exist when the same materials were available on library shelves or in commercial online databases. The concerns arise because of the possibility of searches by surname. While names are currently reduced to initials in published versions of some family and young offender cases, the widespread free distribution of materials online could expose individuals to widespread public view. The response of both AustLII and LII to this issue has been to shift the burden to government and the courts to ensure that appropriate levels of citizen privacy are maintained.<sup>48</sup>

In the past, commercial online publishers would take on the task of redacting confidential information from online judgments in their databases; however, an organization such as CanLII does not have the funds to undertake such work:

In Canada, family law, young offenders and disciplinary related matters generally entail some restrictions as to the publication of judgments. Therefore, an additional editorial task pertained to the management of privacy issues. In the past, commercial publishers performed the de identification work needed to make these judgment files suitable for publication in reports. CanLII, however, did not have the resources to ensure such de-identification activity.

In order to cope with the problem, CanLII representatives first established agreements with the courts to provide for only sending publishable decisions to CanLII. However, mistakes sometimes occur. As a result, CanLII staff briefly inspects judgment files related to family matters. If a judgement cannot be published in the form in which it comes to CanLII, the originating court is notified and the court itself must decide what must be done. So far, CanLII has avoided taking on the task of editing judgments to remove identifying information.<sup>49</sup>

As such, one of the big issues is whether courts themselves will take on the task of redacting sensitive information or whether it will be up to the online publishers (CanLII

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<sup>48</sup> *Supra* note 24 at 326-27. See also the discussion paper prepared on behalf of the Judges’ Technology Advisory Committee for the Canadian Judicial Council on Open Courts, *Electronic Access to Court Records, and Privacy* (May 2003). Available online: <<http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf>>.

<sup>49</sup> Poulin, *supra* Chapter 4, note 144.

or Quicklaw, for example).<sup>50</sup> The Law Society of Upper Canada has suggested a model policy that would provide different levels of access to online court documents for different types of users (litigants, lawyers, the media, etc.).<sup>51</sup> Another issue raised by the Law Society is the need for any policy to take into the account of the needs of the increasing number of *pro se* litigants who may be less aware of some of the privacy issues and who may be unable to easily redact such information from online court documents if the model is to put some onus of the litigant or lawyer to do the redactions.<sup>52</sup> Given the past cooperation between the courts, the Bar, academia and the publishers in Canada on agreeing on a neutral form of citation for online court decisions,<sup>53</sup> there is some hope to think that agreement can also be reached on a policy that will balance the competing interests of protecting private information in online court documents at the same time as ensuring effective access for all members of the public to those documents. In fact, as of March 2005, the Judges' Technology Advisory Committee has issued a report that has two major recommendations that should improve access to Canadian case law for the average citizen at the same time as resolving privacy concerns:

The sub-committee recommends that the ultimate responsibility to ensure that reasons for judgment comply with publication bans and non-disclosure provisions should rest with the judge drafting the decision . . . .

Although the sub-committee was not able to come to a unanimous view on this question, it recommends that courts be encouraged to post all of their written judgments on their own court websites or make them available to other publicly

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<sup>50</sup> See, for example, Canadian Bar Association: *Submission on the Discussion Paper: Open Courts, Electronic Access to Court Records, and Privacy* (May 2004) at 11. Available online: <<http://www.cba.org/CBA/submissions/pdf/04-13-eng.pdf>>.

<sup>51</sup> Law Society of Upper Canada. *Task Force On Electronic Access To Court Records* (27 November 2003) at para. 3. Available online: <[http://www.lsuc.on.ca/news/pdf/convnov03\\_reprt\\_convocation\\_open\\_courts.pdf](http://www.lsuc.on.ca/news/pdf/convnov03_reprt_convocation_open_courts.pdf)>.

<sup>52</sup> *Ibid.* at para. 12.

<sup>53</sup> See Canadian Citation Committee, "A Neutral Citation Standard for Case Law." Available online: <[http://www.lexum.umontreal.ca/ccr-ccr/neutral/index\\_en.html](http://www.lexum.umontreal.ca/ccr-ccr/neutral/index_en.html)>.

accessible sites such as the site hosted by CANLII. While there may be privacy concerns associated with doing so, a majority of the sub-committee holds the view that these concerns are outweighed by the benefits of facilitating open access to the decisions of the court and that any adverse impacts on the privacy of justice system participants can be significantly reduced by following the guidelines set out in [this] protocol.<sup>54</sup>

The protocols developed by this Committee address three levels of protection that courts would follow when redacting information. These protocols include not using personal data identifiers (such as social insurance numbers) in judgments, omitting personal information that would violate a statutory or common law restriction on publication, and omitting other personal information where dissemination over the Internet could harm innocent persons or subvert the course of justice.<sup>55</sup>

### **5.2.5 Lack of permanency of online information**

Although not a “roadblock” per se, the impermanent nature of information on the Internet has the effect of being a roadblock if the information has been removed or not permanently archived online. The difficulties caused by the impermanence of the Internet have been well-documented. One recent study has shown that of 123 academic conference articles published on the Internet between 1995 and 2003, 46% of citations to web-based sources in those articles could no longer be located, which accounted for 22% of all citations in the papers.<sup>56</sup> Likewise, a study by Bar-Ilan and Peritz suggests that close to 40% of web-based citations in articles from 1998, 1999 and 2002 on the topic of

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<sup>54</sup> Judges’ Technology Advisory Committee, Canadian Judicial Council “Use of Personal Information in Judgements and Recommended Protocol” ¶ 9, 13 (March 2005). Available online: <[http://www.cjc-ccm.gc.ca/cmslib/general/PIJ\\_Protocol\\_E.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/PIJ_Protocol_E.pdf)>.

<sup>55</sup> *Ibid.* ¶ 21 *et seq.*

<sup>56</sup> Carmine Sellitto, “The Impact of Impermanent Web-Located Citations: A Study of 123 Scholarly Conference Publications” (2005) 56 J. of the Amer. Society for Inf. Sci. & Tech. 695.



“informetrics” disappeared over time.<sup>57</sup> Similar results were achieved when 3,941 URLs in nine print-based guides on the Internet (e.g., *The Guide to Internet Job Searching*) were examined two to three years after the books were published in print. In that study, only 61% of filename-based URLs were still active.<sup>58</sup> When web pages have a half life of only two years on average, the problem of linkrot means that a lot of information on public websites may well not be there several years in the future.<sup>59</sup>

One ironic example of linkrot in the Canadian legal context is the disappearance of two major government-sponsored reports on the promising role that the Internet will play in Canadian economic and cultural survival. Neither of the well known “IHAC” reports – *Connection, Community, Content: The Challenge of the Information Highway*<sup>60</sup> and *Preparing Canada for a Digital World*<sup>61</sup> – are online anymore; their URLs are dead<sup>62</sup> and even a recent government online report from October 2002 still provides a (broken) link to the document.<sup>63</sup> Another recent example relates to disappearing Ontario government press releases and backgrounder papers, rightly identified by the President of the Toronto Association of Law Libraries as alarming due to its negative impact on legal

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<sup>57</sup> Judit Bar-Ilan and Bluma C. Peritz, “Evolution, Continuity, and Disappearance of Documents on a Specific Topic on the Web: A Longitudinal Study of ‘Informetrics’” (2004) 55 J. of the Amer. Society for Inf. Sci. & Tech. 980 at 986, 988.

<sup>58</sup> Joel D. Kitchens and Pixey Anne Mosley, “Error 404: or, What is the Shelf-life of Printed Internet Guides?” (2000) 24 Libr. Collections, Acquisitions, and Tech. Serv. 467 at 471.

<sup>59</sup> Wallace Koehler, “Keeping the Web Garden Weeded: Managing the Elusive URL” (2000) 8 Searcher 43.

<sup>60</sup> Industry Canada, Information Highway Advisory Council, *Connection, Community, Content: The Challenge of the Information Highway* (Ottawa: Minister of Supply and Services Canada, 1995).

<sup>61</sup> Industry Canada, Information Highway Advisory Council, *Preparing Canada for a Digital World* (Ottawa: Industry Canada, 1999).

<sup>62</sup> The first report is listed in major search engines as being available at <http://strategis.ic.gc.ca/SSG/ih01070e.html> (but is not); the second report is listed in major search engines as being available at <http://strategis.ic.gc.ca/SSG/ih01650e.html> (but is not). Repeated searches were conducted to try to locate the reports online, to no avail.

<sup>63</sup> See Chapter 1(d) of the online version of Industry Canada’s “Section 92” report under the *Copyright Act* entitled “Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act” (October 2002) at notes 13 and 14. Available online at: <<http://strategis.ic.gc.ca/SSI/rp/section92eng.pdf>>.

research and the public's right to access government information.<sup>64</sup> Likewise, when Prime Minister Chretien resigned, his website was "zapped" from cyberspace and "vanished moments after he resigned."<sup>65</sup> Compare this to the situation in the United States, where government agencies have been assigned the task of specifically archiving government pages:

An order from the National Archives and Records Administration that all federal agencies make digital snapshots of their Web pages had information officers across the government scrambling in the waning hours of the Clinton administration.

On Jan. 12, Deputy Archivist of the United States Lewis Bellardo sent a memo ordering agencies to hand over electronic records showing what their publicly available Web site pages looked like before the transition of power to President Bush.

The move is part of an ongoing effort at NARA to preserve for posterity the online presence of every presidential administration from Clinton onward. As Bush's team prepared to take office on the eve of the inauguration, Webmasters at NARA readied the transition of the Clinton version of the White House Web site to NARA's site, where it will now reside for anyone who still wishes to visit it.<sup>66</sup>

However, the commitment to archiving this information apparently has resulted in President Bush avoiding the use of email for correspondence for fear that his emails would eventually be in the public domain.<sup>67</sup>

Although the Internet has a number of obvious advantages for the improvement of providing access to law-related information, there are a number of factors that impede easy access, factors relating to the digital divide, trends in the extension of intellectual

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<sup>64</sup> Email from Danielle Levesque, President, Toronto Association of Law Libraries (TALL) to the TALL-L Listserv (11 December 2003). Email on file with the author. The issues raised in the email made it into the Hansard records on April 16, 2004 when the Chair of the Management Board of Cabinet (the Honourable Gerry Phillips) was pressured by the opposition to commit to restore any public information that had been removed.

<sup>65</sup> Kim Lunman, "Chretien Resigns: There were Tears" (13 December 2003) *The Globe & Mail*.

<sup>66</sup> Shane Harris, "Agencies Scramble to Save Web Sites for Posterity" (22 January 2001) Govexec.com. Available online: <<http://www.govexec.com/dailyfed/0101/012201h1.htm>>.

<sup>67</sup> Lester Haines, "George Bush Fears Email Privacy Breach" (15 April 2005) *The Register*. Available online: <[http://www.theregister.co.uk/2005/04/15/bush\\_private\\_email/](http://www.theregister.co.uk/2005/04/15/bush_private_email/)>.

property protection that may restrict the flow of information online, contractual licensing terms, privacy issues and online information disappearing and becoming inaccessible as a result. Further uncertainty arises due to often incoherent or inconsistent government information policies.

### 5.3 Government Information Policy

*In a knowledge-based society, information is a public resource and essential for collective learning. If Canada is to thrive and compete, government information must be made available as widely and easily as possible, through a variety of channels. Technology provides powerful and cost-effective ways to disseminate a great deal of this information.*<sup>68</sup>

Opaqueness, ambiguity and contradiction are some of the terms that can be used to define Canadian governmental information policy related to access to government information under the federal *Access to Information Act*. That there is a “significant deficit in information management in the federal government”<sup>69</sup> is not too surprising given this opaqueness, ambiguity and contradiction:

It is also evident that federal information policy has been neither a consistent nor a considered process. Instead of weaving a tightly woven fabric of policy, the federal government has fabricated a patchwork of sometimes related initiatives and, more often, unrelated or clashing statements or actions.<sup>70</sup>

A 2002 Access to Information Review Task Force identified a number of factors<sup>71</sup> that have led to this deficit in information management by the Canadian federal government, including a drastic increase in the volume of information being produced by the government, the transition from a paper-based system to an electronic records system

<sup>68</sup> Government of Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Government of Canada, 2002) at 3.

<sup>69</sup> *Ibid.* at 141-42.

<sup>70</sup> Bruce Morton, “Canadian Federal Government Policy and Canada’s Electronic Information Industry” (1995) 12 Gov’t Info. Q. 251 at 258.

<sup>71</sup> *Supra* note 68 at 141-42.

before a system for managing electronic records had been developed, cutbacks in government operations that impacted information management, a decentralization of management to individual public servants who lacked training or understanding of policies, and a reduction in resources devoted to information management:

The “information management deficit” in government is seriously hindering the ability of government institutions to provide proper access to the records under their control. In general, paper records are no longer well organized, and an effective approach to the management of electronic records is not yet available. The Canadian Historical Association, the Association of Canadian Archivists, the Canadian Library Association and the Professional Institute of the Public Service of Canada all advocated urgent action in this area – both to improve current access, and to ensure the long-term preservation of, and access to, valuable historical records. Public servants have themselves observed that they lack the support, training, guidance and tools they need if they are to be expected to document their activities properly, and manage the records they create or control.<sup>72</sup>

Admittedly, information management is not a high-profile election issue for most political parties. This lack of “sexiness,” combined with changes in government over time and general cost control issues facing most governments, may also contribute to the lack of a coherent, well known Canadian governmental information policy. Nonetheless, information policies greatly impact on access to law-related information. The focus that follows will therefore be on information policies that most directly affect law-related information.

There are several legislative and administrative rules that govern information policy in Canada:

Information management in the federal government is currently governed by several information laws and policies. These include the *National Archives of Canada Act*, the *National Library Act*, the *Access to Information Act*, the *Privacy*

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<sup>72</sup> *Ibid.*

*Act*, the Policy on the Management of Government Information Holdings, the Government Security Policy, and the Government Communications Policy, as well as the policies on access to information and privacy and data protection. For the most part, public servants are not aware of these laws and policies, which are the responsibility of different institutions.<sup>73</sup>

Current government policy of information management is to “deliver programs, services, and information cost-effectively and consistent with the needs of Canadians.”<sup>74</sup> As can be seen “cost-effectiveness” is a core component of the government’s information policy. In order to deliver these programs, the policy calls on government institutions to:

- ensure the quality, consistency and availability of information across delivery channels to respect Canadians’ official language of choice and their preferred means of accessing information and of communicating with government;
- organize information to provide clarity, context, and convenient access to relevant, comprehensive, and timely information and services;
- re-use and share information to the greatest extent possible, in accordance with legal and policy obligations and in a manner that protects personal information and the privacy of individuals;
- document decisions and decision-making processes;
- preserve the integrity of information, particularly when it is used in collaborative endeavours with other federal government institutions, other governments, or non-governmental organizations;
- ensure the appropriate security, protection, and disposition of information.<sup>75</sup>

The foregoing *Policy on the Management of Government Information* incorporates other Treasury Board policies, including the *Cost Recovery Policy* which adopts a “user fee” philosophy for the provision of government services. The cost recovery policy has several aims:

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<sup>73</sup> *Ibid.*

<sup>74</sup> Treasury Board of Canada Secretariat, *Policy on the Management of Government Information* (1 May 2003). Available online: <[http://www.tbs-sct.gc.ca/pubs\\_pol/ciopubs/TB\\_GIH/mgih-grdg1\\_e.asp](http://www.tbs-sct.gc.ca/pubs_pol/ciopubs/TB_GIH/mgih-grdg1_e.asp)>.

<sup>75</sup> *Ibid.*

- to promote the efficient allocation of resources (i.e., to eliminate the excess demand that often exists with “free goods,” by subjecting programs to a market test of supply and demand).
- to promote an equitable approach to financing government programs, mandatory or otherwise, by fairly charging clients or beneficiaries who benefit from services beyond those enjoyed by the general public. This may allow a greater share of general tax dollars to be devoted to activities that benefit the general taxpayer, or to reduce the debt. It may also facilitate improvements in the delivery of specific cost-recovered services.
- to earn a fair return for the Canadian public for access to, or exploitation of, publicly-owned or controlled resources.<sup>76</sup>

Much of the thinking behind cost recovery stems from the mid 1980's with the election of the Mulroney Conservative government. In the early 1980's, with the introduction of the *Access to Information Act* in 1983, the Canadian government was adopting a philosophy of *access* in regard to its information policy.<sup>77</sup> However, following a change in government with the election of the Mulroney Conservatives, there was a marked shift in policy to a *market* philosophy where Canadian government information policy began to be determined by cost recovery and revenue generation.<sup>78</sup> There were two major trends that influenced the market philosophy: “the development of the view of government information as a commodity . . . and the Conservative government espousal of a need for government fiscal restraint with a corresponding need for revenue generation.”<sup>79</sup> Nilsen's study showed, for example, that the price of Statistics Canada documents rose 438% between 1982 and 1983.<sup>80</sup> She was suspicious that the costs were not for the cost of production only (as was intended by the government) but also included the government's

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<sup>76</sup> Treasury Board of Canada Secretary, *Cost Recovery Policy* (16 April 1997). Available online: <[http://www.tbs-sct.gc.ca/pubs\\_pol/opepubs/tb\\_h/feeinfoe.asp](http://www.tbs-sct.gc.ca/pubs_pol/opepubs/tb_h/feeinfoe.asp)>.

<sup>77</sup> Kirsti Nielsen, *The Impact of Information Policy: Measuring the Effects of the Commercialization of Canadian Government Statistics* (Westport, Conn: Ablex Publishing, 2001) at 55.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* at 59.

<sup>80</sup> *Ibid.* at 195.

cost of dissemination.<sup>81</sup> Morton in fact suggests that price increases at Statistics Canada were in fact even larger:

Because of Crown copyright, there has always been the potential for monopolistic behavior by the federal government or one of its constituent agencies. Mandated to recover costs of database operations, Statistics Canada, in 1987, reduced by about 60 percent the number of computer-readable products available from the 1986 census as compared with the previous census. The cost of the 1986 products rose 1,500 to 9,000 percent and other Statistics Canada products from 100 to 500 percent, during the same time period.<sup>82</sup>

Ronald McMahon of the Saskatchewan Bureau of Statistics in fact has called for Statistics Canada to “discontinue the practice of cost recovery for goods and services that have been generated in the pursuit of its taxpayer funded activities.”<sup>83</sup>

A risk of the government seeing its information as a “corporate resource”<sup>84</sup> is that information without market value will be ignored.<sup>85</sup> Another consequence is that governments may attempt to restrict access to its information in order to realize the greatest possible revenue by restricting the supply of information:

Public information is valuable, both economically and as a raw material of democratic government. Public and private sector publishers long have earned a return by selling public information. The prospect of selling some public information and a reluctance to have other public information widely known tempts governments and their contractors to restrict access.<sup>86</sup>

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<sup>81</sup> *Ibid.* at 78.

<sup>82</sup> *Supra* note 70 at 257.

<sup>83</sup> Ronald C. McMahon, “Cost Recovery and Statistics Canada” (1996) 2 Government Information in Canada. Available online: <<http://www.usask.ca/library/gic/v2n4/mcmahon/mcmahon.html>>.

<sup>84</sup> Bruce Morton and Steven D. Zink, “The Dissemination and Accessibility of Canadian Government Information” (1992) 19 Gov’t Publ. Rev. 385.

<sup>85</sup> *Ibid.* at 388.

<sup>86</sup> Henry H. Peritt, “Sources of Rights to Access Public Information” (1995) 4 Wm. & Mary Bill Rts. J. 179.

A policy of implementing user charges also act as a potential impediment for members of the public to access government information and may be a sufficient tipping point that results in individuals deciding to not bother trying to access government information:

If citizens are to make informed electoral choices and government is to be transparent and held accountable then the information upon which government makes its decisions needs to be available and accessible to citizens. Federal information user charges inhibit the ability to make government action transparent to public scrutiny and limits the ability of citizens to hold government accountable.<sup>87</sup>

One main underlying problem with the deficit in information management by the federal government is that “Canadian government departments are simply not oriented to thinking about disseminating information.”<sup>88</sup> This has resulted in the government publishing “only what the departments need for internal purposes or what presents the case of the government on a particular issue in the best possible light” with products of government publishing appearing “to be less directed to making available information that might have a broader general interest to the citizenry.”<sup>89</sup>

One consequence of a confusing information policy is that if information is poorly managed, it will be harder for users to access this information:

The problem of accessibility lies in the fact that even if government information is available, it may not be accessible to the public . . . . [P]otential and real diminished accessibility of government information has raised considerable concern. These concerns focus around broad issues of democracy and rights, as well as specific benefits of access to government information to society as a whole.

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<sup>87</sup> Harry Hillman Chartrand, “Rusty Nail on the Information Highway: User Charges and Canadian Federal Government Information” (1997) 3 *Government Information in Canada*. Available online: <<http://www.usask.ca/library/gic/v3n4/chartrand/chartrand.html>>.

<sup>88</sup> *Ibid.* at 395. See also Perritt and Lhulier, *supra*, Chapter 1, note 69 at 900.

<sup>89</sup> *Ibid.*



Accessibility may be limited by poor bibliographic control, controlled or limited dissemination, high prices, unfriendly formats, and other factors. If electronic technology is the only medium used to make information available, it might restrict access for some while, at the same time, improving it for others.<sup>90</sup>

At the provincial government level, the situation varies from province to province but access to provincial government documents continues to suffer from incomplete bibliographic control, particularly for historical publications.<sup>91</sup> But the difficulties governments have in providing a complete or thorough inventory or catalogue of their publications is only one factor that affects access to the information. There must also be an effective distribution system.<sup>92</sup> For law-related information, one important way in which the federal government disseminates information is through the Depository Services Program (“DSP”), established in 1927, by “supplying these materials to a network of more than 790 libraries in Canada and to another 147 institutions around the world holding collections of Canadian government publications.”<sup>93</sup> Depository libraries are required to make this part of their collection available to all patrons and on interlibrary loan. Many of the materials provided under the program include law-related information such as legislation, bills and government reports. However, one key problem with the program is that it is not mandatory for government departments to provide their publications to the DSP. At the provincial level, distribution systems for provincial government documents vary from province to province with some provinces, like Ontario and Québec, providing their documents to depository libraries, with other provinces, such as Nova Scotia, Newfoundland and Manitoba providing only (sometimes incomplete)

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<sup>90</sup> *Supra* note 77 at 49-50.

<sup>91</sup> Edith Jarvi, *Access to Canadian Government Publications in Canadian Academic and Public Libraries* (Ottawa: Canadian Library Association, 1976) at 5.

<sup>92</sup> *Ibid.* at 11.

<sup>93</sup> Government of Canada, “Depository Services Program – Introducing the DSP” (18 January 2005). Available online: <<http://dsp-psd.pwgsc.gc.ca/Info/profile-e.html>>.

centralized centres for distributing their documents.<sup>94</sup> Thus, at the provincial level, access to provincial government documents is much more difficult:

Extreme decentralization of provincial government publishing systems has rendered it extremely difficult, almost impossible, to locate, obtain, and eventually utilize the information generated by and for provincial public authorities. These difficulties apply whether the would-be user is an interested citizen, a public official, or an academic. They threaten, not simply the scholarly study of provincial affairs, but also the fabric of political life at the middle level of Canadian government.<sup>95</sup>

The Pross Study of provincial government documents, conducted in 1969, identified the following five problems with the organization of provincial government documents:

1. The need for a clear definition of a provincial government publication.
2. The haphazard nature of government structures for processing and distributing publications.
3. The absence of adequate procedures for the “discovery” of publications.
4. The lack of an effective depository system.
5. The deficient library procedures for handling documents, including inadequate arrangements for reporting and locating documents and failure to devise systems for the retrieval of the information they contain.<sup>96</sup>

Since the time of that study, however, improvements have been made with over 40% of libraries indicating significant changes had occurred in their collecting of provincial publications, including developments in “current and retrospective bibliographical control, retrospective microfilming projects” and the availability of a commercial product called *ProFile* that indexes and provides access to provincial government documents

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<sup>94</sup> *Supra* note 91 at 12-13.

<sup>95</sup> A. Paul Pross and Catherine A. Pross, *Government Publishing in the Canadian Provinces: A Prescriptive Study* (Toronto: University of Toronto Press, 1972) at 1.

<sup>96</sup> *Ibid.* at 140.

although “[r]etrospective collections beyond the university’s own province appeared to have improved little.”<sup>97</sup>

As for law-related information such as statutes, regulations, bills and Hansard debates, the federal government and most provincial governments have started to publish this information on their individual websites.<sup>98</sup> The CanLII website also provides centralized access to Canadian federal and provincial legislation. However, with the exception of the province of Alberta,<sup>99</sup> this online legislation is usually only recent or only the current version of the legislation, with there being little or no historical, archived versions of legislation. As earlier mentioned, none of the online versions of this legislation is considered “official,” with each of the websites providing a disclaimer against using the information as an official source.

## Conclusions

Thus, while the Internet continues to play an important role in the dissemination of law-related information, it is not necessarily a total panacea and improvements still can be made in the way that law-related information is made available in Canada. The advantages that the Internet brings to the publication and dissemination of law-related information are its interactive nature and the ability to share information quickly and inexpensively. The relatively de-centralized nature of the Internet also reduces the ability

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<sup>97</sup> *Supra* note 91 at 26.

<sup>98</sup> For a nice online, clickable “chart” of links to Canadian federal and provincial legislation, see Bora Laskin Law Library, “Finding Canadian Legislation.” Available online: <<http://www.law-lib.utoronto.ca/resources/locate/canleg.htm>>.

<sup>99</sup> The Alberta Heritage Digitization Project’s Retrospective Law Collection is described, *supra*, Chapter 3, note 70.

for governments to easily censor or control information. As a publishing medium, the Internet is also very fast – current Supreme Court of Canada decisions are now available for free on the Court’s website within minutes of them being released by the Court.

However, there are a number of roadblocks that will continue to impede access to law-related information on the Internet. Some of these roadblocks include the concern that not all members of society have access to the Internet or are comfortable using it. In addition, despite the de-centralized nature of the Internet, the trend towards increased intellectual property protection for publishers and creators – including technological protection measures – may impede access to certain types of law-related information on the Internet that are covered by intellectual property laws. And where intellectual property laws fall short (such as in database protection, for example), publishers are controlling access to their online publications through subscription agreements and password controls, something which will segment all but legal professionals from accessing this information. Privacy issues are also another concern where personal information in online court judgments might become easily searchable unless steps are taken to protect or redact that information (and fortunately, it appears that protocols are being developed by the Canadian Judicial Council to provide such protection). In addition, the impermanent nature of information on the Internet raises concerns over the ability for publishers of online information to archive their information so that it is available in the future.

Finally, although the Canadian federal government (in particular) has developed a number of important Internet initiatives, overall, government information policies in

Canada are inconsistent and the way in which governments manage their information raises concern over the ability of persons to be able to effectively search and retrieve all types of government information.

Before discussing in the next and final chapter the roles that various stakeholders can play in making law-related information more accessible, I will first review the 1975 Friedland study on access to law with an eye to seeing what improvements have been made over the last thirty years and what the impact of the Internet has been on access to law-related information in Canada in the digital age.

## Chapter 6

### **Thirty Years Later: The 1975 *Access to the Law* Study and the Role of Major Players in Providing Access to the Law**

*Surely it is time for the law to be available to those it is meant to govern.*<sup>1</sup>

#### **Introduction**

Thirty years ago, Professor Friedland conducted a study on access to law in Canada in what was then largely, if not entirely, a print environment for law-related materials. This final chapter will briefly review that study since Friedland's research anticipates many of the issues that have arisen in this thesis – the importance of the right to be able to access law-related information and legal help, the complexities in the legal system that hinder this access, and the nature of law-related publications in Canada. However, a number of the recommendations made by Friedland in his study have not been implemented or realized. I will therefore analyze Friedland's study with the goal of seeing what impact the Internet has had on access to law-related information and looking at his recommendations to see if they can be better adapted in the digital age. In doing so, I propose to take a brief look at the role that can be taken to improve access to the law by the major stakeholders – the government, private publishers, lawyers, universities, and other public interest groups – before proceeding with the final conclusions and recommendations section of this thesis.

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<sup>1</sup> Friedland, *supra*, Introduction, note 3 at 9. Because of the multiple citations to the Friedland study in this chapter, all subsequent references to the Friedland study will be made in parentheses in the text.

## 6.1 The Friedland study

Early in his study, Friedland cites the first annual report in 1972 of the Law Reform Commission of Canada on the importance of law reform because of the impact that laws have on individuals in modern society and the importance of having the general public involved in the process of modernizing the law (p. vii). He also cites the second annual report, where the Law Reform Commission of Canada noted the need for the reform of statutes to make them easier to understand for the average citizen. In part, it were these sentiments that prompted Professor Friedland to survey Canadians on their ability to access the law – to find out “where people turn to for information about the law” (p. viii) – in addition to also looking at the legal advice that people receive and the accuracy of that advice. The stated goal was to “investigate whether any new delivery systems and print sources would improve access to the law” (p. viii). The concern was that “[g]overnments have left the task of explaining the law largely to private enterprise, and in Canada the commercial publishers and the legal profession have done relatively little to assist the lawyer or the layman” (p. 1). Because society is growing increasingly complex, “citizens . . . need to have access to the law in order to plan their affairs – financial and domestic, at home and at work” (p. 1).

Friedland and his assistants began their study facing the following questions: “what do members of the general public do when faced with simple legal problems; and, if they seek information or advice, do they receive accurate information and sound advice?” (p. 5). This first phase of their study involved 100 subjects from Ontario – with 60 from a large city (Toronto), 20 from a mid-sized city (Kitchener) and 20 from a small

city (Lindsay). These subjects were asked the following ten questions that raise law-related issues that the average citizen might face in daily life (pp. 10-11):

1. *Old Age Benefits*: You will be turning 65 years old in a few months and wish to apply for any old age benefits you are entitled to. What would you do?
2. *Leaking Roof*: You live in a rented house and your roof is leaking. What would you do if the landlord refused to fix it?
3. *Pregnancy leave*: For 18 months, a woman has been working in an office which employs 26 other employees, and she becomes pregnant. If you were the woman, what would you do to find out what benefits you would be entitled to?
4. *Door-to-door Salesman*: You agree to buy an encyclopedia for \$150 from a door-to-door salesman to be paid in monthly instalments. The next day you change your mind. What would you do?
5. *Car Repair*: You took your car to a garage to have the started repaired and paid \$200. As it was not done properly you took it to another garage and were charged another \$200. What would you do to get the \$200 back from the first garage?
6. *Deserted Wife*: A man deserts his wife and children, leaving them with no money. If you were the wife, what would you do?
7. *Popular Song*: You have written the words and music for a song that you are sure will be extremely popular. What would you do?
8. *Speeding Ticket*: You receive a speeding ticket on which your licence number is incorrect. What would you do?
9. *Swimming Pool Fence*: Your neighbours built a fence around their pool and it doesn't look high enough to you. What would you do?
10. *Criminal Code*: What would you do if you wanted to know what section 195.1 of the Criminal Code says?

From the responses, the researchers noted that that “frequency of government sources being suggested was similar for all three cities . . . and all levels of government were thought of with approximately equal frequency in each city” (p. 12). They also noted that most respondents sought information from a variety of sources, the least likely of which were lawyers (p. 14):



In general, then, it appears that people faced with simple legal problems frequently seek information or advice from some other person or organization. In seeking such information or advice, they approach a wide variety of sources, particularly government agencies. Lawyers in private practice are not approached with any regularity for help with such problems.

Based on the results of the responses to these ten questions, the researchers then telephoned the various information sources suggested by members of the sample and asked those sources for help with the problems to check the accuracy of the answers that members of the public would receive if those information sources were actually consulted by the public. Unfortunately, the researcher's general conclusion was that "the public does not receive accurate information or sound advice in relation to simple legal problems" where "an average of more than 25 percent of the sources called gave an incorrect answer or made a referral which led to an incorrect answer" (p. 14). The telephone calls to the information sources also revealed a wide range of inconsistent answers given by different information sources to the same question in addition to there being significant delays waiting on the telephone when trying to get answers to the questions (p. 18). On other questions, such as locating a section of the *Criminal Code*, many sources provided an out-of-date version of the section (since the section asked about was recently amended at the time of the study); the amended section was even missed by a police department (p. 19). In addition, "[m]ore than half the calls resulted in referrals, and close to half of all the referrals were unsatisfactory. In both cases just over half the attempted answers were correct, but still, a third of the attempted answers were not even partially correct" (p. 22).

As mentioned above, the conclusions at this stage of the research were that “members of the public often do not receive accurate information or sound advice when they approach intermediaries for assistance with legal problems” (p. 22). The researchers were also slightly surprised that many of their 100 subjects would *not* seek the advice of a lawyer for these sorts of typical legal problems (pp. 1-2):

Most people who now seek legal information or advice do not go to a lawyer in private practice. In fact, many people even when faced with serious legal difficulties are reluctant, or afraid, to approach a lawyer.

Most people attempt to get legal information from such sources as government offices, information centres, legal aid and assistance offices, public libraries, and somewhat surprisingly, the police.

As such, the researchers concluded that “the major sources of information are not meeting the need as effectively as they are potentially able to do” and that they “were surprised at the number of times they gave incomplete, inadequate, or simply wrong answers to questions about the law” (p. 3).

For their next phase of the study, the researchers tested whether members of the public were able to look up the law on their own: “Some citizens with questions like these attempt to look up the law on their own; so also do members of the various information sources approached. Can the citizen or his non-lawyer advisor now look up the law successfully?” (p. 4).

To test this, they asked 35 random visitors to the Ontario Science Centre to volunteer for their study. They put the volunteers in a room with relevant Ontario and federal statutes, provided basic instructions on how to use the material and gave the test

subjects a legal question that could be answered by using the materials on the tables (pp. 25-27):

Each subject entered a room containing two tables. On one table stood the Revised Statutes of Ontario 1970, the Statutes of Ontario, 1971-73, and the Revised Regulations of Ontario 1970; on the other table were the Revised Statutes of Canada 1970, and the Statutes of Canada, 1970-72. The subject was given a brief explanation of the meaning of “statute” and “regulation,” a general description of the indexing of the statutes and regulations, and instructions on how to use the materials. Each subject was then given . . . a question . . . and asked to find the answer in the materials on the tables.

The results of this testing suggest that the average person has difficulty in using statutory material in Canada since fewer than 15% of the subject answered the questions correctly (p. 27):

Of the 35 subjects who participated, only five found the correct answer to a question. And of these five, only one used the statute volumes correctly; that is, after finding the answer in the revised statutes, he went on to check the annual volumes for amendments and to look for any regulations that might qualify the answer. In fact, all the subjects who found the correct answer were working on questions that did not involve amendments or regulations.

Since the group of 35 test subjects was highly educated, with 54 percent being college students or graduates and the remainder being high school students or graduates, and since they also received instructions on how to use the material immediately before using it (something not available in most typical settings), the researchers reasonably concluded that “in a sample of the public with average education and having no prior instructions the results of the test would have been dismal” (p. 27). In conducting these tests, it was also noted that most subjects were confused by which level of government had jurisdiction over a particular subject matter and none of the four subjects who answered the question where there was dual jurisdiction (between the federal and provincial government) knew that there could be dual jurisdiction over the subject matter (p. 27).

The study also noted that “subjects tended to stop once they had found what appeared to be a plausible answer” and that they “made no further attempt to check for exceptions or more specific sections or to go on to see if there were any relevant amendments or regulations” (pp. 27-28).

In concluding that “the legal cards are stacked against the non-lawyer,” the study highlights some of the factors that hinder access to the law, consistent with those factors already identified in previous chapters of this thesis (pp. 4-5):

Most people do not even know where to begin. They often do not know whether a particular matter is within federal or provincial jurisdiction or whether it is covered by legislation, by regulation, by municipal by-law, or by case law. Let us assume, however, that a situation is known to be covered by a federal statute. Where does the non-lawyer go to find the statutes? If a set of statutes is found, how does he or she know that there are not amendments to them, or relevant regulations, or cases that qualify the language of the statute, or other statutes that have a bearing on the question? If the relevant section is found, can it be easily understood? And when a matter is covered mainly by case law, the non-lawyer does not have a chance of discovering the law. There are relatively few legal texts produced in Canada to help even the lawyer; many important areas of law are left uncovered. Non-lawyers would obviously have great difficulty in applying a foreign text to Canada.

As part of their study, the researchers then looked at how legal information is disseminated through several major ways, including lawyers in private practice, legal aid assistance, government offices, community information centres, the police, and libraries. They were surprised to learn at the large number of inquiries made to the police every year (on all types of legal questions, not necessarily limited to emergencies): “the Metropolitan Toronto Police Department alone receives from 9 to 10 million calls per year” (p. 49). They then discuss the important role that public libraries played at that time in the provision of law-related information (p. 51):

Libraries are unique among the main sources of information and assistance in that they generally have large collections of reference materials. Many people telephone libraries seeking verbal information just as they might call other information sources. However, because libraries have reference books available for use they are also approached by members of the public who want to look up the law themselves or who are pursuing more academic questions. For example, many students approach libraries to do research into law.

However, as previously noted in Chapter 2 of this thesis, public libraries in smaller urban centres will often have very small or no law-related components to their collections and these smaller centres are not likely to have law libraries that are typically found in major centres that have law schools or large courthouses (p. 55). Law libraries, it is noted, are an excellent source of law-related information but may often be underutilized by the public because of a belief that the law library is not open to the public or is otherwise too intimidating to use (p. 58):

One reason law school libraries, like other university libraries, receive very few public inquiries may be that to the public they seem remote and intimidating. Many people think that these libraries can be used only by the students and faculty of the university. In fact, in most cases, this is not so. Nevertheless, universities are unfamiliar and rather forbidding places to people who have never been to one, and it is not surprising that people outside do not approach them.

Before discussing solutions, the study undertook an examination of existing legal materials and noted that “[a]dequate printed sources of legal information are . . . fundamental to providing access to the law” (p. 63). It was felt that a central problem in accessing the law was the nature of existing legal materials since the “central problem complained of is the existing legal materials. The available tools do not easily provide answers to specific questions” and “[e]ven lawyers in private practice and in legal aid offices have difficulty with them” (p. 63). A major concern was with the difficulty members of the public have in using statutes, which is a problem since statutes “are not only the most commonly used source of law and probably the most available source of

law, they are the most important source of law” since “[t]hey impose many positive obligations on citizens and regulate much of their daily lives” (pp. 63-64). The problem with statutes is “their technical and convoluted language, the inadequate or non-existent indexing, their complex structure, and the difficulty in keeping track of recent amendments” (p. 64). There are several reasons why legislation is so complex (p. 65):

In addition to complex sections resulting from complex concepts, statutes also contain occasional deliberately difficult or confusing sections brought about by political compromise, and sections designed to change judge-made law without adequately explaining what the former common-law rules said. Nor can one overlook the constant time pressure during the drafting process.

On the problem of indexing (and the lack thereof) in Canadian legislation, Friedland cites Professors Packer and Schabas who concluded in relation to the 1970 RSC Index that “the present index does not satisfy the criteria have been generally accepted as the hallmarks of sound indexing practice regardless of its intended users, and it is woefully inadequate to meet the needs of the layman” with there being (in the 1970 Index to the *Revised Statutes of Canada*) no “no entries for terms such as ‘children,’ ‘deportation’ and ‘fingerprints’” (p. 72). The index to the next most recent version of revised federal statutes, the *Revised Statutes of Canada 1985*, is not that much better, although it does now contain the previous three entries that were not in the 1970 Index.

In addition to being critical of the ways in which legislation is too difficult to be understood by the average person, the researchers also noted that the ways in which court decisions are written and published make their comprehension more difficult than they need to be (p. 75):

Case reports are almost impossible for the non-lawyer to deal with. They are hard to find and to interpret and it is often difficult to assess the weight to be given to

a particular case. The problem is difficult to overcome because there will continue to be cases interpreting sections of statutes and legal training will continue to be necessary to interpret the cases. But some improvements can be made.

Likewise, the study noted a number of challenges that lay persons have in using other secondary legal resources, consistent with the observations made in earlier chapters of this thesis (p. 75):

The existing legal textbooks, encyclopedias, and abridgments are also almost impossible to non-lawyers to use. Written for lawyers, they assume the reader has considerable knowledge about law and the legal system as well as full access to a full law library. In addition, they are poorly indexed, particularly for the non-lawyer. Moreover, they are found in very few places where the public can go to find legal information.

Regarding popular handbooks that are aimed at the general public and government pamphlets, the researchers were concerned that these materials were often too superficial and not that useful as a result (p. 76):

One of the major problems with them is that they are not comprehensive either in their treatment of the specific topics they deal with or in their coverage of the whole body of law. Most of the government publications are not designed to give a great deal of specific information; they tend to give a general description of an area and encourage people having specific questions to contact specific government information sources.

### **Solutions Proposed by Friedland:**

Having noted the various challenges that the general public has in accessing the law, either on their own or through non-lawyer intermediaries who also have trouble accessing the law, Friedland proposed a number of solutions to improve access to the law. These solutions were premised on the theory that a legal system should not be designed to require the use of lawyers for all law-related transactions (p. 6):

One obvious method of giving citizens access to the law is through lawyers. But even if it were practical to do so, it is surely wrong in principle to preserve the law in a form that only lawyers can find and interpret. We should not require high priests to keep the law.

Instead, Friedland proposes that access to the law should be improved in a variety of ways, including better forms of self-help (p. 7):

We feel that a variety of measures are necessary to provide better access to the law in Canada. The public, in general, appears to know very little about law and the legal system. Increased education about the law and the legal process, both in schools and in adult education programs, would better enable people to recognize the legal aspects of day-to-day problems and to cope with them more effectively. In addition, the present systems of delivering legal information and advice could be improved by establishing more organized procedures for dealing with questions from the public and for training the staffs of various information sources in the handling of information in general and legal information in particular. Further, the expansion of legal aid into large scale clinical operation should be seriously considered.

Friedland proposed four broad areas (p. 80) in which access to the law could be improved, each of which will be discussed below briefly in turn: (i) improve existing legal materials, (ii) improve basic education for the public about law, (iii) improve the quality of legal information dispensed by intermediary organizations, and (iv) develop a new source of law for non-lawyers.

### **1) Improve existing legal materials**

Friedland was highly critical of the then existing state of legal materials available in Canada. One particular criticism, as mentioned immediately above, was directed towards the way legislation is drafted and published. Noting that much of Canadian law is now prescribed by statute or regulation, Friedland argues that improving the way



legislation is drafted and published would go a long way towards improving access to law (p. 9):

The obligation of the government to promote the production of legal materials is overwhelming in a country like Canada, with a relatively small population, two major languages, eleven systems of law, and a complex and very sophisticated legal system. No doubt such an endeavour could not have been undertaken in the past, because it requires that enough of the law be in statutes to form a basis for intelligible exposition. But now many areas of Canadian law are almost wholly embodied in legislation or regulations: for example, unemployment insurance, workmen's compensation, landlord and tenant, income tax, copyright, criminal law, and labour law.

Friedland suggests several ways that statutes could be improved by: using more readable language; improving the sentence structure with statutes; including comments and examples after each section; using formulas, graphs and charts, where applicable; using different kinds of type/font (by putting definitions in bold throughout the statute to indicate that the word or phrase is a defined term); using explanatory memorandum to explain the statutes and its purpose; using better indexing; making more frequent revisions; and using topical, not alphabetical, arrangements of statutes (pp. 69-74). To date, there has not been too much improvement in this regard, although the Ontario government was improved the delivery of its legislation through its e-Laws website, described above.

Regarding court judgments, Friedland would put the onus on judges to improve the comprehension levels when drafting their own decisions (p. 75):

A court should be under some obligation to sit down after all the judgments have been written and explain the meaning of the reasons for judgment – in other words for the court to write its own headnotes. We feel that with comparatively little effort the writing of appellate judgments can be improved.

Arguably, some improvement has been made in this regard through courses offered to judges through the National Judicial Institute.<sup>2</sup>

## **2) Improve public legal education**

Another way in which access to law can be improved, as suggested by Friedland, is through improved public legal education (p. 80):

An important component in improving access to the law is the education of the general public about law and the legal system. Non-lawyers should be familiar enough with the law and the legal system to recognize areas of activity covered by law. People should also be taught how to find the law in those areas where questions and problems most often arise – that is, how to use sources of law.

To make these improvements in public legal education, Friedland notes that there would need to be a greater supply of teachers, textbooks, resources and advertising to implement such changes (p. 81). Unfortunately, with government cutbacks in law reform programs and public legal education, the state of public legal education in Canada can hardly be said to be better now than it was at the time of Friedland's study. If anything, it is worse: "With a patchwork of programs in place and a lackluster government commitment to PLEI [public legal education and information], the justice system is confronted by a large number of its users labouring under massive ignorance."<sup>3</sup> However, even Friedland acknowledges that more and better public legal education is not enough (p. 7):

At present, attention is being given to providing the public with legal education and improving delivery systems. But no matter what progress may be made in those areas, the public will continue to experience significant difficulty in obtaining access to the law either directly or through others unless better legal

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<sup>2</sup> See National Judicial Institute, "Courses Offered by Category." Available online: <[http://www.nji.ca/Public/courses\\_category.cfm](http://www.nji.ca/Public/courses_category.cfm)>.

<sup>3</sup> John Beaufoy, "A Plea for Better PLEI" (1999) 23(2) Can. Law. 27 at 28.

reference materials are made available. Because we feel that such materials are fundamental to providing better access to the law, and because it is an area which has received far less attention than legal education, legal aid, and information delivery systems, we have given special attention in many parts of this study to the deficiencies of present legal materials and the need for new reference sources.

However, even given this concession, the high cost of litigation, cutbacks in legal aid and the increase in the number of *pro se* litigants makes for weak programs in public legal information which, it is submitted, further strains the legal system and hampers access to justice.

### **3) Improve quality of legal information dispensed by intermediary organizations**

Friedland identifies “better delivery systems” as a third way in which access to the law can be improved for the general public and the non-lawyer intermediaries who are approached with law-related questions; Friedland specifically looks to the positive role that the telephone can play in dispensing information (p. 82):

The existing delivery of legal information should be improved by reducing the problems facing intermediary individuals and organizations in handling legal questions and by improving the quality of the information dispensed. In every case this involves training, as well as the provision of a well-indexed source of Canadian and provincial law containing comprehensive, detailed, and up-to-date information. It also requires some recognition of the important role played by the telephone in transmitting information about law. Information is disseminated over the telephone more frequently than through face-to-face contact. It should not be treated as a second-class device interrupting the normal delivery system.

The telephone is still used as a means of providing legal information for the public – see, for example, the Dial-A-Law service provided by the B.C. Branch of the Canadian Bar

Association;<sup>4</sup> however, the Internet offers similar information with the added benefit of the information being interactive, allowing the user to “click” to obtain additional information or detail. LegalLine, for example, is a free web service that provides law-related information aimed at consumers (e.g. “Tenants’ rights and responsibilities when moving out”) on 870 topics in 28 areas of law.<sup>5</sup> The federal government at one point helped fund the online Access to Justice Network (“ACJNet”)<sup>6</sup> (which is now affiliated with the University of Alberta); there are also numerous other websites that provide free, online law-related information.<sup>7</sup>

Friedland suggests that inquiries involving legislation and government services should continue to be directed towards the specific government departments since “[i]t seems reasonable that specific departments should answer the legal questions they receive that relate to their own activities and responsibilities” (p. 84). However, many government departments are not well-equipped to handle these sorts of questions, as suggested by the following statement from a supervisor of public information at Toronto City Hall, quoted by Friedland (p. 84): “In each department, it is often the lowest-paid person who gets all the inquiries, and that person often has no training at all to deal with them.”

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<sup>4</sup> Canadian Bar Association – B.C. Branch, “Dial-A-Law.” Available online:

<[http://www.cba.org/bc/Public\\_Media/dal/default.aspx](http://www.cba.org/bc/Public_Media/dal/default.aspx)>. Date accessed: 24 July 2005.

<sup>5</sup> Legal Information Online, “LegalLine.” Available online: <<http://www.legalline.ca>>. However, it appears that the site was last updated April 2001.

<sup>6</sup> University of Alberta, Legal Studies Program, “Access to Justice Network.” Available online:

<<http://www.acjnet.org>>. Date accessed: 24 July 2005.

<sup>7</sup> There are obviously too many sites to mention. To mention just two examples: there is an online guide by the Bora Laskin Law Library entitled “Finding Legal Help in Ontario” (available online at <http://www.law-lib.utoronto.ca/resguide/finding.htm>) and the “People’s Law School” in British Columbia (available online at <http://www.publiclegaled.bc.ca>), a non-profit organization with the mandate of helping people learn about their rights and responsibilities under the law.

In addition to improving the way in which government dispenses legal information, Friedland also calls for more and better community information centres that would have long term funding provided by both public and private sources (p. 86).

One final way in which “delivery systems” can be improved is to provide more training for librarians “to facilitate the provision of legal information to the public” (p. 89).

#### **4) Develop a new legal encyclopedia for non-lawyers**

The final and most dramatic recommendation by Friedland to improve access to law-related information is the creation of a multi-volume legal encyclopedia written for the non-lawyer. In coming to this recommendation, Friedland concluded that the existing “popular handbook literature” was insufficient to meet the needs of the average citizen (p. 8):

We know that many people have been turning to help to the popular legal handbooks available in bookstores. Unfortunately, these are inadequate; they are better than nothing, but no matter how well they are written they suffer from several major defects. For example, they cannot keep up with the changes in the law. And not designed to be used as quick reference tools, they tend to provide merely a general overview of an area of law rather than easily retrievable detailed information. Moreover, commercial publishers will concentrate only on major areas, like family law, and will not venture into other needed areas, such as workmen’s compensation and mechanics’ liens.

Instead, the proposed encyclopedia would “a reference tool that will give the citizen or his advisor specific information to deal with a particular question or problem at the time that it arises” (p. 8). However, Friedland appears to acknowledge the enormous challenges in trying to publish sets of such an encyclopedia (p. 8):

Who should write them? At what level of sophistication should they be written? Should descriptive material be integrated with statutory material or should it be restricted to an introductory note? How should updating be systematized? How does one [p. 9] handle areas of law, such as contracts, that are primarily case law? Is it possible to include municipal by-laws? Should one go further than telling the layman merely what the law is and describe, for example, how to incorporate a company or draft a will or conduct one's own legal proceedings? At what point should the reader be warned that the area is complex and a lawyer should be consulted? What training should be given to non-lawyers responsible for using the materials?

It would be a “multivolume legal encyclopedia, regularly updated, which could be directly available to those providing legal information and to citizens in public libraries and in such locations as government offices and school libraries” (p. 91). The format would be a set of binders that would take up to 5 to 6 feet of shelf space and the encyclopedia would be “comprehensive both in the areas of law covered and in the detail in which each area is covered” (p. 92). Because the law vary slightly from province to province, Friedland proposes that there would be a separate set of the encyclopedia for each of the provinces and territories with there being a limited number of cases and statutes referred to (p. 93). The information in the encyclopedia would be classified for non-lawyers by not using legal terms such as “torts”; instead, legal issues involving negligence would be dealt with within the topic that involves elements of negligence (such as motor vehicle law, trespass, etc.) (p. 93). The goal would be to have the information in a form that would be easily understandable for the average citizen (p. 95):

An attempt should be made to present the law in a way that would be useful both to a lawyer operating out of a legal clinic and to a reasonably intelligent citizen faced with, or assisting someone else with, a simple problem involving law. The combination of the lawyer and the professional writer would help ensure that both groups could understand and use the materials. An editorial committee would of course have overall responsibility for the content and style of all the materials.

In addition, “the reader would be warned when a particular matter was complex or required an analysis of a body of case law, and wherever appropriate the suggestion would be made that legal advice be obtained” (p. 96). The encyclopedia would be updated by the persons responsible for preparing that section of the encyclopedia; Friedland proposes that updates would be done every two months through the use of replacement pamphlets (p. 96). In addition, “[e]ach subject category would have its own index, and in addition there would be an index for the complete encyclopedia” (p. 96). He suggests a cost (at that time) of \$300,000 for a set of the encyclopedia for one province with there being 10 subject written per year over a period of 5 years, resulting in a completed encyclopedia with 50 subjects with the cost of preparation spread over 5 years (p. 97). Friedland calls upon “a diversity of funding to help ensure the objectivity of the materials” (p. 98).

### **Comments on the Friedland recommendations**

In the next (and final) section of this thesis, I set out my own 10 recommendations of steps that can be taken to improve access to law-related information in Canada in the digital age. A number of my recommendations mirror those of Friedland, albeit updated to the age of the Internet (while a number of my recommendations are not included in Friedland’s recommendations).

Friedland’s first set of recommendations – to improve existing legal materials – really focus on the way legislation and case law is written and published in Canada. As has been noted, some improvements have been made in these areas since the time of

Friedland's study (such as the Ontario e-Laws legislative website) and better quality of judicial writing, while other recommendations made by Friedland have not been carried out, such as the continued infrequent revision of legislation and the lack of official topical indexes to legislation. In my Recommendations #1, #3, #4, #6 and #7 below, I set out a number of steps that can be taken to better improve the way legislation and case law is published in Canada.

Friedland's second set of recommendations – to improve public legal education – has not been realized as effectively as he proposed, largely as a result of cutbacks or the lack of government funding. My recommendation #2 below on ways to reduce the complexity of the legal system expand on Friedland's recommendations and introduce several new ideas.

Friedland's third set of recommendations – to improve quality of legal information dispensed by intermediary organizations – have been realized in a number of different ways through the expansion of law library collections in Canada over the last thirty years and the development of various web-sites that provide free legal information. These ideas are developed further below in Recommendations #5 and #10.

Friedland's final recommendation – a new legal encyclopedia for non-lawyers – has not been realized likely due to the cost and level of effort that would be required to fully realize the recommendation. However, in Recommendation #10 below I propose an alternative to Friedland's proposal that would take advantage of Internet technology and



be more feasible at the same time as providing the type of law-related information envisioned by Friedland.

At the time of Friedland's study in 1975, it would have been difficult if not impossible for anyone then to envision the Internet and the possibilities it would bring for the publication and dissemination of law-related material. Although computers were being introduced at the time of his study, their use in daily life had not yet been realized. Although the Internet and computer technologies do not provide a complete solution to improving access to law-related information, a number of concerns identified by Friedland can be addressed through the application of some of these new technologies. As part of this analysis, I will look below in the final section of this thesis at the roles that can be taken by the various stakeholders, including the government, private publishers, lawyers, law schools, and other public interest groups. While it is possible to speculate what impact the Internet could have on access to law-related information, what is really needed is a duplication of Friedland's study, now thirty years later, first in a similar print setting to see if conditions have changed regarding the use of print law-related materials. On this point, I would predict that conditions have not changed that much and the average person would still have a difficult time using the print *Revised Statutes of Canada 1985* and the *Revised Statutes of Ontario 1990* to answer the questions posed in Friedland's study. However, I would predict that, if surveyed, people now would identify the Internet as a major source for then to seek out law-related information. As such, the next phase of any new research would be to replicate Friedland's study in online setting to see if quality of information obtained is better using online resources. Here, I would predict that those surveyed would find it easier to find information using online resources but that they may

still have some difficulty in comprehending the information found. Regardless, the study could make comparisons on the time it took persons to find information and could assign notional costs between conducting the research in print and online and could also assess whether the use of online resources improved the speed by which information was found and the accuracy of the results obtained. With sufficient funding, the testing could be replicated on the general public on a larger scale (i.e., more than 100 respondents) and also on lawyers tests to test their information-seeking behaviours.<sup>8</sup> In addition, although not specifically tested by Friedland but instead commented on by him, tests could be designed to study the comprehension levels of respondents to various forms of law-related materials, including statutes, cases and informational guides.

As already mentioned, many of the proposals made by Friedland resurface in the next and final section of this thesis, being the conclusions and recommendations I make regarding improving access to law-related information in Canada in the digital age.

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<sup>8</sup> There has been surprisingly little research done on the information-seeking behaviour of lawyers. Two of the better known studies include one by Mark E. Vale, *Information Structure and the Information-Seeking Behaviour of Lawyers* (Ph.D. Thesis, Stanford University, 1988) (Ann Arbor, MI: University Microfilms International, 1991) and a Canadian study by Weijing Yuan, *Longitudinal Study of End-User Searching Behaviour of Law Students in Information Retrieval* (Ph.D. Thesis, University of Toronto, 1995).

## Conclusions and Recommendations

That access to law-related information should be a fundamental right is not too controversial an argument. The devil, they say, is in the details, and how such a right can be effectively realized by all citizens. In Canada, new technologies such as the Internet show great promise in improving access to law-related information. However, the complexities of the Canadian legal system create challenges for the average person to find, understand and apply the relevant laws governing a particular problem they might have. While these complexities existed when print law-related publications dominated the market – and continue to exist in an online environment – technology can play a role in reducing the informational distance by bringing information to the desktop in easier to use forms instead of it being relatively hidden in a what is most often a distant law library that may not be easily accessible. As such, the Internet holds the possibility to bypass the idea of a “gatekeeper” – like the doorkeeper in Kafka’s novel mentioned in the Introduction to this thesis – by providing multiple, low cost channels for citizens to access law-related information online.

Because the market for commercial law-related publications in Canada is relatively small, most publications are aimed at lawyers who are less price-sensitive than the average person and who can better handle the technical language of most law-related materials. In addition, with the trend towards a “digital drift” – the idea that valued-added material is increasingly being published through subscription databases such as Quicklaw or WestlaweCARSWELL – non-lawyers will increasingly rely on publicly available online databases, such as government and court websites to access law-related

information. However, Crown copyright and the retention by the Canadian government over the royal prerogative to control the ownership and printing of legislation and case law can act as a retardant by making it more expensive for private publishers to license this information for publication in their value-added publications. As has also been seen, governments in Canada have traditionally been slower than the private sector to make law-related information available, and legislation and case law published by the government online in Canada tends to be only current information (with little or no historical information being available).

The private sector has always played an important role in the dissemination of law-related information in Canada. With the trend towards publishers making their value-added information available online through a paid subscription – which has the advantage to lawyers of making the information current and easily accessible – there is a risk of a “have” and “have not” market for value-added legal information. Realistically, only lawyers will have ready access to much of this value-added information since the costs of accessing that information can be passed on to their clients. The average citizen, therefore, risks becoming part of the “have not” part of the market. In addition to protecting their information by licensing and password control, publishers are also a major force at encouraging governments to extend copyright protections that further a potential digital divide for the average consumer.

Thirty years ago, Professor Friedland concluded in *Access to the Law* that the average people or their non-lawyer intermediaries had trouble accessing the law and understanding the law in areas touching upon basic legal rights, such as the right of a

tenant to have the landlord repair a leaky roof. In what was then exclusively a print-based medium, the complexity of the legal system and the confusing way in which law-related information was published greatly contributed to this difficulty in accessing information. One of Friedland's solutions to improve access – a multi-volume encyclopedia of law for each province aimed at the “consumer level” – has not been realized, likely due in part to the costs and work required for such an undertaking. However, the reality is that the publication of law-related information is not necessarily only in the hands of a single party – just the government, for example. The major stakeholders – including the government, private publishers, lawyers, universities, and other public interest groups – can all play significant roles at improving access to law-related information. With the use of modern technology, including the Internet, improving access to law-related information can occur that much more easily.

In the spirit of promoting reform in these areas, set out below is a list of ten recommendations for ways in which access to law-related information can be improved.

**Recommendation #1: Governments need to establish clearer information policies**

*[I]nformation policy should commit to and encourage a diversity of sources and channels for government information. This policy is best implemented by a legal framework that grants anyone a right of access to basic government information and also gives everyone a privilege to disseminate that information in other forms.<sup>1</sup>*

The federal and provincial governments need to establish and articulate clearer information policies regarding all government information but particularly information

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<sup>1</sup> Perritt and Lhulier, *supra*, Chapter 1, note 69 at 901.

that is law-related. In addition, the federal government should carry through on its commitment to implementing broadband Internet access for all Canadians to help reduce the digital divide and improve access to the Internet. The government should also act on the recommendations of the Access to Information Review Task Force,<sup>2</sup> many of which impact law-related information, including the following recommendations:

- that the federal *Access to Information Act* be amended to set out better criteria to determine what federal institutions should be covered by the Act (Recommendation 2-1);
- that the Act apply to the House of Commons, the Senate and the Library of Parliament (subject to Parliamentary privilege and other limited exceptions) and that a mechanism be developed, such as a panel of experienced parliamentarians, to rule on claims of privilege (Recommendation 2-5);
- that the Act not apply to courts and related institutions but that they adopt alternate and comprehensive disclosure regimes to ensure as much transparency as possible with respect to their administration (2-8);
- that guidelines be issued on how to apply discretionary exemptions by:
  - exercising discretion as far as possible to facilitate and promote the disclosure of information;
  - weighing carefully the public interest in disclosure against the interest in withholding information, including consideration of any probable harm from disclosure, and the fact that information generally becomes less sensitive over time; and
  - having good, cogent reasons for withholding information when claiming a discretionary exemption (Recommendation 4-1);
- that government institutions more systematically identify information that is of interest to the public and develop the means to disseminate it proactively. These means should include regular publication, and the use of Web sites, or special arrangements or partnerships with the private sector, where appropriate (Recommendation 8-3);
- that, where there is an identified need or interest, and where the information is not sensitive, government institutions make as much information as possible available to the public either in hard copy or electronically (Recommendation 8-4);

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<sup>2</sup> Discussed *supra*, section 5.3.

- that,
  - a co-ordinated government-wide strategy be developed to address the crisis in information management;
  - a short-term plan be developed to deal with the most immediately critical needs and a longer-term plan to build ability and structure for the future; and
  - this strategy provide for partnerships among the agencies with primary responsibility for information management (Treasury Board Secretariat, the National Archives and the National Library) and other government institutions (Recommendation 9-1);
- that,
  - the Statement of Principles of the Public Service of Canada refer to the responsibilities of public servants as stewards of government information and as providers of access to that information; and
  - training modules for public servants, including orientation sessions for new employees and courses for managers, stress the linkages between access to information and core public service values (Recommendation 11-1);
- that the training of public servants emphasize that they are stewards of government information on behalf of Canadians; that the provision of information is an integral part of their job; and that the records they create in the course of their work are records of the Government of Canada, and for the most part can be made public (Recommendation 11-6); and,
- that, in conjunction with its response to our recommendations, the government launch a broad campaign in the public service to enhance awareness of access to information, appreciation of its principles and pride in providing information to Canadians (Recommendation 11-6).

As part of its information policy, the federal and provincial governments should also abolish Crown copyright and abandon any claim to a royal prerogative since, has been argued, the “commitment to a strong public access philosophy for primary legal materials is at odds with the continued existence in Canada of Crown copyright.”<sup>3</sup> As

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<sup>3</sup> Scassa, *supra*, Chapter 5, note 22 at 321.

seen in Chapter 4, a number of commentators have called into question the continuation of Crown copyright and even the government's own Access to Information Review Task Force has hinted at the inevitability that such an outdated doctrine can no longer have a positive role to play in the Internet age when it states that "[i]n the future, the needs of our 'information smart' society will increasingly pressure government to put as much information as possible in the public domain, through a variety of channels."<sup>4</sup> Even the "for profit" legal publishers in Canada have advocated for government law-related information to be in the public domain:

The Committee of Major Law Publishers strongly endorses "public domain" for primary legal materials, for the following reasons:

- Judgments, statutes and regulations are not "owned" by anyone. They are the law.
- Copyright in these works implies a possibility or intent to restrict access or use, which is inconsistent with the purpose for creating them.
- The public is entitled to access to the law and, in fact, is obligated to know the law.
- Claims to Crown copyright in judicial decisions constitute potential interference with independence of the judiciary. If anyone has copyright, it is the judges themselves, not the government.
- Seeking cost recovery for primary legal materials is illogical. The public has already "paid" for judicial decisions, statutes and regulations through taxpayers' support for the courts, parliament and the government bureaucracy which produces them. The public should not have to pay twice.
- The existing system of disseminating primary legal materials directly and through private sector law publishers, on a competitive basis, is working well. Law publishers provide "value-added" services to their customers with efficiency, accuracy and cost effectiveness.<sup>5</sup>

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<sup>4</sup> Government of Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Government of Canada, 2002) at 133.

<sup>5</sup> Atkey, *supra*, Chapter 4, note 124 at 193.



Jacques Fremont argues that the growth in the volume of primary legal material (what he calls normative information) creates a constitutional duty on the state to disseminate the information as broadly as possible and that a claim to Crown copyright over this information is inconsistent with this duty:

. . . [A]ll normative information must be known, must circulate and be full disseminated. In a period where the normative growth of the State seems to follow an exponential curve, it becomes, if not squarely unconstitutional, at the very least democratically unfair to submit citizens to an increased duty to keep informed about their duties, without correlatively imposing on the State a duty to disseminate efficiently and at a minimal cost its normative information. In this context, any restriction to the free circulation of State information invoking Crown copyright appears to violate the spirit, if not the letter, of the rule of law.<sup>6</sup>

The Australian Copyright Law Review Committee has recently recommended that “copyright in certain materials produced by government should be abolished where there is a strong public interest in their wide dissemination.”<sup>7</sup> In this category, the Committee had included primary legal materials. In doing so, they did not find convincing the traditional argument that copyright is needed to provide incentives to authors since the government, in their role as the promulgator of primary legal materials, does not need the incentives to do so provided by copyright law:

The Committee considers that the main reasons traditionally claimed for copyright ownership, that is, providing an incentive for creators and safeguarding the integrity of material, are not persuasive in relation to primary legal materials. Judgments, legislation and similar materials will be produced regardless of financial incentives, and the Committee believes they should be available as widely as possible and at minimal or no cost.<sup>8</sup>

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<sup>6</sup> Jacques Fremont, “Normative State Information, Democracy and Crown Copyright” (1996) I.P.J. 19 at 31, cited by Scassa *supra*, Chapter 5, note 22 at 323.

<sup>7</sup> Copyright Law Review Committee (Australia), *Crown Copyright* ¶ 9.27 (April 2005). Available online: <<http://www.ag.gov.au/agd/www/Clrhome.nsf>>.

<sup>8</sup> *Ibid.*, ¶ 9.28.

Nor was the committee too concerned about the argument that the government needs to retain copyright or a prerogative right in order to ensure accuracy in its law-related materials:

The Committee also considers that the argument that copyright ensures the integrity of material is over-stated in relation to primary legal materials. There is no incentive for legal publishers to misrepresent legislation or judgments when publishing them, as their reputations for accuracy and due care are crucial. Nor does the Committee consider it likely that there would be any increased tendency to plagiarise or misrepresent judgments if copyright were removed, as was suggested during the inquiry. The Committee notes the comment that 'It is ... clear that in those countries that do not restrict the copyright of primary legal materials, a majority worldwide; there is no glut of bogus legislation.'<sup>9</sup>

In addition, the Committee took into account the likelihood of putting government law-related information into the public domain would provide better incentives for private publishers to publish value-added material:

The Committee does not consider that there will be significant impact on the market for 'value-added' products if copyright is removed; indeed, it has been suggested that the removal of restrictions on reproduction is more likely to stimulate the production of value-added resources.<sup>10</sup>

The Committee was also concerned that the retention of Crown copyright and Crown prerogative could give rise to censorship by the government:

In addition, the Committee is concerned about the capacity for copyright to be used as a tool of censorship, as Sir Laurence Street warned. It is desirable that governments should not be able to withdraw their consent to publish legal materials, an option which is always available if copyright subsists.<sup>11</sup>

In making these recommendations, the Committee also noted the trend in other countries for this sort of law-related information to be made freely available:

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<sup>9</sup> *Ibid.*, ¶ 9.31.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, ¶ 9.30.

There is a worldwide trend to make such material freely available, as evidenced by the growth of international websites which provide free access. Many countries, such as the federal government of the USA and civil law countries such as France, Germany, the Netherlands, Sweden, Finland and Spain, do not recognise copyright in legislation or judgments. Moreover, there is no obligation at international law to protect such materials, and the Committee notes that the European Commission is encouraging member States to make such material freely available . . . .<sup>12</sup>

In addition to recommending the abolition of Crown copyright and Crown prerogative in legislative and judicial materials, the Committee extended its recommendations to other government-produced materials that should be made freely available, including:

- bills, statutes, regulations, ordinances, by-laws and proclamations, and explanatory memoranda or explanatory statements relating to those materials;
- judgments, orders and awards of any court or tribunal;
- official records of parliamentary debates and reports of parliament, including reports of parliamentary committees;
- reports of commissions of inquiry, including royal commissions and ministerial and statutory inquiries; and
- other categories of material prescribed by regulation.<sup>13</sup>

The Committee also recommended in its Recommendation #5 that the governments of the Commonwealth, States and Territories be under a statutory duty to disseminate legislation and judgments.

For all of these reasons, the Canadian governments should follow the path taken by Australia and other countries and abolish Crown copyright and the Crown prerogative over the control of printing of the categories of law-related information produced by the government described above. In addition, the government should accept a statutory duty

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<sup>12</sup> *Ibid.*, ¶ 9.29.

<sup>13</sup> *Ibid.*, ¶ 9.32.

to disseminate legislation and court judgments. Regarding the ownership of model form codes that are authored with the assistance of model code organizations, the preferred view would be for these codes to be in the public domain, consistent with the holding in *Veeck* with the incentives for private bodies to continue drafting such codes being clearer standards for their industries and the opportunity for them to publish copyrightable value-added commentary on the codes.

### **Recommendation #2: We need to reduce the complexity of the legal system**

As was noted in Chapter 2, the Canadian legal system is quite complex, for a variety of historical and cultural reasons. This complexity has arisen over a long period of time and to a certain extent is a systemic that is not really the fault of any single government, organization or profession. Because of this, the complexity in the Canadian legal system will not disappear overnight. There are, however, a number of steps that can be taken to reduce the complexity or minimize its impact. In particular, governments should use plainer English in statutes and regulations, organize legislation topically instead of alphabetically, and provide explanatory memorandum with statutes, consistent with the recommendation made in the Friedland study. Governments can also do a better job with publishing guides and commentary and should annotate their legislation with commentary to better explain when sections are repealed or ruled unconstitutional by the courts. With topical organization, governments could also easily provide better “see” references to related legislation and also to legislation from the federal or (applicable) provincial legislation.

In addition to simplifying the language used in legislation and the way in which legislation is published, federal and provincial governments need to increase legal aid funding and public legal education. The Canadian Bar Association has launched a test case in June 2005 against the federal and B.C. provincial governments arguing for a constitutional right to civil legal aid.<sup>14</sup> The lawsuit was brought “out of a sense of profound frustration with cuts to legal aid that have resulted in a vacuum in access to justice for the poor . . . .”<sup>15</sup> As already mentioned, Friedland’s study called for increased public legal education opportunities, but, as with legal aid, lack of funding has negatively impacted public legal education. For example, in 1996, the Ontario Conservative government of the time – in a cost-cutting move – cut funding for the Ontario Law Reform Commission, even though the Commission had an operating budget of less than \$700,000, bringing to an end 32 years of work of law reform in the province.<sup>16</sup>

Likewise, at the federal level, the Law Reform Commission of Canada was shut down in 1992 to be replaced in 1996 with the Law Commission of Canada (with a much reduced budget).<sup>17</sup> In addition, the Canadian Law Information Council (CLIC), which existed from 1973 to 1992, had as one of its goal the promotion of access to legal information. Its funding, which was largely provided by federal and provincial governments, was significantly cut by the federal government in 1992.<sup>18</sup> CLIC’s

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<sup>14</sup> Canadian Bar Association, News Release: “CBA Launches Test Case to Challenge Constitutional Right to Civil Legal Aid” (20 June 2005). Available online: <[http://www.cba.org/CBA/News/2005\\_Releases/2005-06-20\\_legalaid.aspx](http://www.cba.org/CBA/News/2005_Releases/2005-06-20_legalaid.aspx)>.

<sup>15</sup> *Ibid.*

<sup>16</sup> Paula Kulig, “Tory Creation of the 1960s a Victim of Tory Cutbacks in the 1990s: Ont. Law Reform Commission Wrapping up Work” *Lawyers’ Weekly* (19 July 1996).

<sup>17</sup> Cristin Schmitz, “Membership of New LRC Council will include Non-lawyers: Feds’ Bill Proposes Leaner Law Reform Commission” *Lawyers’ Weekly* (20 October 1995).

<sup>18</sup> Cristin Schmitz, “Feds’ Budget Cuts Leave Legal Programs Dead and Injured” *Lawyers’ Weekly* (20 March 1992).

expenditures in 1991 were \$1.9 million and it had a staff of 22 persons. Some of its major contributions included studies and reports in the area of indexing of statutes, computer-assisted legal research, plain language in the law, law library resources and common law in French. As Professor Campbell has noted, the Canadian Legal Information Council played an important role in improving the quality and accessibility of legal information across Canada, currently no national body “ready and able to pick up this mandate.”<sup>19</sup>

As such, although the Law Commission of Canada or even the Uniform Law Conference of Canada, carry on important work, their mandates are not necessarily focusing on access to the law. One possibility – in conjunction with Recommendation #5 below – would be for the Canadian Legal Information Institute (CanLII) to be funded to take on access to law-related information projects that were under the previous mandate of CLIC.

### **Recommendation #3: Governments need to publish archival legislation online**

As discussed in Chapter 2, a problem with Canadian legislation online is that the online version is generally on the most recent or current version, with there being little or no historical legislation being available online. Although this can meet the need of most researchers, having historical legislation online would remove the geographical barrier that many researchers have in not necessarily having easy access to a large academic law library that would carry historical versions of Canadian legislation in print. As such, the federal and provincial governments should digitize archives of *all* historical legislation along the lines of the digitization project undertaken in Alberta. In addition to digitizing

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<sup>19</sup> Neil Campbell, *supra*, Chapter 3, note 54 at 14.

statutes and regulations, governments should also digitize bills, Hansard transcripts and all law reform commission reports produced by that government. The costs of digitization are decreasing to the point of it being inexpensive compared to the benefit of providing universal access and allowing law libraries to rationalize their collections.

**Recommendation #4: Governments need to make their online legislation official**

As discussed in Chapter 2, online legislation in Canada is generally considered “unofficial,” thereby forcing litigants to using print versions, which may not be as easily accessible and which may not be consolidated and up-to-date, requiring an awkward amount of photocopying. Given the role and use of the Internet in today’s society, not having legislation online being official seems unnecessarily backwards:

Until governments are willing to provide authoritative electronic versions of legislation and regulations, and until courts are willing to do likewise with decisions, and until there is a means to provide historical material online, no free, publicly accessible online site is likely to be able to come close to replicating a library as a point of access for legal materials. This is unfortunate as, unlike law libraries, internet connections are becoming widely available and have the potential to be a very far-reaching tool for public access to legal information.<sup>20</sup>

The traditional rationale of governments for not making their online legislation the “official” version is usually concern over inaccuracies or forgeries. However, given the ability to secure the servers on which the legislation would be provided online, and given that the government is the drafter, owner and publisher of the information, this rationale is not very convincing. Steps should be taken, therefore, for Canadian government to make their online versions of legislation presumptively official for all purposes.

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<sup>20</sup> Scassa, *supra*, Chapter 5, note 22 at 313.

**Recommendation #5: CanLII should be more broadly funded by taxpayers**

Although it is reasonable to assume that CanLII may enjoy its relative independence from the government, funding is always an issue for CanLII. The Federation of Law Societies of Canada currently provides funding for CanLII through mandatory deductions from the annual membership fees from members of law societies across the country.<sup>21</sup> However, it is reasonable to assume that lawyers are not the only users of CanLII (and that many lawyers in fact will instead use the commercial online services which have more extensive materials, where they are able to better absorb the costs of the commercial services or pass those costs onto their clients). As such, funding for CanLII should be broader and a cost absorbed by the general public (including lawyers) since it is the general public who will benefit from access to the material on CanLII:

If non-commercial Web sites are for use by the general public, is this the best way to meet their needs for legal information? Primary legal resources, in their raw form, often are challenging for legally trained researchers to use. In the United States, legal research tools created specifically for lay persons and self-represented litigants are available. Perhaps public funds should be used to develop truly useful resources for the general public, while efforts to find ways of providing public access to the vast and reliable collections which the publishers have built are increased.<sup>22</sup>

With broader (and more funding), CanLII could also move to include more historical/archival legislation and case law. The central “clearinghouse” aspect of CanLII – the fact that it has a search engine to globally search both federal and all provincial jurisdictions – is a feature that no single government itself could easily or justifiably undertake (given

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<sup>21</sup> See “Canadian Legal Information Institute, About CanLII.” Available online: <[http://www.canlii.org/about-apropos\\_en.html](http://www.canlii.org/about-apropos_en.html)>.

<sup>22</sup> Ruth Rintoul, with contributions from Rosalie Fox, “Case law in Canada” (2003) 28 Can. L. Libraries 166 at 170.



constitutional limitations). As has been seen, publication of law-related information is often a combination of private and public sector initiatives. By providing broader funding to an organization such as CanLII, governments could go a long way to meeting their duty to disseminate primary legal materials through such partnerships, something envisioned by the government's own Access to Information Review Task Force:

Partnering with the private sector allows government-held information to be made more widely available to Canadians than would otherwise be the case. We believe that this approach should not be used to replace publication by a government institution where there is a need to inform the general public; however, it may be highly appropriate for those categories of government information for which there is a limited, but identifiable, market (e.g. scientific and technical research papers). The government role in these partnerships should be to ensure that the information is sufficiently widely available to interested Canadians and that issues such as pricing, accessible format and official languages are addressed.<sup>23</sup>

**Recommendation #6: The SCC should publish a complete archive of the Supreme Court Reports Online (1867 to current)**

The Supreme Court of Canada should digitize all of their decisions back to 1867 and make them full-text searchable and browsable for free on their website (or through CanLII). The cost and effort of doing so is not that great and the benefit of having the decisions of the Court online would benefit not only to litigants but also historians and other researchers.

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<sup>23</sup> *Supra*, Chapter 5, note 68 at 135.

**Recommendation #7: Provincial Courts of Appeal should publish a complete archive of their decisions online**

Likewise, given the precedential value of decisions of the provincial Courts of Appeal, all provincial Courts of Appeal should digitize *all* of their decisions and make them full-text searchable and browsable for free on their websites (or through CanLII). In addition, on the topic of provincial Courts, the Courts of Ontario and Québec should immediately mandate the use of neutral citations by their judges for their decisions since these two jurisdictions are the only remaining provinces to not use neutral citation, despite their agreement in principle to do so.

**Recommendation #8: Appoint a National Law Librarian**

As mentioned in Recommendation #1 above, the Access to Information Review Task Force has recommended “a co-ordinated government-wide strategy be developed to address the crisis in information management” including “partnerships among the agencies with primary responsibility for information management” such as the National Library and other government institutions. Along these lines, the government should appoint a National Law Librarian at the National Library of Canada consistent with the call by the Canadian Association of Law Libraries in their Resolution 2000/3:

WHEREAS the National Library of Canada is charged with the mandate to collect and preserve the social, literary, economic, historical and legal publications related to or published in Canada; and

WHEREAS the National Library of Canada is the institution best positioned to facilitate co-operation and collaboration among Canadian law libraries and law library organizations, and with national bibliographic institutions of other nations; and

WHEREAS CALL/ACBD is the Canadian professional association most aware of and knowledgeable about the preservation and access issues related to the publication of legal materials in digital form; and

WHEREAS the globalization of legal information in digital form is a reality that is not yet fully accepted by Canadian institutions in terms of national information policy;

BE IT RESOLVED that CALL/ACBD recommend to the National Librarian, Heritage Canada and to Parliament, the establishment of the position of National Law Librarian with the appropriate authority and resources to work at the national level, and in cooperation with groups and organizations to:

- develop a national legal information policy, especially with regard to access to and preservation of digital legal resources of Canadian origin;
- develop a legal information preservation strategy which is independent of short-term, volunteer initiatives but which may support a distributed undertaking if this appears cost-effective and reliable;
- advise the National Librarian and other working groups on those issues directly related to the unique nature of legal information resources;
- create and facilitate collaborative ventures with national law libraries<sup>24</sup>

A National Law Librarian could be given a mandate to improve access to law-related information in Canada and could be a key person to work with both various sectors within the government and private industry to see this mandate realized.

### **Recommendation #9: Take a balanced approach to copyright amendments**

The Canadian government is currently in the process of copyright reform, in part to bring the *Copyright Act* into the age of the Internet and to comply with international intellectual property treaty obligations. However, within these reforms, the government has a fair amount of flexibility to protect the public interest and users' rights if it chose to do so.

As has been pointed out, however, the public interest in copyright reform often lacks a

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<sup>24</sup> Canadian Association of Law Libraries, Resolution 2000/3 (31 May 2000, Charlottetown Conference). Available online: <[http://www.callacbd.ca/resolutions/resolution\\_2000\\_03e.html](http://www.callacbd.ca/resolutions/resolution_2000_03e.html)>.

visible presence in copyright reform, unlike the interests of the large publishers, who have a strong lobbying force in Ottawa.<sup>25</sup> As such, the Canadian government should move slowly on technological protection measures to ensure that legitimate use of digital material is not impaired.

### **Recommendation #10: Expand the role of Canadian law libraries**

*The law library, and the books in the law library, are central symbols of the law's concern with information during the past 500 years. The new media represent the equivalent of an earthquake hitting the library, not because the electronic library may replace the physical library but because the role of the library, whether it is electronic or print, is shifting as information becomes accessible from new sources. This, of course, affects not only the law library and legal professionals, but citizens whose distance from the law is shifting as well.*<sup>26</sup>

As discussed in Chapter 6, Friedland's proposal for a national and multiple provincial law-related encyclopedias aimed at non-lawyers is not very realistic. The costs and time to prepare them would be extensive; and if Carswell is having difficulty in updating its commercial *Canadian Encyclopedic Digest*, it seems naïve to think that a non-profit venture would be able to keep such publications up-to-date with the constant revisions that occur with new legislation and new cases being introduced every day.

Given these realities, the final recommendation would be for law schools and law libraries to take a more prominent role in making law-related information more available to all persons, including non-lawyers. Although most law school and law libraries have as their primary objective the need to serve their own faculty and students, an essential mission of most Canadian law schools is – or should be – to instill in their students a

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<sup>25</sup> See Michael Geist, "Canadian Copyright Reform Must Focus on Policy and Process" *The Hill Times* (13 June 2005).

<sup>26</sup> Katsh, *supra*, Introduction, note 8 at 56.

sense of service to the public. The Pro Bono Students Canada program is one recent example of this sort of activity. Most Canadian law librarians, moreover, by the very nature of their calling, usually feel a desire to make information as broadly available as possible. In addition, improving access to law-related information is not necessarily inconsistent with the need for law schools and law libraries to also serve the interests of their faculty and students. Law librarians have a “built-in” incentive to participate in print and online publications that seek to improve access to law-related information through their need to achieve tenure-status through such criteria as “academic achievement and activities and professional achievement and activities.”<sup>27</sup> It would also be possible for law libraries to call upon some of their students to volunteer for this sort of work.

Law libraries across Canada are already making huge strides in improving access to law-related information in Canada. At the University of Montreal, for example, the LexUM website<sup>28</sup> gathers together a number of experts to provide free access to law-related materials. The Bora Laskin Law Library at the University of Toronto has also published a number of guides to improve access to the law, including “Finding Legal Help in Ontario”<sup>29</sup> and the “Landlord and Tenant Resources (Ontario),”<sup>30</sup> to name two examples.

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<sup>27</sup> University of Toronto, *Manual of Staff Policies: Academic/Librarians* (Code Number: 1.01.01) ¶ 30. Available online: <<http://www.utoronto.ca/hrhome/acman.pdf>>.

<sup>28</sup> University of Montreal Law Faculty Public Law Research Center, “LexUM Home Page.” Available online: <<http://www.lexum.umontreal.ca>>.

<sup>29</sup> Bora Laskin Law Library, “Finding Legal Help in Ontario.” Available online: <<http://www.law-lib.utoronto.ca/Resguide/finding.htm>>.

<sup>30</sup> Bora Laskin Law Library, “Landlord and Tenant Resources (Ontario).” Available online: <<http://www.law-lib.utoronto.ca/comminfo/landlordtenant.htm>>.

Academic and courthouse law librarians (and librarians at private law firms), through the Canadian Association of Law Libraries, would be able to coordinate both federal and provincial online guides that could go a long way towards realizing the recommendation in the Friedland study of a law-related encyclopedia for non-lawyers but at a much more realistic and sustainable level. These online guides would be free, could be written in plain English, and could explain where print resources could be found in each province. For example, the law libraries across the country could agree on the most needed guides on matters falling under federal jurisdiction and then divide up the task of preparing and updating the guides. Topics under federal jurisdiction of likely interest to most citizens would include guides on the topics of divorce, income tax, criminal law, youth criminal justice, the *Charter*, immigration law, intellectual property law, privacy law and administrative law. It would be easier to cooperate on the authorship of online guides for these topics, with each academic law library in Canada agreeing to publish and update guides on one or two of these topics. These guides, on topics under federal jurisdiction, could then be shared and adapted, as needed, for each province with “local” information added, depending on the resources available within a particular province.

Guides on law-related topics that fall within provincial jurisdiction could also be created without too much difficulty. And even though the laws vary from province to province, the “templates” for the guides could be shared, and in some cases, the guides would not be that different from province to province. Topics for the provincial guides that would likely be the most needed would include landlord/tenant, family law, mechanics’ liens, going to court, real estate (and buying and selling a home), traffic court, education law, administrative law, starting your own business, employment law, labour

law, insurance law, municipal bylaws, occupational health and safety, privacy law, workers' compensation, and wills and estates.

These online guides could be hosted on a single server; alternatively, if the guides produced by each law school law library were kept on their individual servers, links could be provided to each guide, regardless of its location. These guides could also be coordinated with legal aid clinics and other public interest groups, including those offered by law societies and law student legal clinics.

By dividing up the labour among the Canadian law school law libraries, the effort to keep the guides up-to-date would not be overly onerous. In addition, these guides would not necessarily be seen as a threat to the commercial law-related print and online publishers since their products would continue to service a slightly different market (and would have more extensive copyrighted sources, such as newspaper and journal databases), although many lawyers might find the free online guides to be useful.

It is hoped that if the foregoing ten recommendations were implemented, many of which take advantage of Internet technology, that access to law-related information in Canada in the digital age would be improved.

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