

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

EXECUTIVE SUMMARY

The Canadian Judicial Council received a report on issues arising from electronic access to court records and docket information from its Administration of Justice Committee in March 2002. Council asked for additional input from the Judges Technology Advisory Committee. JTAC created a subcommittee with the mandate of reviewing that report and making proposals to JTAC for its consideration.

This discussion paper was prepared by the subcommittee for the Judges Technology Advisory Committee and was considered at its meeting in May, 2003. It builds on the important work initially undertaken for the Administration of Justice Committee by Chief Justice Brenner of the Supreme Court of British Columbia and the Supreme Court Law Officer Judith Hoffman.

Based on a review of jurisprudence established by the Supreme Court of Canada, **JTAC has concluded that the right of the public to open courts is an important constitutional rule, that the right of an individual to privacy is a fundamental value, and that the right to open courts generally outweighs the right to privacy.**

This discussion paper further develops the many policy and logistical issues which arise when courts accommodate electronic filing and electronic retrieval of court records and docket information.

In the United States, where remote and on-site electronic access to court records and docket information is far more advanced, many of these issues have been investigated by judicial colleagues, their administrative staff, lawyers and representatives of the media. As their efforts illustrate, the policy issues which require consideration include the following:

- who has the responsibility for establishing electronic access policies
- what, if any, are the differences between paper and electronic environments
- what is the purpose for which court records are filed and docket information is prepared, and

- is that purpose relevant to establishing policies for electronic access.

In addition there are a variety of logistical and administrative issues including the following:

- who is responsible for the accuracy of the court record and docket information
- should electronic access to some court records and docket information be on-site rather than remote
- should the identity of users of electronic access systems be tracked
- who is responsible for communication of access policies.

Given the complexity of the issues and the importance of consultation amongst those interested in and involved in electronic access policies, **JTAC has concluded that it would be inappropriate for it to recommend a model policy. Instead, this discussion paper provides a framework within which electronic access policies might be established.**

JTAC has assembled 33 conclusions including these: **that the Canadian Judicial Council has a leadership role in initiating discussions and debate about the development of electronic access policies and that such policies be as consistent as possible throughout Canada.**

JTAC recommends to the Canadian Judicial Council that this discussion paper be made available in French and in English and that it be disseminated for purposes of inviting comments. JTAC will report to the Council in due course on the results of the feedback received and recommend next steps, if any, that might be taken by the Council with respect to the issues raised.

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Discussion Paper on Open Courts, Electronic Access to Court Records and Privacy

In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only as proportion as publicity has place, can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.¹

Introduction

[1] The Judges Technology Advisory Committee is an Advisory Committee of the Canadian Judicial Council. The mandate given to JTAC by Council includes the following:

- providing advice and making recommendations to the Council on matters relating to the effective use of technology by the courts, consistent with the Council's overall mandate to promote uniformity and efficiency and improve the quality of judicial service in courts across the country;
- supporting the development of standards for judicial information, court filings, evidence, judgments and other information in electronic form;
- monitoring and considering technical issues that may have an impact on access to justice.

[2] In March 2002, Chief Justice of the Supreme Court of British Columbia Donald J. Brenner and his Law Officer Judith Hoffman prepared a report for the Administration of Justice Committee of the Council. That report is entitled "Electronic Filing, Access to Court Records and Privacy". In the report, the authors identified and considered some of the policy and logistical issues arising from electronic filing of and electronic access to court records. The Administration of Justice Committee received that report and referred it to JTAC. In response, in April, 2002, JTAC created a subcommittee which included Chief Justice Brenner, Judith Hoffman, Jennifer Jordan (Registrar, Court of Appeal of British Columbia), Justice Kiteley (Superior Court of Ontario), Justice Denis Pelletier (Federal Court of Appeal) and Justice Linda Webber (Supreme Court of Prince Edward Island, Appeal Division). JTAC directed the subcommittee to make proposals for its consideration.

[3] This discussion paper contains the following:

- the current status of access to court records and docket information in Canada
- the relationship between freedom of information legislation and access to court records and docket information in Canada
- the global context in which electronic filing, access to court records and privacy will unfold
- the status of electronic filing and electronic retrieval of court records and docket information in Canada and in the United States
- the policy and logistical issues which arise when courts accommodate electronic filing and electronic retrieval of court records and docket information
- recommendations.

[4] At the heart of the matter is the relationship between two fundamental values: the right of the public to transparency in the administration of justice and the right of an individual to privacy.

Definitions

[5] Several terms will be used extensively throughout this discussion paper. While they may have different meanings elsewhere, for purposes of this discussion paper they are defined as follows:

Court record - is used to include pleadings, orders, affidavits etc; that is to say, documents created by the parties, their counsel, or a judicial official or his/her designate.

Docket information - is used to include documents prepared manually by court staff or automatically by data entered into a computer such as a listing of court records in a court file.

Court file - includes both of the above bearing in mind that some docket information will not be physically in the court file but resides in ledgers or data bases.

E-filing - includes the transmission, service and storage of information in electronic form whether the information is sent and received in a way in which it can automatically populate the court's data base or whether information is manually entered into the court's data base.

[6] There are some records which are not encompassed by this discussion paper, namely any records which might be described as judicial administration records such as the scheduling of judges and trials, the content of judicial training programs, statistics of judicial activity prepared by or for a judge.

Access to Court Proceedings, Court Records and Docket Information in Canada

[7] The Supreme Court of Canada has consistently held that, in a contest where the right of the public to transparency in the administration of justice conflicts with the right of the individual to privacy, generally the right of the public prevails. What follows are some examples of the analysis involving those two values in a statutory or regulatory framework or in a common law context.

[8] In Attorney General of Nova Scotia v. MacIntyre² a journalist sought access to an executed search warrant and the material filed to obtain the warrant. The Justice of the Peace who had issued the warrant denied the application on the basis that such material was not available for inspection by the general public. MacIntyre began a legal proceeding against the Attorney General of Nova Scotia in which he sought an order that search warrants and related informations issued pursuant to the Criminal Code are part of the public record. In the Trial Division, the search warrant and informations were found to be court records which were available for inspection. The application was granted with respect to search warrants which had been executed. In dismissing the appeal, the Court of Appeal also concluded that a member of the public is entitled to be present in open court when search warrants are issued.

[9] In the Supreme Court of Canada, the appeal with respect to being present in open court when search warrants are issued was allowed. The appeal was dismissed with respect to access to executed search warrants where objects had been found during the search and had been brought to the Justice of the Peace.

[10] Dickson J. (as he then was) speaking for the majority recognized that there is a strong common law presumption that court proceedings should be open to the public and that the public should have access to court records:

Many times it has been urged that the ‘privacy’ of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.³

[11] Furthermore:

At every stage, the rule should be one of public accessibility and concomitant judicial accountability. . .

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of those is the protection of the innocent.⁴

[12] However, the open court presumption is rebuttable and the Court maintains discretion over the issue of access to its records:

Undoubtedly every court has supervisory and protecting power over its own records. **Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose.** The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of that right. ⁵ [emphasis added]

[13] In considering access to court records, Dickson J. noted that protection of the innocent is a legitimate concern:

Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear. ⁶

[14] It is important to bear in mind that MacIntyre deals only with search warrants in the criminal context. Dickson J. recognized that the parameters of access to other types of judicial records are not clear:

By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or the delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. ⁷

[15] In Edmonton Journal v. The Attorney General for Alberta et al ⁸ the Edmonton Journal challenged sections of the Alberta Judicature Act R.S.A. 1980, c. J-1 which prohibited the publication of certain information contained in matrimonial files (s. 30(1)) and other civil files (s. 30 (2)). Counsel for the Edmonton Journal argued that the Judicature Act violated section 2(b) of the Charter. Both the Court of Queen's Bench and the Court of Appeal dismissed the application on the ground that s. 30 constituted a reasonable limit to s. 2(b) under s. 1 of the Charter and that it did not violate s. 15.

[16] Cory J. wrote on behalf of Dickson C.J. and Lamer J. He acknowledged that while it might be necessary to protect the privacy of persons involved in such

proceedings, s. 30 was overbroad, did not minimally interfere with freedom of expression and of public access to the courts, and did not reflect the proportionality which is required between the effect of the measure and the attainment of the objectives. He concluded that s. 30(1) and (2) contravened s. 2(b) and that the limits imposed by the Judicature Act were not justifiable under s. 1. Wilson J. came to the same conclusion in separate reasons. In reasons written by La Forest J. (in which L'Heureux-Dube J. and Sopinka J. concurred), s. 30(1) was found to be a justifiable infringement under s. 1 but s. 30(2) was found to be an infringement which could not be justified.

[17] In his observations about open justice, Cory J. said:

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.⁹

[18] Cory J. adopted the passages by Dickson J. in MacIntyre (covertness is the exception; every court has a supervisory and protecting power over its own records) to which reference has been made above. And Cory J. added that “access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings”.

[19] In Vickery v. Nova Scotia Supreme Court (Prothonotary)¹⁰ the accused (Nugent) had been convicted of second degree murder on the basis of taped confessions. On appeal, the audio and videotapes containing the confessions were ruled inadmissible and the conviction was overturned. A journalist asked the Registrar to provide a copy of the audio and videotapes which had been made exhibits at the trial. The Prothonotary refused. The journalist brought an application which was heard by Glube J. (as she then was). She granted the order although it was implicit in her order that before any use could be made of the tapes, the matter was to come before her again once the media had gained access. The Court of Appeal reversed her order, thereby denying access to the exhibits. The Supreme Court of Canada dismissed the appeal.

[20] In the Supreme Court of Canada¹¹ the majority held that Nugent’s privacy interests in the tape outweighed the public’s right to access to the videotape. Stevenson J. concluded that Nugent, having been acquitted, ought not to be subjected to possible unrestricted repetition of the illegally obtained evidence. Nugent was “an innocent person” within the meaning suggested by Dickson J. in MacIntyre. Nugent’s privacy rights constituted a social value of superordinate importance. The general rule of public accessibility had to give way to Nugent’s privacy rights. Access to the tapes was denied.

[21] In arriving at that conclusion, Stephenson J. dealt with the nature of exhibits:

An exhibit is not a court record of the same order as records produced by the court, or pleadings and affidavits prepared and filed to comply with court requirements. Exhibits are frequently the property of non-parties and there is, ordinarily, a proprietary interest in them. When they have served the purpose for their filing they are ordinarily at the disposition of the person who produced them. **While they remain in its custody, the court has a duty to pass upon any request for access. . .**

Once exhibits have served their purpose in the court process, the argument based on unfettered access as part of the open process lying at the heart of the administration of justice loses some of its pre-eminence.¹² [emphasis added]

[22] He then concluded that:

. . . the court, as the custodian of the exhibits, **is bound to inquire into the use that is to be made of them** and, in my view, is fully entitled to regulate that use by securing appropriate undertakings and assurances if those be advisable to protect competing interests. . . .

In exercising its supervisory powers over material surrendered into its care, the court may regulate the use made of it. . . . In an application of this nature the court must protect the respondent and accommodate the public interest in access. **This can only be done in terms of the actual purpose, and in the face of obvious prejudice and the absence of a specific purpose**, the order for unrestricted access and reproduction should not have been made.¹³ [emphasis added]

[23] Cory J. wrote the dissenting judgment in which he pointed out that Nugent had undergone a trial during which the tapes were played in public and that, accordingly, Nugent's right to privacy was of less weight than it would be had the tapes never been played. It was his view that "the importance of the openness of the courts and judicial accountability weighed heavily in favour of access".¹⁴ He also pointed out that since the Court of Appeal had found the tapes not to be admissible and had reversed a conviction made by a jury, that the public had a right to know the basis upon which the Court had arrived at that result:

Therefore, like the criminal trial, the criminal appeal should be as open as possible. The media, as the public's representative, should have access to all the exhibits which are part of the appeal proceedings and which may form the basis for the appellate court's decision. There can be no confidence in the criminal law process unless the public is satisfied with all court proceedings from the beginning of the process to the end of the final appeal.¹⁵

[24] The majority and minority balanced the issues of openness/judicial accountability and privacy and arrived at different conclusions. Albeit in dissent, the description by Cory J. as to the principles engaged in the appeal is consistent with the views of the majority:

There are two principles of fundamental importance to our democratic society which must be weighed in the balance in this case. The first is the right to privacy which inheres in the basic dignity of the individual. This right is of intrinsic importance to the fulfilment of each person, both individually and as a member of society. **Without privacy, it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought.**

The second principle is that courts must, in every phase and facet of their processes, be open to all to ensure that so far as is humanly possible, justice is done and seen by all to be done. If court proceedings, and particularly the criminal process, are to be accepted, they must be completely open so as to enable members of the public to assess both the procedure followed and the final result obtained. Without public acceptance, the criminal law is itself at risk. ¹⁶ [emphasis added]

[25] In Canadian Broadcasting Corp. v. New Brunswick (Attorney General) ¹⁷ the accused had pleaded guilty to charges of sexual assault and charges of sexual interference involving young female persons. On a motion by the Crown, consented to by defence counsel, the trial judge had ordered the exclusion of the public and the media from 20 minutes of the sentencing proceedings which dealt with the specific acts committed by the accused. The media and other members of the public were excluded on the basis that the offence was of a “very delicate” nature and the exclusion order was in the interests of the “proper administration of justice” because it would avoid “undue hardship on the persons involved, both the victims and the accused”. The CBC challenged the constitutionality of s. 486(1) of the Criminal Code. The court held that s. 486(1) constituted an infringement on the freedom of the press protected by s. 2(b) of the Charter but that the infringement was justifiable under s. 1 of the Charter. The Court of Appeal affirmed the judgment.

[26] The Supreme Court of Canada agreed that s. 486(1) constituted an infringement on s. 2(b) rights but that it was justifiable. However, the Supreme Court disagreed with the basis upon which the trial judge had exercised his discretion in ordering exclusion. Accordingly, the Supreme Court allowed the appeal, quashed the exclusion order and directed that the media and the public have access to the transcript of that part of the proceedings which had been held in camera. La Forest J., writing on behalf of a unanimous court, quoted extensively from Cory J. in Edmonton Journal. ¹⁸ At parag. 23, La Forest J. expressed the relationship between openness in judicial proceedings and freedom of expression as follows:

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.

[27] In F.N. (Re)¹⁹ the Youth Court staff in St. John's had begun routine distribution of its weekly Youth Court docket to local school boards. One docket disclosed the name of the appellant, the fact that he was charged with two counts of assault and breach of probation, and the place and date of trial. F.N. objected that this administrative practice violated the non-disclosure provisions of the Young Offenders Act, R.S.C., 1985, c. Y-1, and applied for an order of prohibition. His application was dismissed by the Newfoundland Supreme Court, Trial Division and the Court of Appeal. The Supreme Court of Canada allowed the appeal and issued a prohibition order against continuation of the practice.

[28] Binnie J. delivered reasons on behalf of a unanimous court. At paragraph 10, he started with this position:

It is an important constitutional rule that the courts be open to the public and that their proceedings be accessible to all those who may have an interest. To this principle there are a number of important exceptions where the public interest in confidentiality outweighs the public interest in openness. This balance is dealt with explicitly in the relevant provisions of the Young Offenders Act, which must be interpreted in light of the Declaration of Principle set out in s. 3.

[29] Binnie J. observed the need for confidentiality to prevent stigmatization or premature labelling of a young offender. He noted observations made in previous jurisprudence in Canada and the United States and pointed out that the importance of confidentiality in dealing with youthful offenders had been recognized internationally.²⁰

[30] Binnie J. noted that the Act created two distinct but mutually reinforcing regimes to control information: a prohibition against publishing any report identifying a young offender with an offence or proceeding; and the maintenance and use of court records. At paragraphs 23 and 24, he held as follows:

23 Much argument was directed here and in the courts below to the precise scope of the words "report" in s. 38 and "record" in s. 40. The idea seemed to be that if the document could be characterized as something other than a "record" or "report", its contents could be disseminated free of statutory restrictions. I do not agree. While neither term is defined in the Act, **etymological niceties ought not to be allowed to overwhelm the clear purpose expressed by**

Parliament to control publication of “the name of the young person, a child or a young person who is a victim of the offence or a child or a young person who appeared as a witness in connection with the offence, or . . . any information serving to identify such young person or child” (s. 38(1)).

- 24 It is scarcely plausible that Parliament intended to control publication of such information by way of a “report” but was quite prepared to have the same information disclosed to the public in an allegedly different vehicle called a communiqué, notification write-up, divulgation or, indeed, docket. What is important is not what the communication is called but the substance of what is communicated. **The concern is with the message**, not with the label applied to the medium of communication. . . . [emphasis added]

[31] In Atomic Energy of Canada Limited v. Sierra Club of Canada²¹ AECL marketed nuclear technology. The federal government gave a subsidy to facilitate the construction and sale of nuclear reactors to China by AECL. Sierra Club sought judicial review of that decision to subsidize on the basis that the decision triggered an environmental assessment. A preliminary motion dealt with Sierra’s request to have access to documents referred to in an affidavit filed by AECL. AECL took the position that the documents would only be made available if an order sealing the documents were made. The Federal Court, Trial Division refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. The Supreme Court allowed the appeal and granted the order.

[32] Iacobucci J. wrote on behalf of a unanimous court. At paragraph 36 he agreed with the open courts principle expressed by La Forest J. in Canadian Broadcasting Corp. to which reference is made above. He noted that a discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out in Canadian Broadcasting Corporation et al v. Dagenais et al.²² He pointed out that while Dagenais dealt with the common law jurisdiction of a court to order a publication ban in the criminal law context, the principles nonetheless applied to the discretion to be applied under rule 151 of the Federal Court Rules, 1998, SOR/98-106. Iacobucci J. reviewed the progression of the Dagenais test, and the Mentuck test²³ and at paragraph 53 held that the Sierra test ought to be as follows:

A confidentiality order under Rule 151 should only be granted when:

- (1) such an order is necessary in order to prevent a serious risk to an important interest, including commercial interest, in the context of litigation because reasonably alternative measures will not prevent risk; and
- (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a trial, outweigh its deleterious effects,

including the effects on the right to free expression, which in context includes the public interest in open and accessible court proceedings.

[33] At paragraph 90 he concluded:

In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respect would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

[34] The foregoing approaches have been applied in countless cases in most jurisdictions in Canada.

[35] Some provinces and territories have passed statutes or created regulations which touch on the fundamental principle of openness to court proceedings, court records and docket information, or which create exceptions to the general rule. Those have been catalogued in Appendix B to this discussion paper. Some of these have been tested as indicated above. Others have not been challenged. The following are observations which arise from the compendium of statutes and regulations:

- *in court proceedings generally*, Manitoba, Nova Scotia, Ontario, Prince Edward Island and Quebec provide that proceedings shall be open, but leave the judge with the discretion to exclude members of the public while British Columbia, Alberta, North West Territories, Newfoundland and Labrador and the Yukon have no provisions dealing with the openness of general court proceedings
- Manitoba, Ontario and Prince Edward Island have provisions entitling a person to see any document filed in a civil proceeding unless an Act or an order of the court provides otherwise. For the purpose of confidentiality, a judge may order that any document filed in a civil proceeding be sealed and not form part of the public record; seven other provinces and territories do not have any provisions concerning access to court records
- *in family court proceedings*, British Columbia and Nova Scotia provide that they shall be open although the judge has the discretion to exclude any person; New Brunswick leaves it to the judge's discretion whether the proceedings are open or closed; Alberta, Manitoba, Newfoundland and Labrador, Prince Edward Island and the Yukon provide that family proceedings may be closed
- Newfoundland and Labrador and Saskatchewan generally restrict access to court records for family law proceedings to the parties and their lawyers; In British Columbia access is restricted to parties, their lawyers and a family justice or a person authorized by a judge in an application pursuant to the

Family Relations Act; in Quebec, sworn financial statements filed with the court in relation to support applications are confidential; Alberta, Manitoba, North West Territories and Ontario do not restrict access to court records in family proceedings

- in child welfare proceedings, British Columbia and Nova Scotia provide that the proceedings shall be open although the judge does have the discretion to exclude any person; Alberta provides that the proceedings may be closed to the public; Manitoba, Newfoundland and Labrador, Ontario and Prince Edward Island provide that the proceedings shall be closed to the public, although in Manitoba and Ontario proceedings are open to the media unless the judge exercises discretion to exclude them
- there are dozens of statutes and regulations which limit access to court proceedings and/or court records.

Freedom of Information and Protection of Privacy Legislation

[36] Aside from the privacy issues referenced by the Supreme Court of Canada, there is legislation in all provinces which is based on an open government policy which ensures public access to documents and information held by government while at the same time, protecting certain privacy rights of those to whom reference is made in the material. In each jurisdiction where such legislation exists, it does not apply to *court records*. So for example, in Alberta, the Freedom of Information and Protection of Privacy Act, R.S.A. 2000 c. F-25 does not apply to “information on a court file”.

[37] On the issue of *docket information*, FOI legislation does come under discussion. In a recent decision by Bielby J. in Her Majesty the Queen in Right of Alberta et al v. Jay Krushell and The Office of the Information and Privacy Commissioner²⁴ the court dealt with a request to obtain a copy of the lists of the names of accused persons, the charges they faced and ancillary information prepared daily in relation to matters to be dealt with in each criminal docket court in the Province of Alberta. The applicant sought the information for the purpose of offering it for sale to the public via the internet. Krushell asked Alberta Justice (the public body having custody or control over the dockets) to provide the information but the request was refused. Krushell applied to the Privacy Commissioner who granted an order concluding that the legislation applied to criminal dockets. In the appeal, Bielby J. held that the criminal dockets fell within the exclusion of “information on a court file” to which the Act did not apply.

[38] In British Columbia, the Privacy Commissioner investigated a complaint regarding the disclosure of “personal information” contained in the Justice Information System. JUSTIN is an integrated criminal case management system. It is a repository of data about all criminal cases arising in the province, from initiation through disposition. Information about an individual having been charged with impaired driving was disclosed by an employee of the Court Services Branch. While

acknowledging that that information was contained in an unsealed court file to which the public had access, the Commissioner took the position that the information in JUSTIN was not analogous to a “record in a court file” (and therefore exempt from the Act), but was information in an “internal administrative database file” to which the Act applied.

[39] The point is not which view is preferred. The point is that while the status of the contents of court records may be clear, the status of docket information is less clear.

Conclusions:

1. The right of the public to open courts is an important constitutional rule.
2. The right of an individual to privacy is a fundamental value.
3. The right to open courts generally outweighs the right to privacy
4. There is disagreement about the nature of the exemptions to the general rule.
5. “Open courts” includes both 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.

Global Context

[40] Up to this point, the issue of accessibility and the rationalization of the fundamental values of openness and privacy have arisen in a world dominated by paper. That will change dramatically. As an example:

The world produces between 1 and 2 exabytes of unique information per year, which is roughly 250 megabytes for every man, woman, and child on earth. An exabyte is a billion gigabytes, or 10¹⁸ bytes. **Printed documents of all kinds comprise only .003% of the total.** Magnetic storage is by far the largest medium for storing information and is the most rapidly growing with shipped hard drive capacity doubling every year. Magnetic storage is rapidly becoming the universal medium for information storage. ²⁵ [emphasis added]

[41] Furthermore:

While many government site users focus on their personal needs in dealing with government agencies, there is abundant evidence that a new “e-citizenship” is taking hold: 42 million Americans have used government Web sites to research public policy issues[;] 23 million Americans have used the Internet to send comments to public officials about policy choices[;] 14 million have used government Web sites to gather information to help them decide how to cast their votes[; and] 13 million have participated in online lobbying campaigns. ²⁶

[42] In the Canadian context, in 2001, half of Canada's small businesses were doing business online (compared to 77% of American small businesses). Canada leads North America in connectivity with 60% of Canadians online as of 2001 (compared to 52% of Americans) although only 17% of Canadians purchased online (while 27% of Americans purchased online).²⁷ In the financial sector, 85% of Canadians have a debit card and 82% of debit cardholders have used their card to make a purchase. An estimated 2.5 billion debit card transactions were made in Canada in 2002. Canadians can use their debit cards at more than 460,000 terminals across Canada, including in grocery stores, gas stations and drug stores. Over the past six years, Canada's six largest banks have spent a cumulative total of almost \$17 billion on technology.²⁸

[43] The federal government has established an Innovation Strategy and has set a goal to make Canada one of the top five countries in the world for information and communications technology research and development performance by 2010. A commitment has been made to make high-speed broadband access available to all Canadians by 2005.

[44] It may be that jurisdictions which have attempted or contemplated "e-commerce" in various aspects of the administration of justice have been confronted with challenges. Notwithstanding such challenges, it is not a question of whether the electronic environment will dominate the administration of justice. It is a question of when.

Status of Electronic Filing of Court Records in Canada

[45] Several courts have embarked on electronic filing of *court records* including:

- (a) the Supreme Court of Canada conducted a pilot project in 2002 involving a few cases and a few lawyers who volunteered to file notices of appeal and related documents in electronic form. The pilot project will be resumed in the spring of 2003 with additional volunteers. The court will conduct a Privacy Impact Assessment during this next phase.
- (b) The Federal Court (Trial Division) has contracted with Quicklaw for development of an electronic filing system.
- (c) The Tax Court of Canada permits electronic filing for notices of appeal and for an application to extend time to file a notice of appeal.²⁹
- (d) In Ontario, electronic filing began in the Superior Court in 1997 in Toronto in a pilot project with volunteer lawyers. The pilot status ended in 1999 when the Rules of Civil Procedure were amended to authorize electronic filing of enumerated documents. As of the end of 2002, over 22000 documents had been filed electronically.

In late 2001 and early 2002, further pilot projects were initiated in the Superior Court in Hamilton and in Cochrane and in the Small Claims Court in Toronto. Approximately 1600 documents had been filed electronically by the end of 2002. The pilot projects in Cochrane and Hamilton terminated as of the end of March, 2003.

- (e) Courts in British Columbia and Prince Edward Island continue in their development of electronic filing capabilities.
- (f) At least four provinces (Alberta, British Columbia, Ontario and Prince Edward Island) have facilitated the submission of facts and transcripts of trial proceedings to the Court of Appeal in electronic form.
- (g) Some tribunals such as the Competition Tribunal, where proceedings involve hundreds of documents and thousands of pieces of paper are moving to a paperless environment.³⁰

Status of E-Access to Court Records and Docket Information in Canada

[46] No court in Canada facilitates the e-access to *court records*. However several courts now provide remote electronic retrieval of *docket information*. The following are examples.

[47] In the Supreme Court of Canada, the web site www.scc-csc.gc.ca facilitates an on-line tracking system which allows the user to obtain a list of all of the documents filed, the party responsible for filing them, and the date and a description of events which have occurred in that Court.

[48] In Manitoba, the court web site www.jus.gov.mb.ca provides free electronic access to case information from the court registries as follows:

Court of Queen's Bench:	
Brandon	from February 1, 2001
Dauphin	from June 1, 2001
St. Boniface	from March 1, 2001
Winnipeg	from 1984
Portage la Prairie	from March 1, 2003
Court of Appeal	from 1991

[49] The user has access to the following:

- docket information - a listing of the court records and the events which have occurred in that court
- search by name of litigant or by action number or by lawyer
- motions to be heard on the following day sorted by lawyer
- daily court hearing list which identifies the list for the following day
- available court hearing dates.

[50] The docket information includes all civil actions and family law actions. With respect to the latter, the full names of the litigants are provided. However, addresses and other details are not available. The three courts in Manitoba share an all court committee to consider the privacy issues arising from the existing and any contemplated expanded electronic access.

[51] In Quebec, a litigant, counsel or member of the public may attend at any court house in the province and gain electronic access to the registries of all court houses in the province. In addition, anyone may obtain remote electronic access to the same information by registering with the Societe quebecoise d'information juridique (SOQUIJ) through www.azimut.soquij.qc.ca, a service provided by the Minister of Justice of Quebec. The user can obtain the following:

- docket information – a listing of the court records and the events which have occurred in that court and in the Court of Appeal and in the Supreme Court of Canada
- all proceedings (civil, family, criminal, provincial offences) are available
- search by name of litigant or by action number.

[52] In British Columbia, the web site for the Court of Appeal www.courts.gov.bc.ca provides a list of cases to be heard in the current week and the preceding two weeks along with a brief description of the order under appeal. In the Supreme Court, there is on-site electronic access through a system called RITS (Registry Information Tracking System) to civil case information including party names, a list of the documents filed and the dates of court appearances, to the names of the parties and the docket number in family law cases. Through JUSTIN, a user has on-site access to criminal case file information including party names, details of the information and/or indictment (where the name of the accused is not subject to a publication ban) and details of court appearances.

[53] The web site of the Supreme Court of Prince Edward Island www.gov.pe.ca/courts/supreme provides a list of the appeal cases scheduled for hearing in the current week. Users can obtain information about the issue raised and the names of parties and legal counsel. In Alberta, the web site www.albertacourts.ab.ca provides sitting dates, speaking to the list dates and chambers dates. The Court of Appeal provides a list of cases to be heard in the following week.

[54] In Ontario, as a result of the case management system, many civil court files in Toronto have docket information (referred to as a case history). The case history is not available remotely. However, any person may attend at the court registry and pay a fee for a printed case history. This is primarily available in Toronto and to some extent in Ottawa and in Windsor. The case history is available to a lesser extent in family cases in Toronto and more widely in the Family Branch. In addition, the Court of Appeal's web site www.ontariocourts.on.ca includes the weekly case list by courtroom, the names of the judges hearing the appeal, and the name of the judge whose judgment is under appeal. The same information is available for the preceding two weeks.

Conclusions:

6. While no court in Canada is now providing e-access to court records, and the pace at which that capability is being introduced is unknown, such accessibility is nonetheless inevitable.
7. E-access to docket information is varied.
8. Access policies ought to be established before e-access is provided.

Status of E-Access to Judgments in Canada

[55] There are several ways to obtain access to reasons for decision of a judicial officer: litigants and their counsel receive a paper copy from the court registry; in some jurisdictions, the court posts judgments to its own web site; in some jurisdictions, the court provides an electronic version of judgments to CANLII www.canlii.org; and in some jurisdictions, the court provides an electronic version to commercial publishers.

[56] In the middle of 2002, as a result of privacy issues having been raised in family law reasons for decision, at the direction of the Chief Justices, the Supreme Court of British Columbia (with few exceptions related to judgments which the judicial officer considered to be of precedential value) and of the Court of Queen's Bench in Alberta stopped posting family law cases to the court web site and stopped sending electronic versions to CANLII. Electronic versions continued to be sent to commercial publishers.

[57] There are a number of anomalies in the current situation:

- (a) Reasons for decision are no longer universally available without charge. Reasons are universally available only to subscribers who pay a registration fee with a commercial publisher.
- (b) Aside from statutory privacy requirements such as child protection matters, where one would expect consistency, there may not be consistency in the anonymization protocols which the commercial publishers use and as a result, one publisher may hide certain details which another would not.

- (c) Depending on the practice in the province, there may be many versions of a judgment: the version released to the parties, the version released on the court web site, and the versions provided by different commercial publishers. Which is the “official version” for purposes of citation?
- (d) While the reasons for decision of the trial divisions of at least two provinces are not available on the court web site or on CANLII, the reasons for decision in family cases in the Courts of Appeal of those two provinces are available on the court web site or on CANLII.
- (e) While the reasons for decision of family law cases in Quebec uniformly have initials in the style of cause, by matching the action number on the reasons for decision with the action number on www.azimut.soquij.qc.ca, the identity of the parties (and any other information which is in the court record and the docket information) can be ascertained.
- (f) Some judicial officials will “sanitize” the reasons for decision of personal identifier details to the extent possible, while others are of the view that those details are important to the litigants.

Conclusion:

9. There is inconsistency in the availability of reasons for decision in family law cases.

Status of Electronic Filing in the United States

[58] Electronic filing is widespread but not universal.

[59] In the state court system, at least 20 states have adopted some form of electronic filing at some sites.³¹

[60] In the federal court system, the court sponsored Case Management/Electronic Case Files system (CM/ECF) is available in at least 16 district courts, 47 bankruptcy courts and the Court of International Trade with implementation begun or scheduled in 33 bankruptcy courts, 30 district courts and the Court of Federal Claims for a total of 128 courts, which represents more than 25% of the total federal courts. Over 3 million cases and over 14 million documents are on CM/ECF. Over 19000 attorneys and others have filed.³²

Status of E-Access to Court Records and Docket Information in the United States

[61] In addition to documents which have been filed electronically, many courts scan paper documents into the database which allows for electronic access to the image but does not enable an electronic search of the image. Between documents filed

electronically and scanned documents, electronic-access is also widespread while not universal.

[62] There are at least three methods of accessing court records and docket information over the internet. The first is by registering with a commercial provider. For example, LexisNexis Courtlink www.lexis.com has been described as “the leading provider of online access to and from the nation’s courts, with more than 200 million records in over 4,000 federal, state and local courts”.³³

[63] PACER (Public Access to Court Electronic Records) provides electronic access where the Federal Judiciary’s Case Management/Electro Case Files (CM/ECF) System is used and in courts where documents have been imaged. Electronically accessible sites include 9 appellate courts and U.S. District Courts and Bankruptcy Courts in sites in 50 states and districts. PACER <http://pacer.psc.uscourts.gov> was established by the Judicial Conference of the United States with reference to court records and docket information in federal courts.

[64] Both Courtlink and PACER charge a fee either for registration or for viewing and copying.

[65] The second method is to access records through web sites maintained by the Clerk of Courts. For example, in Hamilton County, Ohio <http://caseinfo.hamilton-co.org> the Clerk of Courts attracted national attention by implementing a comprehensive name search facility. Some courts with web sites charge a fee for access to court records and docket information while others are available at no cost.

[66] Lastly, the widespread availability of court records and docket information (together with land registration, credit reports, birth, marriage and divorce records, criminal and driving records) has spawned enterprises which will conduct searches for a fee. Examples include www.cybersleuther.com and <http://web-detective.com> and www.courtexpress.com.

[67] The breadth of retrieval of information is astonishing. Depending on the versatility of the web site, one can search using a variety of requests such as: all cases in that court by nature of actions (such as medical malpractice or family law); all cases on a particular day; all cases (civil, family, motor vehicle) in which a named individual has been a party.

Policy and Logistical Issues Arising out of E-Access to Court Records and Docket Information

[68] In the United States, the availability of court records and docket information in all areas of law (bankruptcy, civil, small claims court, family, estates and some driving offences and criminal matters) has led to widespread discussion about the issues which

have arisen, largely focussed on the relationship between privacy and accountability. There is a growing library of materials available electronically.³⁴

[69] Two initiatives are particularly relevant to this report. The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) asked their Joint Committee on Court Management to consider issues concerning public access to court records in light of emerging technologies, including the potential for electronic access to such records. The Joint Committee in partnership with the National Center for State Courts and the Justice Management Institute established an Advisory Committee which drafted Guidelines, invited commentary, received hundreds of comments and conducted one public hearing. The extensive Report³⁵ entitled Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts was released in October 2002 after the CCJ and the COSCA had both approved it as “a valuable tool for use in crafting court policy to address individual privacy concerns and public access requirements”. The CCJ/COSCA has commended “the Guidelines to each state as a starting point and means to assist local officials as they develop policies and procedures for their own jurisdictions”. [There was some concern about the final product see for example, The Reporters Committee for Freedom of the Press.³⁶]

[70] In September, 2001, the Judicial Conference of the United States, which includes the Senior Circuit Judges of federal courts, issued the Report of its Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files. In March 2002, the Conference authorized a pilot project in criminal cases. www.uscourts.gov.

[71] There is activity in other countries. As an example only, the Privacy Commissioner of New South Wales wrote an article dealing with the interplay of new approaches to privacy protection and public access to information, and the manner in which these issues impact upon the courts.³⁷

[72] As noted above, in March, 2002 Chief Justice Brenner and Judith Hoffman initiated the discussion in Canada in their report to the Administration of Justice Committee of the Canadian Judicial Council.

[73] In October, 2002, Professor Elizabeth Judge (University of Ottawa, Faculty of Law, Common Law Section) presented a paper on the topic [Canada’s Courts Online: Privacy, Public Access and Electronic Court Records] at the annual conference of the Canadian Institute for the Administration of Justice.

[74] The authors of this discussion paper have benefited by a review of the engaging debate on this subject in the United States.

POLICY ISSUES

Responsibility for Establishing E-Access Policies

[75] Based on a review of the extensive work done in the United States and the preliminary issues raised at JTAC and by members of the Subcommittee, this is a threshold issue. To what extent should the Canadian Judicial Council have involvement in these emerging issues?

[76] There are a number of reasons why the judiciary and Council have a role to play in establishing e-access policies.

[77] First, as indicated above, “every court has supervisory and protecting power over its own records”. While part of its power is manifested in jurisprudence, it is also manifested in the establishment of rules of court. Members of the Judiciary have long participated in Rules Committees and Bench and Bar Committees which initiate or vet proposals to amend court rules, and sometimes to amend legislation. It is in keeping with the historic role of the judiciary to be involved in such emerging issues.

[78] Second, in addition to those responsibilities within provincial and territorial and specialized courts, one of the objects of Council contained in s. 60 (1) of the Judges Act is to “promote efficiency and uniformity”. Many of the relevant statutes are federal. A consistent approach in areas of federal jurisdiction would be desirable to ensure that members of the public in Victoria could have the same expectations as members of the public in St. John’s. In addition, appeals from provincial courts are typically taken to federal courts. Appeals from federal courts are taken to other parts of federal courts. It would discourage rather than promote efficiency if the policies in provincial courts differed materially from policies in federal courts. Each province/territory will have its own legislation such as in child protection. Notwithstanding differences between provincial and territorial statutes, there have been and will be common approaches. Consistency among those jurisdictions which share a common approach is desirable.

[79] Last, the Canadian Judicial Council takes an interest in the use of technology by the courts, as is evident from the mandate of the Judges Technology Advisory Committee referred to above and Recommendations 6 and 10 of the Future Directions Report adopted by Council in September, 2002. This area of technology will affect the amount of information available to the public about the judicial process and will serve to enhance the public understanding of the role and responsibilities of judges which is consistent with Recommendation 9 of the Future Directions Report.³⁸ Justice “will be seen to be done” in new ways. It will be important to ensure that whatever policies or procedures are put in place, that they assure equal access to all members of the Canadian public.

[80] On the other hand, there may be some reservations about the judiciary (through the Canadian Judicial Council) establishing e-access policies. Judges will continue to adjudicate disputes about access by the public to court records and to docket

information³⁹. It might be seen to fetter the discretion of judges disposing of the merits of a proceeding where an individual or group has attempted to gain e-access to court records or docket information if the Council had adopted a policy which it encouraged all chief justices and chief judges to adopt.

[81] Of course others will likely be interested in the establishment of e-access policies. Attorneys General and the Minister of Justice have statutory and regulatory responsibilities which will lead them to be keenly interested. So too will be lawyers, court agents, members of the public, the media and businesses. Even though “every court has the supervisory and protecting power” over records, e-access policies ought not to be made without affording to “the public” in whose name access is protected, an opportunity to advance views as to what openness means in an electronic environment. Other than the research and analysis by Professor Elizabeth Judge, it appears that in Canada no person or organization is taking an active role in initiating discussion and debate amongst such interested persons about e-access policies.

[82] Judges have a vital role to play in the establishment and implementation of e-access policies. What is debatable is the extent of their involvement, the identification of others who may have a responsibility for or an interest in such policies and the extent to which judges and others participate in the development of e-access policies. It would be premature to include a model policy in this discussion paper. Rather, the expectation is that all interested parties will benefit by a discussion of this and the other issues which follow.

[83] Related to the responsibility for establishing policies is the form of such policies. Whether they are statutory, regulatory or practice directions will have an impact on consequences if the policies are not followed.

Conclusion:

10. The Canadian Judicial Council has a leadership role to play in initiating discussions and debate about the development of electronic access policies.

Differences between paper and electronic environments

[84] It has often been said that the main difference lies in the “practical obscurity” of paper court files on the one hand and the accessibility of electronic information and the consequences which flow from that difference on the other hand. The genesis of “practical obscurity” is worthy of note.

[85] The United States Supreme Court gave reasons in the case of the United States Department of Justice et al. v. Reporters Committee for Freedom of the Press et al.⁴⁰ On the basis of information provided by local, state, and federal law enforcement agencies, the Federal Bureau of Investigation (FBI) compiles and maintains criminal identification

records or “rap sheets” on millions of persons, which contain descriptive information as well as a history of arrests, charges, convictions and incarcerations. A news correspondent and the Reporters Committee made a Freedom of Information request for the rap sheets of 4 members of a family who were involved in a company which a state Crime Commission had identified as a legitimate business dominated by organized crime figures. It was alleged that the company had obtained defense contracts as a result of an improper arrangement with a corrupt Congressman. The FOIA applicants argued that there was a public interest in learning about the family’s past arrests or convictions. The FBI refused the request although it subsequently gave information concerning three of the four after each had died. The correspondent and the Reporters Committee made a complaint in the District Court in which they sought the rap sheet for the fourth person, insofar as it contained “matters of public record”.

[86] The parties filed cross-motions for summary judgment. The District Court granted the Department’s motion for summary judgment. The Court of Appeals reversed. The Supreme Court reversed and access to the rap sheet was denied.

[87] The Supreme Court took a purposive approach to the FOIA and to the creation of the rap sheet, to which reference will be made below. Without focusing on the specific FOIA exemptions which were the subject of the reasons, the following excerpts from the majority opinion written by Stevens J. are relevant:

[The exemption] requires us to balance the privacy interest in maintaining, as the Government puts it, the “**practical obscurity**” of the rap sheets against the public interest in their release. ⁴¹

Also supporting our conclusion that a strong privacy interest inheres in the nondisclosure of compiled computerized information is the Privacy Act of 1974. . . . The Privacy Act was passed largely out of concern over “the impact of computer data banks on individual privacy”. . . . Congress’ basic policy concern regarding the implications of computerized data banks for personal privacy is certainly relevant in our consideration of the privacy interest affected by dissemination of rap sheets from the FBI computer. ⁴²

In addition to the common-law and dictionary understandings [of privacy], the basic difference between scattered bits of criminal history and a federal compilation, federal statutory provisions, and state policies, our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public. ⁴³

. . . . The privacy interest in a rap sheet is substantial. The substantial character of that interest is affected by the fact that in today’s society the computer can accumulate and store information that would otherwise have surely been forgotten. . . . ⁴⁴

Finally: The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. . . . Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records what the Government happens to be storing, the invasion of privacy is "unwarranted."⁴⁵

[88] "Practical obscurity" has come to refer to the inaccessibility of individual pieces of information or documents created, filed and stored using traditional paper methods relative to the accessibility of information contained in or documents referred to in a computerized compilation. Practical obscurity has precluded the realization of openness to court records and to docket information, and to a certain extent to court hearings.

[89] 60% of Canadians now have online access from home or the workplace. Others have access in a library or publicly provided kiosk. Those members of the public who are now interested in access to court records and docket information will have more expedient access. Furthermore, those members of the public who have been discouraged by the barriers created by practical obscurity may become interested. As a result of the increased interest in the logistically easier and more accessible electronic medium, should the existing policies/presumptions in the paper environment apply when the court record and docket information is in electronic form?

[90] There are at least two options. The first is to establish the same policies and presumptions of openness in the paper and the electronic environments. Proponents argue that there is no justification for restricting access to court records and docket information in the electronic medium. Indeed, those who support this position assert that by gaining access to court records and docket information, not only will practical obscurity disappear but meaningful access will finally be provided. Technical capacity will create equality of access. Furthermore, if the standard is different between paper and electronic access, and if, realistically it will take years for all court records and docket information to be converted to electronic form and in the meantime, courts are likely to operate with historic files in paper form and current files in electronic form, the prospects for inconsistent treatment are pronounced. Staff will have to be trained on two systems of access. The greater the disparity, the more likely there will be errors. Training costs and error rates can be reduced if there is a consistent approach.

[91] The second option is to maintain different policies depending on the medium in which the court records and docket information is available. Proponents argue that access to compiled computerized information is fundamentally different than what is available in the paper world, that simply because it is capable of being provided does not mean it ought to be provided, that ready accessibility (particularly to commercial users) will be inconsistent with the purposes for which the court records were provided, that practical obscurity ought not to be altered, and that enhanced accessibility may

discourage litigants from recourse to the courts because of the risk of identity theft and the increased prospects of publicity.⁴⁶

[92] Those who advocate consistency in access yet recognize that the demise of practical obscurity may create opportunities which ought to be discouraged, have argued that the negative aspects of consistency of access in the paper and the electronic environments can be compensated in various ways to which reference will be made below (no bulk searches, tracking identity of searcher, access on site only).

Conclusions:

11. Before establishing policies of access to electronic court records and to docket information, it is essential that the differences in access in the paper and electronic environments be considered.
12. It may be that there are broad areas of consistency of access between the paper and electronic environments, such as in civil matters, but that in, for example, family cases, access policies in the electronic medium should be different from access policies in the paper environment.

The purpose for which court records are filed and docket information is prepared

[93] Before establishing policies about access to court records, it is essential that one examine the purpose for which court records have been filed and docket information is prepared.

[94] In non-criminal matters, *court records* are filed by litigants and their agents in order to establish the basis upon which the court may make a judgment or order which affects the rights and interests of the parties.

[95] In criminal matters, *court records* are filed by the prosecutor in order to establish the basis upon which a conviction might be obtained or a sentence imposed and by the defence in order to pursue a charter remedy, resist conviction or assert an alternate sentence.

[96] In non-criminal matters, *docket information* is created by court staff or automatically generated by data entered into the computer for the purpose of enabling the court to efficiently process the cases which require the intervention of a judge or other judicial officer.

[97] In criminal matters, *docket information* is created for at least two purposes: to enable the court to efficiently process the cases which require the intervention of a judge

or other judicial officer; and in some jurisdictions, to facilitate cross-agency collaboration to prevent criminal offences, to track offenders, and, increasingly since September 11th, to enhance “public safety”.

[98] Fair information practices suggest that information which has been collected is used for the purposes for which it was provided, not for a collateral purpose. As indicated above, the Supreme Court of Canada raised that as an issue in MacIntyre, Vickery and F.N. as did the United States Supreme Court in the Reporters Case.

Conclusion:

13. The purpose for which the court record was filed and the docket information was created is a factor to be considered in deciding who has access to all or part of the court record and docket information.

The contents of the court file

[99] As indicated above, “court file” is meant to include court records and docket information. It is useful to elaborate on the documents and information which are available in a court file.

[100] In a civil case, the court record will contain some or all of the following: pleadings, motions or applications, affidavits or declarations in support of motions and applications, trial record, exhibits at trial, transcripts of examination for discovery, transcripts of cross-examinations on affidavits in support of motions and applications, endorsements, orders and judgments. In tort cases, such as wrongful sexual conduct by a parent, parent-surrogate, clergy, or other person in authority, the details of the alleged conduct and clinical notes and records of the complainant may be contained in the court record.

[101] In a commercial case, in addition to the generic documents in a civil case, the court record will contain some or all of corporate financial statements and tax returns, contracts between the parties (such as franchise agreements), lists of customers (including names, addresses, goods or services purchased, receivable status), details of personal and corporate debt and security, and allegations of breach of fiduciary duty.

[102] In a family law case, in addition to those enumerated in a civil case, the court record will contain some or all of the following: financial statements, income tax returns for 3 years, professional assessments of the needs of children, witness statements or affidavits or declarations describing parental behaviour where custody or access is in issue, and experts reports about the value of property.

[103] In a mental incompetency case, in addition the court record will contain reports of psychiatrists as to competency, and clinical notes and records which may be subject to mental health legislation as to disclosure.

[104] In an estates case, the court record will contain lists of assets in the estate (including account number and financial institution) liabilities, description of steps taken to administer the estate, details of conflict between beneficiaries or between named beneficiaries and claimants.

[105] In a criminal case, the court record may contain affidavits filed in support of requests for search warrants and wire tap authorizations the information detailing the particulars of the offence charged, will-say statements, names and addresses of witnesses, motions or applications for relief arising from alleged charter violations, endorsements, orders and judgments with respect to interim release, bail review, conviction, acquittal, stay, sentencing, victim impact statements, pre-sentence report, criminal record of the accused (and in some circumstances, of a witness).

[106] In an appeal from the decision in any of such proceedings, the court record will include the notice of appeal, the record on appeal, the transcript of the proceeding from which the appeal is taken, a compendium of documents relevant to the appeal, the facts and books of authorities, the endorsement, order or judgment on appeal.

[107] As indicated above and as reflected in Appendix B, in some jurisdictions, court records, docket information and exhibits will be available for inspection and/or copying. In others, the public has the right to inspect pleadings and motions and related documents, but exhibits at trial are not necessarily available for public inspection as indicated in Vickery. In others, the contents of the court record will be available for public inspection, but the identity of the parties is hidden by use of initials or a pseudonym. Yet in others, all or part of the court record is sealed from public view. And finally, the contents of the court record will be available for public inspection, but details which identify the parties or certain witnesses may not be published.

[108] Professionals such as accountants who prepare a valuation of a business for litigation purposes; mental health physicians who are required to respect the disclosure restrictions on clinical notes and records; and assessors of the needs of the children in a custody/access case; all will have an interest in their work product not being available for purposes other than that for which it was intended. Potential commercial users will have interests much different than those persons identified in the documents.

Conclusions:

14. There may be little controversy about the accessibility of some of the contents of the court file, such as the information or indictment (in criminal matters) and pleadings (in non-criminal matters) and judicial work product (endorsements, orders and judgments).
15. There will likely be controversy about accessibility to most of the other documents and information contained in the court file.
16. There will be competing interests involved in establishing policies of accessibility.

17. Rules or policies as to accessibility ought to take into consideration that there are trial and appellate courts for which consistent approaches may be desirable.

The contents of docket information

[109] There are some components which are universal. In criminal matters, the daily docket or door sheet includes the name of the accused, the charges, the courtroom and the judge presiding that day. In non-criminal matters, the list will include a shortened version of the title of proceedings, the nature of the event that day (trial or motion or application), the courtroom and the judge presiding that day.

[110] Typically such lists are posted in the lobby of the courthouse on a daily basis.

[111] As indicated above, in addition to those universal components, some jurisdictions such as British Columbia's JUSTIN and Quebec's Plumitif have docket information which is far more comprehensive.

Conclusion:

18. There is currently no consistent approach as to what is contained in docket information and with whom it is shared or to whom it is made available.

Is there information in the court file which is unnecessary for the purpose for which the court record is provided?

[112] Many cases are started. In relative terms, few non-criminal matters require a judicial disposition because the parties resolve their differences. Often, material is filed and served and the entire action settles before responding material is required and without any judicial disposition. In other circumstances, material is filed and served and a response is filed and served, and then settlement is achieved without any judicial disposition. In others, material is filed and served, a response is made and an interim judicial disposition is made and then the action settles without any further judicial disposition. In the remaining minority, trial is conducted, evidence is heard and judgment is given. In all of those situations, generally all material remains in the court file.

[113] In the criminal context, a similar pattern emerges of resolution short of trial except that in criminal matters, there must always be a judicial disposition: accepting a guilty plea and imposing sentence, endorsing a stay, endorsing withdrawal of charges. Likewise in state initiated proceedings such as child protection, there must always be a judicial disposition.

[114] Unnecessary information creates opportunities for illegal activity such as pedophiles looking for information about vulnerable children and identity theft which is becoming an increasingly prevalent offence.⁴⁷

[115] Bearing in mind that context, there are several possible solutions. One possibility might be that prescribed forms be altered to identify only those documents and information which are necessary for purposes of a judicial disposition. For example, instead of the full names and birthdates and schools of children of divorcing parents (details which are contained in every petition for divorce), the number of children and their ages can be inserted until a disposition is required and then those details might be segregated from the public portion of the file. A second possibility is that documents and information might be served in a timely fashion but filed later in a method designed to protect confidentiality. For example, where income tax returns are essential (such as in family and estates matters), they can be served on the other side but not filed at the outset and when required, filed in a method which protects the confidential information. A third possibility is to alter the information which is filed to prevent public access to information to which it ought not to be entitled. For example, where any document contains a social insurance number, partial or total removal of the number might be a solution. [In the U.S. there is increasingly deletion of the middle numbers of SIN and account numbers so that the remaining numbers verify to the intended recipient what the information is but doesn't facilitate access for a purpose for which it was not intended.⁴⁸] Where the social insurance number might be relevant to enforcement of child or spousal support orders, the full number could be provided to the enforcement agency. Another possibility is to serve all of the documents including the pleadings, but file only a notice of claim. This was implemented for a short period in Ontario and met with resistance from the media.

Conclusion:

19. Statutes and rules of procedures which mandate the contents of documents ought to be examined to: (a) identify mandated forms which require early or excessive personal identifiers; (b) propose amendments to the forms to remove the need for the personal identifiers, postpone the filing of the personal identifiers until a disposition is sought, and or direct the filing of personal identifiers in a manner which would segregate it from the court file to which public access is given.

Existing Procedures for Sealing Files and Anonymization

[116] In addition to legislation which attempts to exclude certain subject matters from the general principle of openness, there is a considerable body of jurisprudence dealing with anonymization of the parties by the use of initials or pseudonyms in the style of cause with some interesting differences in judicial approach.⁴⁹

[117] As indicated in Appendix B the provincial legislation and regulations often do not enumerate the factors upon which the court might make an order for anonymization. This makes it a challenge for counsel to advise their clients when one of the privacy protections will be invoked. Furthermore, it has become a challenge for representatives of the media in their role as guardians of the public interest to be informed when a request for anonymization or sealing has been made in order to determine what position, if any, the media would take with respect to the request. This has led to a variety of ways of dealing with the role of the media from the court taking no steps to inform the media, to the court making an order and then directing the method by which media might be informed, to the court directing the process which will be followed if the media become informed and wish to set aside the order,⁵⁰ to the court establishing a web site link where requests for such orders will be posted daily to enable the media to participate in the motion, if so desired.⁵¹

Conclusion:

20. Statutes and rules of procedures which establish methods by which a litigant or a witness might request a publication ban, a sealing order, or an order for anonymization ought to be considered to determine whether they require amendments which would reflect the electronic medium.

Who is entitled to access? Who is “the public”?

[118] When the debate is positioned as the intersection of the right of the public to transparency in the administration of justice and the right of an individual to privacy, the obvious issue is: who is the public? The answer to that varies depending on the context in which the question arises.

[119] *Access to courtrooms:* Generally any member of the public including a representative of the media may observe court hearings, although there may be restrictions on what can be reported.

[120] *Access to docket information:* To the extent that lists of the cases to be heard that day are posted outside of courtrooms, generally any member of the public may see the lists. To the extent that docket information containing a list of all of the documents filed and steps in the proceedings is available, generally any member of the public may see it, without fee or with a registration or copy fee. In criminal cases, docket information may be shared amongst law enforcement personnel.

[121] *Access to court records:* In criminal matters, generally any member of the public including the media has access to the Information and to the Indictment subject to statutory provisions or judicial orders about publication. In other matters, the parties to the proceeding and their counsel are entitled, usually without charge, to have access to

the court record. In those other matters, access by non-parties/counsel falls into two categories: those where access is provided on payment of a retrieval fee and copies are provided at a fee; and those where access is not provided, perhaps because a sealing order has been made. Where access is provided, a bulk search agreement may be made to reduce the per file viewing cost. For example, a credit bureau may enter into a bulk search agreement to inspect civil files which contain monetary judgments.

[122] *Access to reasons for decision*: any member of the public is entitled to see the endorsement, order or judgment which arises from a proceeding. They can be obtained in a variety of ways: retrieval from the court file, court web site, CANLII, or a commercial publisher.

[123] Whether in a paper or an electronic environment, those interested in access to docket information, court records and judgments include the following:

- the parties
- their counsel
- prospective counsel
- counsel in related or potential proceedings
- persons named in the court documents for example, a bail surety in a criminal case or a witness in a criminal or non-criminal case
- representatives of the media particularly where there is an important legal or factual issue or where one or more of the parties is notorious
- social science researchers, for example, research on child support payments
- legal researchers, for example, on the sentencing patterns of particular judges
- commercial enterprises, for example, credit agencies which maintain creditor/debtor data bases
- curious member of the public/interest groups.

[124] Where court records are open to access by the public but searching capacity is reduced by the need to identify files in court ledgers and file retrieval fees, “practical obscurity” prevails. The theoretical openness is limited by logistical barriers. However, where electronic access exists, the definition of “public” will likely expand to include some of the following:

- commercial enterprises interested in using the divorce petitions data base as a marketing tool for diapers or dating agencies
- disgruntled franchisees searching for other disaffected franchisees who have sued their common franchisor
- possible class action participants searching for others who have commenced individual or class action proceedings
- employers searching the background of potential employees
- legal researchers capturing the work load of particular judicial officers
- non-parties with harmless motives such as the nosy neighbour

- non-parties with inappropriate motives such as possible predators who use divorce petitions to identify children and potential identity thieves who obtain social insurance numbers and property ownership details from financial statements filed in family proceedings.

[125] A recent example of such a request is found in the reasons for decision by Bielby J. referred to above.⁵² Krushell wanted bulk access so that he could sell the information contained in the dockets for profit. The application was pursuant to the Freedom of Information Act but part of the reasons are nonetheless apt:

The mischief which could be created by allowing ready public access to the names of unconvicted accused is not difficult to imagine. Statutorily prescribed punishments for the convicted would pale in many cases in comparison to the de facto punishment created by posting information on the criminally charged for the benefit of the gossip and the busybody. Similarity of names might create defamatory impressions. Same-day internet posting would create concern about court-house security and judge-shopping which could affect the administration of justice and thus judicial independence in ways the Legislature clearly attempted to avoid by so carefully exempting all matters relating to the judiciary in other subsections of section 4.

While there is currently limited public access to this information via the physical daily posting of the criminal dockets on site, that does not justify posting world-wide for all time to all of those with access to the internet. Currently privacy is protected by the practical obscurity created by the physical inconvenience of attending at each courthouse to examine the criminal dockets by others than those who have personal involvement in the matters then before the courts. . .

[126] And, reminiscent of F.N.⁵³ :

The Legislature must have intended to protect the information in those files in whatever format it might ultimately take, rather than simply the files themselves.

[127] If the current arrangements for bulk searches are few, it is a reasonable expectation that they will increase. The rules of procedure are generally silent on such arrangements. In Ontario, for example, the Director of the Corporate Planning Branch in the Ministry of the Attorney General responds to such requests. Assuming that the requests are dealt with in the context of FOI legislation, it may be that there are other factors which ought to be considered.

[128] The issue of bulk searches has been raised in the United States as is reflected in the Fenwick and Brownstone essay which suggested the following:

It appears the courts will be more tolerant of restrictions on bulk transfers. . . . United States v. McDougal, 103 F.3d 651, 658 (8th Cir. 1996) (“as a matter of public policy, . . . courts should avoid becoming the instrumentalities of commercial or other private pursuits”); and Paisley Park Enters., Inc. v. Uptown Prods., 54 F. Supp 2d 347, 349 (S.D.N.Y. 1999)

Virtually all have an interest in ensuring that everyone in our society have access to a fair and impartial judicial system without having to pay too high a price of admission in the form of the surrender of personal privacy. . . . courts must be vigilant to ensure that their processes are not used improperly for purposes unrelated to their role.⁵⁴

Conclusions:

21. The purpose for which bulk access is sought is crucial to a decision whether to afford access to all or part of court records and docket information.
22. The purposes for which media and commercial enterprises intend to use court records and docket information may conflict with the interests of the parties.
23. Access may be restricted, for example, by facilitating single searches only and prohibiting or limiting bulk searches.

LOGISTICAL ISSUES

[129] In addition to what have been categorized as issues of policy, there are a multitude of logistical issues for consideration.

Defamation and Privilege

[130] The elements of an action for defamation are, in summary: defamatory words, publication, and injury.

[131] Assuming the plaintiff is able to establish those elements, one of the defences is absolute privilege. On the grounds of public policy, an absolute privilege to speak and write without legal liability for defamation flows to judges, witness, advocates, and parties while participating in judicial proceedings. This is because “. . . the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly. . . in order that their duties may be carried on freely and without fear of any action being brought against them”.

[132] Qualified privilege is a conditional immunity that attaches to certain occasions deemed to be of a lesser importance. Certain communications for certain specified purposes are excused from liability for defamation, if made without malice. This

privilege is said to arise “where the person who makes [the] communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it”.

[133] Whether absolute or qualified privilege applies to the reporting and publication of the contents of pleadings is a subject of controversy.⁵⁵

[134] Publication includes the communication to a third party.⁵⁶ The online version of a newspaper is a newspaper.⁵⁷ Information which has been posted on the Internet is a publication, and if it is allegedly defamatory, the person claiming to be defamed is subject to the time limitations for giving notice contained in provincial libel and slander legislation.⁵⁸

[135] In this brief legal context, a number of issues may arise. First, if the parties electronically file pleadings which the registry office makes available electronically to be searched by “the public”, it might be argued that the registrar has “published” what might be considered libellous material. Second, if the person who takes exception to the libellous material cannot take legal proceedings against the person who included the allegedly libellous material in the pleading, it might be argued that there is nonetheless an action against the registrar because the registrar is not specifically included in the persons who are entitled to absolute privilege. Third, assuming that an action lies against the registrar, it might be argued that the registrar is entitled to the defence of qualified privilege by having a legal duty to publish the pleadings. Fourth, if the electronic publication of pleadings becomes widespread, and if litigants become aware that any pleading will become publicly available and that practical obscurity has ended, it might be argued that litigants will be encouraged to include libellous material because they are protected by absolute privilege.

Conclusion:

24. The implications of electronic filing and electronic access on the tort of defamation should be considered.

Accuracy of the public and non-public court file

[136] Assuming that the court record and docket information is made available in electronic form, there are several issues in the category of accuracy including these:

- changes are made by a party or lawyer to documents previously filed, for example a subsequent affidavit, an amended pleading, a revised financial statement which materially alters a previously filed document
- securing the sealed parts of the court file from the unsealed parts

- removing the information from the court file which is not part of the public file
- ensuring that data which is entered and which appears in the docket information indicates the current status of judicial dispositions, for example, that an ex parte order (such as an injunction) was set aside by a subsequent order; or an order was set aside on appeal in a different division (provincial court appeal to superior court; or superior court to appellate division).

[137] These issues give rise to consequential liability issues if wrong information is recorded in the electronic record or if correct information is given to an unauthorized person. In each of the above examples, is it the responsibility of staff to ensure that the court record and docket information is complete and accurate? Is it the responsibility of the party and his or her counsel? In a paper environment, a party who has the benefit of an order sealing all or part of a file may volunteer or be directed by the court to oversee the mechanics of the sealing of the material. In an electronic environment, that is not possible. If for example a policy is established which requires that personal identification details are routinely to be removed from the court record, it will be necessary (a) for the court office to have software which will enable that removal and (b) for counsel and the administration to have compatible software to ensure that data which has been “tagged” by counsel will be so identified by the court office. These complexities are compounded where one or more parties is not represented.

Conclusions:

25. There may be important issues of liability (a) if court records or docket information which is inaccessible by statute, regulation or order is wrongly made available; (b) if incorrect court records or docket information is made available; or (c) if correct information is given to an unauthorized person.
26. When software solutions are chosen, it will be necessary to ensure that vendors of the technology provide software which facilitates removal of data rather than inhibits it.

Remote Access or On-Site Access

[138] Once the policy issue is determined as to whether paper and electronic access ought to be differentiated, there is a supplementary issue. It may be that remote access is available for a wide variety of court files while on-site access is mandated for a restricted category of court files. Alternatively, it may be that remote access is available to a category of users such as credit bureaus, but on-site access is available to another category of users such as dating agencies. If the inequality can be rationalized and if differential access is to be afforded, it will be necessary to establish the criteria to be applied, publish the criteria, oversee the implementation of the criteria, and address failure to apply the criteria. Even if remote electronic access is afforded without restrictions, there will still be a significant number of the public who do not have

electronic access and for them, to ensure equal access, on-site electronic access in kiosks may be required.

Conclusions:

27. It may become necessary to differentiate between remote public access and on-site access.

28. In any event, on-site electronic access will be essential to ensure equality of treatment of various segments of the public.

Track Users of E-access

[139] This is categorized as a logistics issue. However, for some it would be an important policy issue because user-tracking is sometimes considered in itself a privacy infringement.

[140] In the paper environment, a member of the public asks for a particular file and pays a fee; or asks for copies of specific documents and pays a fee. There may be a record of the identity of the requester or the source of the fee payment. It is unlikely that that information is maintained at all let alone in a readily recoverable fashion.

[141] In the electronic environment, it is easy and inexpensive to track such information. But simply because the capacity exists, does not mean that tracking ought to be implemented.

[142] Before affording greater electronic access than is now available, it will be important to consider whether, for what purpose and to what extent users of electronic access will be logged. If a decision is made that they ought to be logged, the corollary issues which must be addressed include who has access to the logs and for what purpose.

Conclusions:

29. Consideration ought to be given to what purpose would be served by tracking the identity of users, whether the court office should track the identity of users, and if so, how to track, and whether and how to inform those who are tracked that their identity is being tracked.

30. If a decision is made to track or to have the option to track, vendors must supply software which facilitates it. Otherwise, the software will dictate the option.

Retroactive or Prospective Application of the E-Access Policy

[143] If changes are made in the existing court access policy, or if existing policies are simply formulated, the issue arises as to whether such policies apply only to court records

filed and docket information created after the policy is implemented. If after the adoption of an electronic access policy, the court opts to scan previously filed documents, a decision will have to be made as to whether such documents, which had been filed when practical obscurity and its attendant expectations prevailed, ought to be subject to the newly articulated policy. There will be a responsibility on the part of the litigant or on the court to ensure, for example, that documents which were ordered sealed are preserved in that condition once transformed to the electronic format.

[144] It may be the application of the access policy will be largely driven by financial concerns because the cost of transforming already filed paper documents into electronic form may be prohibitive while the cost of prospectively ensuring court records are filed in electronic form might be manageable.

Conclusion:

31. The implications of the access policies on court records and docket information in existence prior to the implementation of the policy ought to be identified and considered.

Archiving and Retention:

[145] If the official version of the court file is an electronic file, then archiving and retention systems must be altered to accommodate that medium. There are likely policies within the court office. However, they may require modification to ensure that an electronic file is available and accessible for motions to set aside *ex parte* orders, for appeals and, particularly in family law cases, for applications to vary child and spousal support where the preceding file is often important to establishing whether there is a “material change in circumstances”.

[146] As *Brownstone and Fenwick* noted, any archiving and retention systems must recognize that existing versions of software and hardware may change during the retention period. The prospect arises that while the court file is theoretically available, it is no longer accessible.⁵⁹

Conclusion:

32. Archiving and retention policies must be established.

Communication of Access Policies:

[147] Existing policies may be currently largely communicated by word of mouth. Other than specific mention in a statute, a rule or a practice direction, little is

communicated to the litigants, their counsel and others as to access to court files. That minimum level of knowledge may have sufficed in the era of practical obscurity. However, if the documents and information which becomes available are increased and if the category of persons to whom access is facilitated is both increased and altered, it will become necessary to formulate policies which are readily understandable, perhaps in multiple languages, and which are user friendly to unrepresented litigants.

[148] The corollary to establishing the policy will be other issues such as these. First, who will have responsibility for communicating the policies to the litigants: the lawyer or the court? Or will the obligation be on the litigant to seek out the information? How will the increasing incidence of unrepresented litigants be addressed? Second, at what point will the policies be communicated: before the non-criminal litigation has started? Or when public access is granted to a non-party? Third, it will be necessary to establish systems which ensure the consistent application of those policies and deal with breaches of the policies.

Conclusion:

33. Once access policies are established, there must be systems in place for communicating, applying and enforcing those policies.

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- ¹ Attorney General of Nova Scotia v. MacIntyre [1982] 1 S.C.R. 175 quoting from Bentham
- ² [1982] 1S.C.R. 175
- ³ ibid page 185
- ⁴ ibid page 185
- ⁵ ibid page 189
- ⁶ ibid page 187
- ⁷ ibid page 183
- ⁸ (1990) 64 D.L.R. (4th) 577
- ⁹ ibid page 608
- ¹⁰ (1989) 91 N.S.R. (2d) 126 (N.S.C.A.)
- ¹¹ [1991] 1 S.C.R. 671
- ¹² ibid page 681-2
- ¹³ ibid page 682-3
- ¹⁴ ibid page 713
- ¹⁵ ibid page 704
- ¹⁶ ibid page 687
- ¹⁷ [1996] S.C.R. 480
- ¹⁸ see endnote 8 above
- ¹⁹ [2000] 1 S.C.R. 880
- ²⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”) adopted by General Assembly Resolution A/RES/40/33 of November 29, 1985, supported by Canada
- ²¹ [2002] S.C.C. 41
- ²² [1994] 3 S.C.R. 835
- ²³ [2001] S.C.C. 76
- ²⁴ [2003] ABQB 252
- ²⁵ Fenwick and Brownstone: Electronic Filing: What is it? What are it’s implications? 19 Computer & High Tech L.J. 181 December 2002. Page 2 and endnote 1: Peter Lyman & Hal R. Varian, How Much Information (October 18, 2000) at <http://www.sims.berkeley.edu/research/projects/how-much-info/>
- ²⁶ ibid endnote 145: Pew Internet & American Life Project, The Rise of the E-citizen: How People Use the Government Agencies’ Web Sites at 2 (April 3, 2002), available at <http://www.pewinternet.org/reports>.
- ²⁷ www.ic.gc.ca/mediaroom/speeches - Speaking Notes for Industry Minister Allan Rock to the Softworld 2002 Conference on Canada’s Future with Technology (web site of Industry Canada)
- ²⁸ www.cba.org - web site of Canadian Bankers Association
- ²⁹ www.tcc-cci.gc.ca - web site of the Tax Court of Canada
- ³⁰ www.ct-tc.gc.ca - web site of the Competition Tribunal
- ³¹ Fenwick ibid page 4 and endnotes 50 and 51 with reference to www.ncsconline.org/ (last modified Oct. 9, 2002)
- ³² Fenwick ibid page 5 and updated March 26, 2003
- ³³ <http://www.infotoday.com/searcher/jan03/barr.htm>

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- ³⁴ www.epic.org - web site for Electronic Privacy Information Center
www.ojr.org - web site for USC Annenberg – Online Journalism Review
www.ncsconline.org - web site for National Center for State Courts
www.courtaccess.org - web site maintained by Susan Larson on behalf of the NCSC
www.rcfp.org - web site for The Reporters Committee for Freedom of the Press
- ³⁵ www.courtaccess.org
- ³⁶ www.rcfp.org
- ³⁷ The Judicial Review, Journal of the Judicial Commission of New South Wales
Volume 6 Number 1 September 2002
- ³⁸ Future Directions Report September, 2002 www.cjc-ccm.gc.ca - web site of the
Canadian Judicial Council

Recommendation 6:

The Council should extend the range of activities in which it is engaged as consistent with its statutory mandate.

Recommendation 10:

The Council should (a) encourage all members of the Council to become computer literate, in order to make it possible for more Council communications to be conducted electronically; (b) support the taking of such steps as are necessary to ensure that the information technology systems that are now and will in the future be used by federally appointed judges are fully secure; (c) encourage all federally appointed judges to develop the skills and understanding necessary to make use of information technology in the performance of their judicial functions; (d) add as members to the Judges Technology Advisory Committee representatives of both the Office of the Commissioner of Federal Judicial Affairs and the National Judicial Institute; and (e) generally take a leadership role in the use of information technology in the superior courts.

Recommendation 9:

The Public Information Committee should be made a standing committee of the Council.

³⁹ See endnote 25 above

⁴⁰ (1989) 489 U.S. 749

⁴¹ *ibid* at page 762

⁴² *ibid* at 766-767

⁴³ *ibid* at 767

⁴⁴ *ibid* at 771

⁴⁵ *ibid* at 780

⁴⁶ In the Edmonton Journal decision (endnote 8) the court dealt with the concern as to whether access to court records might discourage litigants. The Court pointed out that no evidence had been advanced to support the proposition and to the extent that there was evidence such as statistics of rates of divorce, the contrary appeared to be the case. In another case, evidence might be marshalled to suggest that electronic access would discourage litigants from seeking to enforce legal rights.

⁴⁷ www.ftc.gov United States Federal Trade Commission and in particular

www.consumer.gov/idtheft

⁴⁸ As an example, see “Virginia Will Remove Personal Data From Court Sites” beginning January 1, 2004. www.bespacific.com/mt/archives/002109.html

⁴⁹ As examples: T.(S.) v. Stubbs [1998] O.J. No. 1294; and B. (A.) v. Stubbs [1999] O.J. No. 2309

⁵⁰ T. (S.) v. Stubbs [1998] O.J. No. 1294

⁵¹ Nova Scotia Courts www.courts.ns.ca in collaboration with the University of King’s College School of Journalism

⁵² see endnote 25 above

⁵³ see endnote 19 above

⁵⁴ see endnote 26 above; endnote 112 in the Essay

⁵⁵ paragraphs [131] to [133] borrow heavily from Canadian Tort Law, fifth edition, Butterworth’s, pages 660 - 671

⁵⁶ Gatley on Libel & Slander, 9th edition at page 127

⁵⁷ Weiss v. Sawyer, Ontario Court of Appeal www.ontariocourts.on.ca released September 19, 2002

⁵⁸ Bahlieda v. Santa Justice H.M. Pierce, Superior Court, Ontario April 2, 2003 [2003] ONSC 02-0017

⁵⁹ see endnote 26 above; endnote 123 in the essay

⁶⁰ The web sites to which reference is made were viewed between November 2002 and March 2003.

APPENDIX A

COMPENDIUM OF CONCLUSIONS

- 1. The right of the public to open courts is an important constitutional rule.**
- 2. The right of an individual to privacy is a fundamental value.**
- 3. The right to open courts generally outweighs the right to privacy.**
- 4. There is disagreement about the nature of the exemptions to the general rule of openness.**
- 5. “Open courts” includes both 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.**
- 6. While no court in Canada is now providing electronic access to court records, and the pace at which that capability is being introduced is unknown, such accessibility is nonetheless inevitable.**
- 7. Electronic access to docket information is varied.**
- 8. Access policies ought to be established before access is afforded.**
- 9. There is inconsistency in the availability of reasons for decision in family law cases.**
- 10. The Canadian Judicial Council has a leadership role to play in initiating discussions and debate about the development of electronic access policies.**

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11. **Before establishing policies of access to electronic court records and to docket information, it is essential that the differences in access in the paper and electronic environments be considered.**
 12. **It may be that there are broad areas of consensus of access between the paper and electronic environments, such as in civil matters, and that in, for example, family cases, access policies in the electronic medium should be different from access policies in the paper environment.**
 13. **The purpose for which the court record was filed and the docket information was created is a factor to be considered in deciding who has access to all or part of the court record and docket information.**
 14. **There may be little controversy about the accessibility of some of the contents of the court file, such as the information or indictment (in criminal matters) and pleadings (in non-criminal matters) and judicial work product (endorsements, orders and judgments).**
 15. **There will likely be controversy about accessibility to most of the other documents and information contained in the court file.**
 16. **There will be competing interests involved in establishing policies of accessibility.**
 17. **Rules or policies as to accessibility ought to take into consideration that there are trial and appellate courts for which consistent approaches may be desirable.**
 18. **There is currently no consistent approach as to what is contained in docket information and with whom it is shared or to whom it is made available.**
 19. **Statutes and rules of procedures which mandate the contents of documents ought to be examined to: (a) identify mandated**

forms which require early or excessive personal identifiers; (2) propose amendments to the forms to remove the need for the personal identifiers, postpone the filing of the personal identifiers until a disposition is sought, and or direct the filing of personal identifiers in a manner which would segregate it from the court file to which public access is given.

20. Statutes and rules of procedures which establish methods by which a litigant or a witness might request a publication ban, a sealing order, or an order for anonymization ought to be considered to determine whether they require amendments which would reflect the electronic medium.
21. The purpose for which bulk access is sought is crucial to a decision whether to afford access to all or part of court records and docket information.
22. The purposes for which media and commercial enterprises intend to use court records and docket information may conflict with the interests of the parties.
23. Access may be restricted, for example, by facilitating single searches only and prohibiting or limiting bulk searches.
24. The implications of electronic filing and electronic access on the tort of defamation should be considered.
25. There may be important issues of liability (a) if court records or docket information which is inaccessible by statute, regulation or order is wrongly made available; (b) if incorrect court records or docket information is made available; of (c) if correct information is given to an unauthorized person.
26. When software solutions are chosen, it will be necessary to ensure that vendors of the technology provide software which facilitates removal of data rather than inhibits it.
27. It may become necessary to differentiate between remote public access and on-site access.

- 28. In any event, on-site electronic access will be essential to ensure equality of treatment of various segments of the public.**
- 29. Consideration ought to be given to what purpose would be served by tracking the identity of users, whether the court office should track the identity of users, and if so, how to track and whether and how to inform those who are tracked that their identity is being tracked.**
- 30. If a decision is made to track or to have the option to track, vendors must supply software which facilitates it. Otherwise, the software will dictate the option.**
- 31. The implications of the access policies on court records and docket information in existence prior to the implementation of the policy ought to be identified and considered.**
- 32. Archiving and retention policies must be established.**
- 33. Once access policies are established, there must be systems in place for communicating, applying and enforcing those policies.**

APPENDIX B
COMPENDIUM OF PROVINCIAL, TERRITORIAL AND
FEDERAL LEGISLATION AND RULES

Alberta
British Columbia
Manitoba
New Brunswick
Newfoundland and Labrador
Nova Scotia
Ontario
Prince Edward Island
Quebec
Saskatchewan

Northwest Territories
Nunavut
Yukon

Canada