

# **Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy**

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## **Executive Summary**

In September 2003, the Canadian Judicial Council released a discussion paper entitled “Open Courts, Electronic Access to Court Records, and Privacy,” and invited comments from those interested, including media, litigants, legal and academic communities and commercial users of court documents. The discussion paper was prepared by the subcommittee for the Judges Technology Advisory Committee and built upon the important work in an earlier report prepared by the Administration of Justice Committee in March 2002.

The Canadian Judicial Council received many responses to the discussion paper, from Deputy Attorneys General, Chief Justices and Chief Judges, other members of the legal profession, academics, and representatives of the media. The Council directed JTAC to prepare a synthesis of the responses and to draft a model policy on access to court information. JTAC engaged Lisa Austin, Assistant Professor at the University of Toronto Faculty of Law, and Frédéric Pelletier, Assistant Editor at CanLII and Research Officer at the University of Montreal's Centre de recherche en droit public, for this purpose. This document provides their overview and synthesis of the responses to the discussion paper and, based upon this, proposes a framework for a draft model policy.

Based upon a review of the comments received, as well as the most recent Supreme Court of Canada statement of the open courts principle,

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this document concludes that the Dagenais/Mentuck test provides an appropriate framework for balancing the right of the public to have access to court information with the right of individuals to preserve their privacy and other important values such as the proper administration of justice. Adapted to the context of “e-access”, that is, a context where any information can be digitally available on electronic networks, the Dagenais/Mentuck test would allow restrictions on access to court information only where:

- (a) such restrictions are necessary to prevent a serious risk to the rights of individuals to protect their privacy or to other important interests such as the proper administration of justice;
- (b) the restrictions are carefully tailored to minimally impair the open courts principle; and
- (c) the salutary effects of the restrictions outweigh their deleterious effects on the open courts principle, taking into account the continuing availability of this information at court houses, the desirability of facilitating access for purposes strongly connected to the open courts principle, and the need to avoid facilitating access for purposes that are not connected to the open courts principle.

Although the responses to the discussion paper were not unanimous with respect to the issues raised by e-access to court information, there was strong agreement with respect to some of the potential problems associated with permitting unrestricted e-access, including concerns regarding bulk searches of electronic court records, especially if commercial entities could engage in forms of data-mining, identity theft and the possibility of harassment. These concerns are not present to the same degree with paper records because the “practical obscurity” inherent in a paper-based environment deterred many problematic uses of information.

Applying the Dagenais/Mentuck framework, these potential problems can justify restrictions on access to court information, so long as those restrictions can be carefully tailored to minimally impair the open courts principle and the deleterious effects of such restrictions on the open courts principle do not outweigh their salutary effects in protecting privacy and other values.

This document further develops options for providing access to court information, with some restrictions, in a manner that fulfils the

requirements of the Dagenais/Mentuck framework. It also indicates, based upon the responses to the discussion paper, the degree to which there is agreement with respect to some of these options. Although these responses are not unanimous with respect to opinion on the desirability, and feasibility, of various types of restrictions on access to court information, some conclusions may be drawn:

- (a) There is a general consensus that unrestricted bulk searches should not be permitted to the public generally;
- (b) There is a general consensus that remote public access should be provided to judgments, with privacy concerns dealt with through de-identification protocols for which courts would be responsible;
- (c) There are mixed views regarding remote public access to docket information, partly because of the inconsistent cross-jurisdictional approaches to what is included within docket information. Suggestions to deal with privacy concerns with docket information include implementing de-identification protocols, charging fees for remote access, providing remote access only to specific categories of user, or restricting remote access entirely;
- (d) There is a general consensus that remote public access to the contents of all court records was not desirable. Suggestions to deal with privacy concerns with court records include implementing de-identification protocols, indicating that a document exists without providing details regarding its contents, providing differing levels of access to different categories of users, and exempting “sensitive” records from remote access entirely.

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## Introduction

[1] The Judges Technology Advisory Committee (JTAC) is an advisory committee of the Canadian Judicial Council (the Council). The mandate given to JTAC by the 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.

*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. [...]*

*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.*

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

[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, 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 and of 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 Frances 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] Building upon the work of the initial report for the Administration of Justice Committee of the Council, the JTAC subcommittee prepared a discussion paper entitled “Open Courts, Electronic Access to Court Records, and Privacy” (the Discussion Paper). Reviewing the jurisprudence of the Supreme Court of Canada, the Discussion Paper 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. The discussion paper further developed many of the policy and logistical issues pertaining to electronic access and generated 33 conclusions (see Appendix A for the list of conclusions). This paper was considered by JTAC at its meeting in May, 2003 and released for public comment in September 2003 (see <http://www.cjc-ccm.gc.ca>).

*The issue of access to court records is a very important one to Albertans. We are at the startup of the initiative that will ultimately see all court records in Alberta received in electronic format. Of course, this will bring the issue of public access to these records to the forefront.*

Terrence J. Matchett, Q.C., Deputy Minister of Justice and Deputy Attorney General, Alberta

[4] Up until April 2004, the Council received many responses to its Discussion Paper from Deputy Attorneys General, judges, other members of the legal profession, academics and representatives of the media (see Appendix B for a list of the responses). The Council directed JTAC to prepare a synthesis of the responses and to draft a model policy on access to court information.

*Electronic access to court records is a complex issue. [...] I look forward to your suggestion of having representatives of the subcommittee meet with Deputy Ministers about this important initiative.*

Doug Moen, Q.C., Deputy Minister of Justice and Deputy Attorney General, Saskatchewan

[5] JTAC engaged Lisa Austin, Assistant Professor at the University of Toronto Faculty of Law, and Frédéric Pelletier, Assistant Editor at CanLII and Research Officer at the University of Montreal's Centre de recherche en droit public, to synthesize these responses and draft a model policy on access to court information. Frédéric Pelletier was also mandated by the JTAC to include the French comments in the synthesis and to further inquire into the situation in Quebec, in order to ensure that all of its recent developments would be considered in the model policy (see Appendix C for his complete memorandum).

*The timing of this discussion paper is fortuitous. The ministry's Court Services Division has just commenced a project seeking to establish a comprehensive legal and policy framework to govern access to Division and court records. [...] Your discussion paper raised and addresses many of the issues that Court Services must consider and no doubt will significantly expedite our progress on this project.*

Mark Freiman, Deputy Attorney General and Deputy Minister Responsible for Native Affairs, Ontario

[6] The present work presents an overview and a synthesis of the responses to the discussion paper and, based on this, the authors propose a number of policy options which might form the basis of a model policy on access to court information.

## **Overview of Responses**

### ***(a) Federal/Provincial/Territorial Justice Departments***

[7] Most of the provincial Deputy Attorneys General and Ministers of Justice responded to the Discussion Paper. Quebec and British Columbia have the most experience so far with e-access questions, and their

expertise was shared with the Council. The Deputy Attorney General of British Columbia discussed British Columbia's experience to date with its Justice Information System (JUSTIN). He also mentioned that the JUSTIN authorities developed an electronic access policy that covers many areas, while striving to balance access and privacy requirements. The Deputy Minister of Justice for Quebec was helpful in highlighting relevant aspects Quebec's experience including its *Act to establish a Legal framework for information technology* (R.S.Q., c. C-1.1), and a feasibility study that was undertaken regarding an integrated justice information system called the "Système intégré d'information de justice" (SIJ) that examined many of the same issues outlined in the Discussion Paper. He also noted Quebec's unique legal context and the need to take this into account. However, despite the unlikelihood that uniform solutions could be adopted by all federal and provincial courts, he indicated that it would be a significant advance if these solutions were founded upon the same policy principles.

*[E]lectronic access to case information of the Court of Queen's Bench and the Court of Appeal is provided to the public via the Manitoba courts web site. I am advised that while this level of accessibility has mostly been of great assistance to members of the legal profession and litigants, there have been some privacy issues that have arisen. Those issues speak to the heart of the debate in the area of electronic access — how much electronic access is required to be given to court record information in order to maintain the principle of openness in an electronic age? [...] The challenge for court administrators will be in providing the necessary supports (information systems) to ensure that court electronic access policies are enforced and maintained.*

Bruce A. MacFarlane, Q.C., Deputy Minister of Justice and Deputy Attorney General, Manitoba

[8] What is clear from all of the responses received by the Deputy Attorneys General is that the issue of e-access is often emerging in conjunction with a move towards electronic filing and case management systems, and that most jurisdictions are facing these issues in some manner and welcome a national dialogue. For example, The Deputy Minister of Justice and Deputy Attorney General of Alberta indicated that Alberta is at the startup of an e-filing initiative and that, consequently, it is



conducting consultations on the issue of public access to electronic court records. Ontario is currently in the process of developing a legal and policy framework to govern access to court records. Manitoba makes case information of the Court of Queen's Bench and the Court of Appeal available through the Manitoba courts web site. Nova Scotia is currently overhauling its Justice Information System (JOIS) in order to launch a new Justice Enterprise Information Network (JEIN). Prince Edward Island has also recently commenced an e-filing project.

*[W]e are in the midst of completely overhauling our Justice Information System (JOIS) which, although probably still the most integrated Justice Information System in Canada, is also among the most outdated in terms of software. When we launch the new Justice Enterprise Information Network (JEIN) in early 2004 we expect to be once again in the vanguard and in a position to take advantage of the full range of opportunities technology offers. Obviously the decision we take will benefit from the Open Courts work. [...] We share many of the concerns as are raised in the discussion paper.*

Douglas J. Keefe, Q.C., Deputy Minister of Justice, Nova Scotia

[9] Many of the Deputy Attorneys General also indicated that further consultation on these issues and the sharing of experiences and expertise arising out of these various provincial initiatives is highly desirable.

*I commend the members of the Judges Technology Advisory Committee for creating such a comprehensive paper. [...] Currently, there is no electronic access to records of the Provincial Court and the Discussion Paper will most definitely be an asset in our ongoing discussion in Manitoba.*

The Honourable Chief Judge Raymond E. Wyant, The Provincial Court of Manitoba

***(b) Chief Justices/ Chief Judges***

[10] The Chief Justices and Chief Judges who responded to the Discussion Paper largely agreed with its identification of issues. Some

also pointed to relevant experience that their courts have had with e-access to court records. For example, the Alberta Courts Internet judgment database developed a Privacy Protocol and supporting Judgment Database Protocols to deal with the privacy concerns associated with making judgments broadly available. These protocols were shared with the Council. Notably, in June 2002 the Alberta Court of Queen's Bench discontinued posting its family law decisions because many of its cases arise under the *Divorce Act*, which does not provide a statutory publication ban. Judges from the Provincial Court of Manitoba have been working with their colleagues of the other two benches in Manitoba on the development of an access to courts records policy for their courts.

*[T]he paper deals with fundamental values that often appear to be in conflict. The treatment of those issues in the discussion paper is both thoughtful and thorough.*

The Honourable Chief Justice Brian W. Lennox, Ontario Court of Justice.

[11] Chief Justice Guy Gagnon (Quebec Court), like the Deputy Minister of Justice for Quebec, highlighted both the unique nature of Quebec's civil law system and its own experience with the issue of e-access. Instead of seeking to establish an electronic access policy, he suggested that we should seek to establish principles upon which to base different access policies. Similarly, different jurisdictions should be able to adopt different rules or initiate an e-access program before a uniform national policy has been established.

*One aspect of this debate which may be overlooked is this. The media have statutory and common-law privilege against defamation for fair and accurate reports of proceedings in open courts. The present case law is not clear, but tends to suggest that the protection does not extend to the contents of court files. If the courts broadcast the content of court files to the world in machine searchable form, that might tend to tip that balance in favour of privilege against defamation suits. Is that a good thing?*

The Honourable J.E. Côté, Justice of Appeal, Court of Appeal of Alberta

[12] In addition, Justice J.E. Côté (Alberta Court of Appeal) cautioned the JTAC not to overlook the question of the interaction between electronic access to the contents of court files and defamation concerns. His concern is that if court records are, in effect, broadcast to the public, this might lead to the extension of the privilege against defamation to cover the content of court files and not simply reports of proceedings in open court.

*(c) Privacy Commissions*

[13] The Council received submissions from the Office of the Privacy Commissioner (OPC) of Canada as well as two of the provincial Information and Privacy Commissioners (British Columbia and Alberta). The OPC argued that the issue of the privacy interests in court records is not one that should be examined solely in the context of new communications technologies. Rather, courts should use the opportunity to re-examine their information practices with respect to court records more generally, and create a policy that reflects the proper level of personal information disclosure that is minimally required to fulfill the public and private interests in accessing court information, regardless of whether that information is held in a paper-based or electronic format. The balance between the right to privacy and the right to access should be determined with the contextual approach to the interpretation of rights adopted by the Supreme Court. The OPC recommended that courts use a three-part “purpose, public interest and proportionality” test to determine what personal information should be collected by courts in the first place, and then what portion of this information should be disclosed to the public.

[14] The provincial Information and Privacy Commissioners welcomed the national dialogue on the issue of e-access and, in addition, singled out some issues for the attention of the Council. The Information and Privacy Commissioner of British Columbia, David Loukidelis, stressed the importance of educating members of the judiciary to ensure that their reasons for decision do not contain personal information that is unnecessary to their reasoning process. The Information and Privacy Commissioner of Alberta, Frank J. Work, drew the Council's attention to the issue of the international data flow that becomes possible with broad public electronic access to court records.

*I applaud your pan-Canadian approach due to the transborder data flow and the inconsistent practices that exist between jurisdictions. Hopefully, this approach will encourage consistency and harmonization of the divergent federal, provincial and regional practices that currently exist for electronic court records. However, you merely mention international data flow, which I regard as creating even greater risks from a privacy perspective.*

Frank J. Work, Q.C., Information and Privacy Commissioner of Alberta

**(d) The Broader Legal Community**

[15] The Council also received submissions from the broader legal community, including the Law Society of British Columbia, the Law Society of Upper Canada, the Canadian Bar Association, the Licence Appeal Tribunal of the Ontario Ministry of Consumer and Business Services, and Professor Lisa Austin of the University of Toronto Faculty of Law.

*It would in my view be inappropriate in the arena of public safety to offer the cloak of privacy to protect dishonest individuals who take advantage of law-abiding citizens and engage in unfair business practices, or to offer to protect the reputation of individual who operate unsafe trucking companies, which endanger the lives of our citizens on our highways. The public's right to know in order to protect itself from shams and sharp operators must have [sic] primacy over an individual who has put society at risk in order to maximize profit. Consumer protection and public safety must have priority over the privacy rights of an individual.*

Carl F. Dombek, Chair, Licence Appeal Tribunal, Ontario Ministry of Consumer and Business Services

[16] The Law Society of British Columbia was particularly concerned to promote the creation of a national standard for the de-identification of judgments and was unanimously of the view that it is the role of the courts to provide this service, not the publishers of the judgments. The Law Society of Upper Canada supported the Council's desire to establish a

national approach to the issue of e-access and indicated a willingness to play a role in supporting the implementation of such a national policy – responsibility for which lies with the provincial Attorneys General. The Law Society of Upper Canada also made numerous helpful suggestions regarding more specific elements of the Discussion Paper – which are taken up below – and indicated that it would like to be involved in the further work of developing a model policy.

[17] The Canadian Bar Association also expressed a strong desire to continue to be included in discussions regarding policy development in this area. The Canadian Bar Association argued that any policy governing electronic access to court records had to begin with the question of the difference between paper and electronic media. Its submission outlined two positions. The first, generally allied by the National Media and Communications Law Section of the CBA, argued for making all court records generally available to the public unless a judicial order or statutory provision prohibits this. The second, generally allied by the National Family Law and National Privacy Law Section of the CBA, argued that public access via the Internet should be limited or denied, while open access remains the norm for paper records.

*[1] When we say that the courtroom is “public” we are not denying that information discussed in that courtroom implicates privacy concerns. Rather, we are saying that because of the strength of the countervailing interests the public is entitled to that information. The question then is whether the kind of shift in context or aggregation of information facilitated by [information and communications technology] changes this balance. For example, if there is a shift in the context of the use and disclosure of “public” information, then the privacy interest might be more acute in this different context, or perhaps the countervailing interests are not as compelling. These considerations might lead to a determination that in this different context the information is to be considered “private.” Similarly, if information is aggregated in a computer database, then such aggregation might affect the nature of the privacy interest at stake in the compilation or the nature of the countervailing interests, leading to a different outcome of the balancing exercise.*

Lisa M. Austin, Assistant Professor, University of Toronto Faculty of Law

[18] The Licence Appeal Tribunal of the Ontario Ministry of Consumer and Business Services strongly emphasized the need to ensure that with regard to the posting of decisions on the tribunal’s website, considerations of consumer protection and public safety take priority over individual privacy rights.

[19] Professor Lisa Austin argued that the difference between paper-based and electronic records can have a normative, and not just a practical, significance. Court records are not public because of the absence of privacy interests in the information they contain but because other values, such as open courts, generally outweigh these privacy interests. However, information and communications technology can change the nature of this balance between open courts and privacy in a particular context by either heightening the privacy interest at stake or by changing the nature of the countervailing values operating in that context. It is these elements that must be attended to, and not simply changes to the “practical obscurity” of the information.

***(e) Media***

[20] The Canadian Newspaper Association indicated its interest in seeing representatives of interested parties, such as the media, play a key role in ongoing discussions regarding the development of a national policy. It also highlighted the important role that the media plays in ensuring that the right to open courts is a meaningful right, and advocated for the position, much like that of the National Media and Communications Law Section of the Canadian Bar Association, that an e-access policy should facilitate broad public access to court records.

*Any policy relating to E-access must be developed in light of the cardinal principle that the right of the public to open courts is constitutionally protected and that, in most cases, that right will trump any right of an individual to privacy. [...]*

*The media play an indispensable role in the effective realization of this right of the public.*

Anne P. Kothawala, President and CEO, The Canadian Newspaper Association

## Synthesis of Comments

[21] This part outlines the most important issues raised by the persons or organizations that commented on the Discussion Paper, as well as recent developments in case law. It is organized as follows:

- (a) The Nature of a National Policy and the Role of the Canadian Judicial Council;
- (b) Definition of Court Records;
- (c) General Principles:
  - i. Open Courts vs. Privacy;
  - ii. Application of the Dagenais/Mentuck Framework to E-Access;
  - iii. Paper vs. Electronic Environments;
  - iv. General Policy Options
- (d) Specific Issues:
  - i. Bulk Searches;
  - ii. On-Site vs. Remote Access;
  - iii. De-identification of Records.

### ***(a) The Nature of a National Policy and the Role of the Canadian Judicial Council***

[22] Most of the responses to the Discussion Paper were positive with respect to the role that the Canadian Judicial Council was taking in seeking a national dialogue on these issues. However, a number of important concerns were raised.

*I strongly encourage the CJC to continue its work in this area, in an effort to streamline and harmonize meaningful, appropriately strong, privacy protection for Canadians.*

David Loukidelis, Information and Privacy Commissioner for British Columbia

[23] Chief Justice Guy Gagnon (Quebec Court) agreed that the role of the Council in initiating discussion regarding e-access policies is important, but cautioned that such role should not be restrictive or exclusive. He pointed to the considerable amount of work that has already been undertaken in Quebec on the issue of e-access, as well as Quebec's unique legal context. In addition, he was concerned that Judges from each jurisdiction maintain their judicial discretion to decide cases upon underlying principles that may differ from the principles established by the Council in a model policy. Some of these concerns were also echoed by the Deputy Minister of Justice of Quebec.

*Il est approprié que cette consultation soit initiée par le Conseil canadien afin de consulter largement ceux et celles qui sont intéressés par ces questions. Cependant bien que primordial, le rôle du Conseil canadien ne devrait être ni exclusif, ni limitatif. Il pourrait arriver en effet, que d'autres acteurs tel le Comité québécois de la magistrature dont nous ferons état ci-après puisse s'impliquer lui aussi activement à cet égard.*

L'Honorable Juge en Chef Guy Gagnon, Cour du Québec

[24] The Deputy Attorney General of Prince Edward Island inquired into the appropriateness of the Council assuming a lead role in this discussion, given the fact that judges will be called upon to decide e-access questions in the context of litigation. Madam Justice Beverly McLachlin, Chief Justice of Canada, responded personally to this concern and her response bears repeating:

*"I must emphasize that the Committee is not speaking as a Court, and that the guidelines it proposes are provisional. Should litigation arise in this area, it would be difficult to describe the Discussion Paper as stating legal rules. Indeed, as you say, other bodies may be better equipped than the Canadian Judicial Council for the task of stating legal rules governing electronic access to court records and privacy issues. On the other hand, the Council is well situated to offer for discussion some preliminary guidelines emerging from its experience in courts across the country."*



*Presumably, at some point litigation will occur in relation to electronic access to court records and privacy issues. When such litigation does arise I would question whether it is appropriate for the Judiciary to have previously determined the rules by which electronic access and privacy will function within the courts.*

Patsy G. MacLean, Deputy Attorney General, Prince Edward Island

***(b) Definition of Court Records***

[25] The development of a model national access model policy to court information will, of course, require consensus regarding the threshold definition of “court information.” The Discussion Paper used the following definitions (para. 5):

*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;

*It is the CNA's view that a broader definition of “court record” would be appropriate, and should include any document filed in the court records irrespective of its creator (For the purposes of this discussion, the exclusion of judicial administration records, referred to in paragraph 6 of the Discussion Paper, is acknowledged and accepted.)*

Anne P. Kothawala, President and CEO, The Canadian Newspaper Association

*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 databases.

[26] The Council received a number of comments pertaining to these definitions. For example, both the Canadian Newspaper Association and

the Canadian Bar Association felt that the definition of “court record” should not make reference to the creator of the record. The Deputy Attorney General of British Columbia pointed to British Columbia’s experience regarding determining a definition for their Electronic Access Policy and highlighted the need for further cross-jurisdictional discussion on the issue. Others, such as the Canadian Bar Association (in particular, the National Family Law and National Privacy Law Sections) pointed out that different jurisdictions include different information in their “docket information,” which can raise significant privacy concerns. This echoes the Discussion Paper’s 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.)

[27] Given the inconsistent cross-jurisdictional approaches to defining “court records” and “docket information,” any proposed model policy must determine its own definitions in order to ensure maximum clarity with respect to the implications of its provisions. However, it is also important that such definitions be viewed by the legal community as the starting point for a broader, more focused discussion on the matter and that a model policy be adaptable to different definitions.

*Our approach has been to create a definition of court record that more closely resembles the discussion paper’s definition of court file. A clear definition of court record is important for defining the scope of the Electronic Access Policy. The definition of “court record” is an area that would benefit from cross-jurisdictional discussion and the development of a uniform definition. I encourage the Judges Technology Advisory Committee to consider whether, through the avenues opened with this discussion paper, it could begin the discussion on this point.*

Allan P. Seckel, Deputy Attorney General, British Columbia

### ***(c) General Principles***

#### **i. Open Courts vs. Privacy**

[28] The Discussion Paper reviewed the Supreme Court of Canada’s jurisprudence regarding the open courts principle and its relation to privacy and drew a number of conclusions, including:

1. The right to open courts generally outweighs the right to privacy.
2. There is disagreement about the nature of the exemptions to the general rule.

[29] These conclusions were agreed upon by virtually all of the responses to the Discussion Paper. However, one submission disagreed. The Office of the Privacy Commissioner of Canada (OPC) indicated that the open courts principle does not outweigh privacy but rather exists in “equilibrium” with it. According to the OPC, whether one is considering new technologies or traditional forms of access, “[t]he crux of the matter — to be colloquial — is who needs to know what, and why.”

*[T]he crux of the matter is not simply one where the merits of new communication technologies are at issue. The crux of the matter — to be colloquial — is who needs to know what, and why.[...]*

*With respect, the OPC believes that the right to open courts does not outweigh the right to privacy. Rather, both rights should exist in equilibrium relative to one another. Such equilibrium can best ensure both the continued efficiency and fairness of our system of law, and the protection of the fundamental right to privacy.*

Raymond D’Aoust, Assistant Privacy Commissioner, Office of the Privacy Commissioner of Canada

[30] In June 2004, after the public consultation was completed, the Supreme Court of Canada released its most recent statement of the open courts principle in its decision in *Vancouver Sun (Re)*.<sup>1</sup>

[31] In *Vancouver Sun (Re)*, the Supreme Court held that the *Dagenais/Mentuck* test applied not only to publication bans but also to “all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings.”<sup>2</sup> Because it incorporates both the minimal impairment and proportionality requirements of the *Oakes* test,

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<sup>1</sup> 2004 SCC 43.

<sup>2</sup> *Ibid.*, at par. 31.

the Supreme Court argued that the *Dagenais/Mentuck* test provides an adaptable test through which to balance freedom of expression and other important rights such as the administration of justice, the right to a fair trial, privacy, and security interests.

[32] The *Dagenais/Mentuck* test indicates that the freedom of expression of the press can only be limited when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the rights of the accused to a fair and public trial, and the efficacy of the administration of justice.<sup>3</sup>

*Where [freedom of information and the protection of privacy] are in conflict I agree with your statement that, "The right to open courts generally outweighs the right to privacy." The difficulty that arises is defining the specific exceptions to the general rule.*

Frank J. Work, Q.C., Information and Privacy Commissioner of Alberta

[33] It is proposed here that the *Dagenais/Mentuck* test also provides a useful framework for balancing the open courts principle with privacy concerns in the context of e-access and permits the accommodation of many of the concerns regarding e-access that were raised in the public consultation, including the concerns raised by the OPC.

## **ii. Application of the Dagenais/Mentuck Framework to E-Access**

[34] Although the *Dagenais/Mentuck* test provides a useful framework for determining the proper balance between open courts and privacy, the

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<sup>3</sup> *Ibid.*, at par. 29.

test must be adapted to the specific context of e-access to court information. In this regard, it is important to keep in mind that restrictions on access are not the same type of restrictions as publication bans or sealing orders. The question of access is not whether court information should be open to public inspection or not. Rather, the question is whether the existing accessibility of this “public” information should be enhanced through the provision of some form of access through electronic means.

*All restrictions [to the public's right to openness and transparency in the administration of justice] must be tailored closely to the interests to be protected, and also considered in light of the purpose for which access as a general principle exists. As noted in the Discussion Paper, “Fair information practices suggest that information which has been collected is used [or disclosed] for the purposes for which it was provided, not for a collateral purpose.”: para 98. This also applies in the context of court records. The presumption is one of openness and accessibility; however, it should also be noted that the jurisprudence overwhelmingly bases that presumption on the importance of judicial accountability and the right to understand and criticize democratic institutions. Commercial interest in the data has not been a factor.*

The Honourable Chief Justice Catherine A. Fraser, Alberta  
The Honourable Chief Justice Allan H. Wachowich, Court of  
Queen's Bench of Alberta, The Honourable Chief Judge Ernie J.  
M. Walter, Provincial Court of Alberta

[35] The first part of the *Dagenais/Mentuck* test reflects the minimal impairment requirement of the *Oakes* test.<sup>4</sup> What this demands in the context of access to court records is the recognition that access to court information is not simply a matter of deciding between sealing the file or providing unrestricted access to everyone. Options for access can fall along a spectrum between these extremes, where neither the right of individuals to privacy nor the right to open courts must absolutely prevail over the other. Careful tailoring that recognizes differing levels of accessibility can help accommodate both the open courts principle and privacy interests.

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<sup>4</sup> *Ibid.*, at par. 30.

*As a general rule, the Law Society endorses the present primacy of the right to open courts over the right to privacy. Court records should be presumed to be public unless there is a valid reason for restricting access. The Law Society recognizes at the same time that exceptions to the general rule will be necessary to protect legitimate privacy interests. It is essential that electronic access policies not facilitate the exploitation of children or other vulnerable persons.*

Frank N. Marrocco, Q.C., The Law Society of Upper Canada

[36] The recognition of a spectrum of public access is already reflected in the jurisprudence. For example, in *R. v. Mentuck* the Supreme Court of Canada accepted a publication ban with respect to the identity of undercover police officers (but not their methods of investigation).<sup>5</sup> However, this was not a ban on the presence of the media in the courtroom — or the general public — but rather a ban on the further publication of information that was already “publicly” revealed in court.

[37] The second part of the *Dagenais/Mentuck* test reflects the proportionality requirement of *Oakes* and asks whether the salutary effects of the restriction outweigh its deleterious effects.<sup>6</sup> This part of the test is able to accommodate concerns regarding the purposes for which access to court information is sought. As was outlined in the submission from Chief Justice Fraser, Chief Justice Wachowich, and Chief Judge Walter, any restriction on the right to openness must be “considered in light of the purpose for which access as a general principle exists.” Some reasons for access to court records are not very closely linked to the underlying rationale for the open courts principle. This concern is particularly acute in the context of e-access. As many of the responses to the Discussion Paper pointed out, commercial uses of data contained in court records is weakly related to the purposes underlying the constitutional principle of open courts and should not be facilitated by e-access.

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<sup>5</sup> 2001 SCC 76.

<sup>6</sup> *Vancouver Sun (Re)*, *supra* note 1 at par. 30.

[38] Canadian jurisprudence also recognizes that the connection between the purposes for access and the open courts principle can be more acute in some contexts than others. For example, in *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, the majority of the Supreme Court of Canada held that “those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.”<sup>7</sup> Another way to put this is to say that in some contexts the deleterious effects of a restriction on access will be more serious than in others, depending upon the strength of the connection between access to court records and the underlying rationale for the open courts principle in a particular context.

[39] In sum, applied to the context of e-access, the Dagenais/Mentuck test would allow restrictions on access to court information only where:

- (a) such restrictions are necessary to prevent a serious risk to the rights of individuals to protect their privacy or other important interests such as the proper administration of justice;
- (b) the restrictions are carefully tailored to minimally impair the open courts principle; and
- (c) the salutary effects of the restrictions outweigh their deleterious effects on the open courts principle, taking into account the continuing availability of this information at court houses, the desirability of facilitating access for purposes strongly connected to the open courts principle, and the need to avoid facilitating access for purposes that are not connected to the open courts principle.

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<sup>7</sup> [1991] 1 S.C.R. 671 at para. 19, Stevenson J.

*Clearly, both privacy and open access to the justice system are important to the public interest. Neither is absolute, nor are they mutually exclusive. It remains to be seen how current jurisprudence on the issue of access to court records will apply in the electronic context, as many of the questions and challenges raised will be new ones and will arise from a factual and technological context which is still evolving. While the policy rationale for the “open courts” principle is well understood, we lack experience regarding the impact on privacy interests of electronic access to judicial records. [...]*

*Electronic access to court records may be a controversial and developing issue, but information now publicly accessible through the paper medium should not become less so as a result of the development of policy and regulations affecting electronic access. It would be ironic indeed, and likely unconstitutional, if proposed changes resulted in a system less transparent than that we have now. [...]*

*There is legitimate room for argument as to whether a principled justification exists for differentiating between electronic and paper access, but there are in any event practical reasons for such differentiation.*

Canadian Bar Association

As the next section will outline, this framework provides the basis for a model policy on access to court information that embraces both access to paper-based records and access to electronic records.

### **iii. Paper vs. Electronic Environments**

[40] One of the conclusions of the Discussion Paper was:

*“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.”*

This conclusion was widely agreed upon and, indeed, seen by many to be the key consideration in developing many of the details of an access policy that takes into consideration the issues raised by the context of e-access.



[41] However, views regarding the significance of the distinction between paper and electronic environments also varied quite substantially. For example, some submissions argued that the same approach should be taken regardless of whether the records were in paper or electronic form. For the Canadian Newspaper Association, and some groups within the Canadian Bar Association (The National Media and Communications Law Section), this would entail broad public e-access to all court records. In contrast, for the Office of the Privacy Commissioner (OPC) of Canada, this would entail providing more protection to personal information contained in both paper and electronic formats.

[42] Others admitted that the basis for a principled distinction between paper and electronic environments was difficult to articulate but that there were nonetheless a number of important practical reasons for such a distinction. In particular, there was widespread agreement that electronic access should not facilitate bulk searches or problematic commercial data-mining of personal information found in court records. Other concerns included personal information being accessed for reasons of voyeuristic curiosity, identity theft, stalking, and employee background checks. Additionally, there were some concerns regarding the potential for e-access to maintain some information in the “public eye” long after events would normally fall into obscurity. Others argued that moving toward e-access could make individuals less inclined to participate in the judicial system and lead to greater reliance on private dispute resolution.

L'article 24 de la LCJTI répond directement à plusieurs des questions soulevées dans le document de consultation.

Me Louis Dionne, sous-ministre de la Justice et sous-procureur général, Québec

[43] The framework outlined in the previous section is helpful in outlining a principled basis for the distinction between paper and electronic environments. The “practical obscurity” fostered by paper-based records has meant that, generally, there has been a close connection between the purposes for seeking access to court records and the underlying purposes for the open courts principle. The fact that records were difficult and costly to obtain, search, and link with other documents, has meant that purposes unconnected with the accountability of the

judicial system have largely not been pursued by members of the public. Moreover, media access to court records includes a further factor that ensures a close connection between the purposes for access and the purposes for open courts—the role of the editor in vetting the public importance of news items and determining whether to commit resources to pursuing these stories. In other words, “practical obscurity” served to bury the question of the connection between the purpose of access and the purpose of open courts.

*The CNA submits that the entire contents of all court files should be made available to the public unless a judicial order has been made that seals all or part of the file, or a statute prohibits access. [...]*

*The primary issue addressed in these submissions is whether the existing policy governing access to paper court documents should also apply to E-access. The CNA submits that the same policy should be applied to both the paper and electronic media; there is no principled reason for differentiating between them.*

*The CNA also recommends that a pilot project, in which E-access is governed by the same policy as that which applies to the paper medium, be implemented in order to determine what, if any, problems may arise.*

Anne P. Kothawala, President and CEO, The Canadian Newspaper Association

[44] The move towards an electronic environment brings this question of the connection between the purpose of access and the purpose of open courts to the fore. Furthermore, the electronic environment permits the linking and aggregation of personal information, heightening the privacy interest of individuals in controlling that information.

[45] The move towards electronic access therefore raises the possibility that such access might facilitate some uses of information that are not strongly connected to the underlying rationale for the right to open courts and which might have a significant negative impact on values such as privacy or the administration of justice more generally.

[46] In light of the foregoing, one can argue that restrictions on access to court information may be justified in a principled manner according to the *Dagenais/Mentuck* framework: unrestricted e-access presents serious

risks to privacy, there are reasonably alternative measures that can prevent these risks while still permitting access to court records, and so long as an e-access policy is carefully tailored, the salutary effects of having some restrictions outweigh their deleterious effects.

[47] This is consistent with the position adopted in Quebec, where s. 24 of the *Act to establish a Legal framework for information technology*, (S.Q. c. C-1.1), requires that searches of electronic documents must be restricted to the purposes for which those documents were made public.

24. The use of extensive search functions in a technology-based document containing personal information which is made public for a specific purpose must be restricted to that purpose. The person responsible for access to the document must see to it that appropriate technological means are in place to achieve that end. The person may also set conditions for the use of such search functions, in accordance with the criteria determined under paragraph 2 of section 69.

An Act to establish a Legal framework for information technology,  
S.Q. c. C-1.1

[48] The question then is how a system of e-access might be designed in order to ensure a close connection between access to court records and the underlying rationale for the right to open courts while not facilitating practices that have little connection to this rationale and potentially high privacy costs. The following section outlines some of the general options available for crafting such a policy while subsequent sections discuss particular options in light of the responses received from the Public Consultation.

*We would urge caution, particularly when considering the prospect of bulk searches of court records. Improving access to the law is a worthy goal. It is surely more open to question whether it is also necessary to provide ready access to commercially-valuable data that identifies individuals.*

The Honourable Chief Justice Catherine A. Fraser, Alberta  
The Honourable Chief Justice Allan H. Wachowich, Court of  
Queen's Bench of Alberta, The Honourable Chief Judge Ernie J.  
M. Walter, Provincial Court of Alberta

#### iv. General Policy Options

[49] There are four general options for restricting e-access in order to ensure that the uses made of court records are consistent with the purposes for which these records are made public. These options may also be combined in different ways and will have different impacts on both the open courts principle and privacy, depending upon the context.

[50] The first option is to replicate the restrictions on access inherent in a paper-based environment by putting in place practical impediments to deter problematic uses. This could include restricting e-access to on-site terminals at courthouses, imposing user fees, or providing e-access only through a subscription service.

[51] The second option is to provide different levels of e-access depending upon category of user. For example, the Law Society of Upper Canada suggested breaking down the ‘public’ into different groups such as: a) Judges; b) Parties to the proceedings and their counsel; c) Other lawyers; d) Media; e) General Public; f) Commercially interested parties. Indeed, the Office of the Privacy Commissioner (OPC) of Canada argued that the reasons that the courts and litigants require access to information are different from the reasons that the general public requires access to information, which could justify different forms of access.

*As the right of the public to open courts is an important constitutional principle, the definition of “public” ought to continue to include all individuals, commercial enterprises and any representatives of the media.*

Anne P. Kothawala, President and CEO, The Canadian Newspaper Association

[52] The third option is to provide the general public with unrestricted e-access to court records but to redact some of the personal information from those records (for e.g., change the date of birth to the year of birth only, change the complete address to the city only) or remove some personal information from the public records entirely.

[2] *[S]ealing orders and existing legislation do not deal with problems likely to arise as a result of facilitation of bulk searching by the electronic medium. Further consultation and study are required to determine what options are available to ensure that legitimate research and public interest inquiries are permitted while abusive "bulk searches" are not.*

Canadian Bar Association

[53] The fourth option is to leave restrictions on e-access to judicial determination on a case-by-case basis, similar to current practices regarding sealing orders and publication bans. However, a system of e-access would have to make available a range of options regarding possible restrictions on e-access, ranging from no access to partial access. Partial access could include, for example, on-site only access, access by only certain categories of users, or access to a version of the records that has had personal identifiers removed. In this regard, the Discussion Paper's conclusion #20 remains important:

*"Statutes and rules of procedure 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."*

[54] The following sections further elaborate upon the framework developed above, and the options for, and desirability of, restricting e-access to some degree. The specific issues that received the most attention in the responses to the Discussion Paper were bulk searches, on-site vs. remote access, and the de-identification of records.

[3] *Bulk searches [...] would not be addressed by either a court order or by any existing statute. Through electronic searching, one could theoretically search for a particular class of individual or subject (e.g. recently divorced persons). It is submitted that various safeguards could be implemented to ensure that mischief relating to bulk searching is avoided. For example, the court could: (a) retain the capacity to identify the searcher if judicially ordered; or (b) develop rules that would require parties to redact personal information not required by the Court to adjudicate on an issue, prior to filing the documentation with the Court (for example, a party could remove certain confidential information, such as social insurance numbers, from the documents).*

*This is an area in which further consultation and study are required, to ensure that improper searching is prevented while searches that support legitimate research or that are in the public interest, are not compromised.*

*Anne P. Kothawala, President and CEO, The Canadian Newspaper Association*

#### ***(d) Specific Issues***

##### **i. Bulk Searches**

[55] Although a variety of positions were taken with respect to the question of the distinction between paper-based and electronic environments, there was strong agreement with respect to the potential problems associated with permitting unrestricted bulk searches of electronic court records, especially if commercial entities could engage in forms of data-mining.

[56] These concerns were also outlined in the Discussion Paper (see Conclusions 21-23). In the context of the analysis outlined above, bulk searches can be problematic in two regards. First, because such searches can link together disparate pieces of information and then aggregate this information, such searches can potentially create privacy concerns that are not present to the same degree in a paper-based environment. This can be further connected to specific privacy concerns surrounding practices such as identity theft or stalking. Second, bulk searches can facilitate activities that have little connection to the underlying rationale for open courts.

[57] There is therefore a consensus regarding the need to prevent problematic bulk searches but at the same time permit searches that are consistent with the rationale for open courts. There were suggestions to charge user fees for some uses such as commercial uses, which could then also generate information about such uses. Other potential options include restricting remote access and redacting personal information from court files. These are canvassed below.

## ii. On-Site vs. Remote Access

[58] Concerns regarding unrestricted remote access are linked to concerns regarding unrestricted bulk searches: that remote electronic access will promote activities that are not strongly connected to the underlying rationale for the right to open courts. Indeed, even if a system of remote access does not itself permit bulk searches, so long as it provides access to an electronic version of the information, this information can be “scraped” — automatically gathered from the format provided — and imported into systems that can permit such searches. At the same time, the privacy afforded by on-site access should not be overstated, even if on-site access does not permit electronic copies to be obtained. Sophisticated parties can take paper copies of records and then scan these to create electronic records. In this way, paper copies become functionally equivalent to electronic copies and, at least for some classes of users, many of the differences between remote and on-site access are removed.

[4] *[T]he Law Society is of the opinion that limiting users to onsite access rather than remote access would be more consistent with the present practice.*

Frank N. Marrocco, Q.C., The Law Society of Upper Canada

[59] Other concerns included the fact that unrestrained electronic access over the Internet would make personal information available beyond jurisdictional borders. Additionally, it could facilitate accessing partial and misleading information because it is taken out of context or not viewed within the entire proceeding of which it formed a part.

*The practice of publishing our decisions on the internet occasionally gave rise to complaints by parties that their names and personal information were available on the worldwide web. While in principle we subscribe to the view that the right to open courts generally outweighs the right to privacy, we realized that we could, without impinging upon that principle, make our decisions available on the court's website but not necessarily available through all commonly used search engines such as Yahoo or Google. This small change in our publishing policy seems to have resolved the problem.*

The Honourable Chief Justice Alban Garon, Tax Court of Canada

[60] A number of submissions pointed out that legislation, such as the federal *Personal Information and Protection of Electronic Documents Act* (PIPEDA), provide some recourse against improper uses of public records. PIPEDA requires that the collection, use or disclosure of personal information in court records relate to the purpose for which the information appears in the records. This could catch some private sector uses of information. It would not catch journalistic uses, private uses, or — importantly — uses outside of Canada's jurisdictional borders. Because of such concerns, some submissions pointed to the wisdom of restricting remote access to only some categories of users.

[61] There are currently some access models in Canada that restrict remote access in different ways. For example, in Québec, the preliminary analysis of the integrated justice information system (“Système intégré d’information de justice” or “SIJJ”) concluded that “only justice stakeholders should have remote access to all court files. However, the parties should have remote access to their own court files. Court files that are not sealed should continue to be available in court houses to every citizen, by electronic means.”<sup>8</sup>

[62] In British Columbia, the Justice Information System (JUSTIN) permits public access at JUSTIN public terminals in court registries. There, members of the public can search for public information on criminal cases (information not subject to bans and not youth

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<sup>8</sup> *SIJJ presentation document with regard to implications on personal data and privacy protection*, May 9 2003, p.57.



information). These cases are searchable by case file number, agency or participant name. Access to civil court information is provided through Court Services Online.<sup>9</sup> This service provides public access to public information from court records for Provincial and Supreme civil court files in B.C. Information can include file number, type of file, date the file was opened, registry location, style of cause, names of parties and counsel, list of filed documents, appearance details, terms of order, caveat details. However, this does not provide access to the actual documents and there is a per-file service charge of \$6.00.

[63] Just as it is helpful to distinguish between different categories of users, it is helpful to distinguish between different categories of court records. For example, it may be that, for the purposes of dealing with the question of remote access, that it is important to treat judgments differently from other types of court records. As a number of the submissions pointed out, judgments are different from other types of court records as they are closer to the core accountability purpose of open courts and also are potentially easier to edit for privacy concerns.

*[5] [Sensitive issues] are difficult to address even in judgments, which are, despite the many pressures of the judge's workload, a product which admits of refinement and reconsideration before production. [...] Judges may be able to omit sensitive information that is not required for the decision of allegations that were not proven. But other court records contain data closer to its raw state — certainly privacy is not often a consideration when documents are filed in court.*

*[6] The Honourable Chief Justice Catherine A. Fraser, Alberta  
The Honourable Chief Justice Allan H. Wachowich, Court of Queen's  
Bench of Alberta, The Honourable Chief Judge Ernie J. M. Walter,  
Provincial Court of Alberta*

[64] This is also consistent with emerging practice in Canada, where there is a growing emphasis on broad public access to judicial decisions. The CanLII project as well as numerous court web sites are examples of this. In Quebec, the provincial corporation named Société québécoise

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<sup>9</sup> [www.ag.gov.bc.ca/courts/cso/](http://www.ag.gov.bc.ca/courts/cso/)

d'information juridique (SOQUIJ) provides access to court records and docket information in the province. SOQUIJ is an agent of the crown and has a general mandate to make legal data "more accessible to the public"<sup>10</sup>. This objective is mainly realized through the selection and publication of judicial decisions in several reports.<sup>11</sup> SOQUIJ sells its products to law professionals so as to be completely internally financed. SOQUIJ has been providing free Internet access to judgments rendered since 1998,<sup>12</sup> largely as a response to a court judgment ordering SOQUIJ to provide access to a private publisher to all of the judgments it receives, for a fee that should not exceed the real storage, reproduction and transmission costs incurred.<sup>13</sup>

[65] Docket information is another category for consideration although many pointed to the inconsistencies in what is included. In Quebec, members of the public may register with the SOQUIJ Website for Internet access to docket information (the "Plumitifs" service<sup>14</sup>), which costs a minimum monthly fee of \$10. In addition, searching by the name of a litigant costs \$3 per query, and reviewing each single docket costs \$2. Consulting the roll of the practice divisions is free of charge. Even if names in family cases can be ascertained in Quebec using the docket number through the plumitifs – as the Discussion paper puts it<sup>15</sup> – this access is restricted through registration and cost. Recently, British Columbia inaugurated a similar service for allowing remote access to public information contained in court records for Provincial and Supreme civil court files. Each search query costs \$6.

[66] Additionally, there was a lot of agreement regarding the sensitive nature of family law records and suggestions that such records might merit special treatment. It was also pointed out that access policies might differ

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<sup>10</sup> *An Act Respecting the Société québécoise d'information juridique*, R.S.Q. c. S-20, s. 19.

<sup>11</sup> *ibid.*, s. 21; *By-law respecting the collection and selection of judicial decisions*,

<sup>12</sup> Online: <[jugements.qc.ca](http://jugements.qc.ca)>.

<sup>13</sup> *Wilson & Lafleur c. Société québécoise d'information juridique*, [2000] R.J.Q. 1086 (QC C.A.), online: <<http://www.canlii.org/qc/jug/qcca/2000/2000qcca198.html>> (CanLII).

<sup>14</sup> Online: <<http://www.azimut.soquij.qc.ca/identification/plumitifs-id.shtml>>.

<sup>15</sup> Discussion paper, ¶ 57(e), p. 23.

depending on the availability of statutory and common law publication bans.

*[7] In the case of sensitive material (such as psychiatric reports or reports of sexual abuse) it may be appropriate for the electronic file to indicate that a document exists, without disclosing its contents. In this way, those with a valid interest would be able to apply to receive the contents of the document. Such access could be limited by use of a login system requiring a password or if necessary by application to the court. This approach would maintain the principle of openness without unnecessarily violating the privacy of innocent persons.*

Frank N. Marrocco, Q.C., The Law Society of Upper Canada

[67] Apart from family law matters, other categories of sensitive information that were identified included:

- Information about vulnerable persons such as children, who may not even be parties to the action;
- Commercial proprietary information;
- Accused who is not convicted;
- Child welfare matters;
- Young offenders;
- Unrepresented parties;
- Intellectual property;
- Health and genetic information;
- Social insurance numbers;
- Income tax information;
- Bank account information;
- Bankruptcy proceedings;
- Incompetency hearings;
- Wrongful dismissal actions;
- Tort and professional negligence matters;
- Personal injury matters;
- Estates and trusts;
- Criminal matters.

Even if remote access is not provided for the contents of such records, the Law Society of Upper Canada suggested that the electronic file could indicate that a document exists without disclosing its contents.

[68] In sum, to the extent that there is a consensus on the question of remote access, there is strong support for remote access to all court records for judicial stakeholders and parties, remote access of judicial decisions for all members of the public, and against unrestricted remote access for commercial parties. After that, a variety of concerns counsel adopting some forms of restriction for other users and other categories of records.

*[8] Redaction (deletion) of personal information contained in court records is a possibility, although it would create challenges in practice. [...]*

*[9] Practical questions for consideration include: who would be responsible for redaction; what rules would apply to redacting the various court documents; would it be up to the parties as to which information should be redacted (it may be necessary to implement a mechanism for resolving disputes about redaction); and, who will address the interests of third parties – or even primary parties – who are unrepresented. Amendments to Rules of Civil Procedure and Codes of Conduct may be required.*

Canadian Bar Association

### iii. De-identification of Records

[69] There is also the issue of whether some electronic records should have personal identifiers removed and, if so, who would bear responsibility for this. The Office of the Privacy Commissioner (OPC) of Canada pointed out that the US Judicial Conference has approved a plan requiring attorneys to delete some personal information from both their paper and electronic filings. In addition, the 11<sup>th</sup> US Circuit Court of Appeals in Atlanta requires attorneys to file two versions of their pleadings, one for judges only and a redacted copy for public inspection. Some submissions highlighted this as a potential solution to some of the problems associated with unrestricted remote electronic access.

In conclusion, it is in the best interests of the public and the legal profession throughout Canada that the courts undertake on an ongoing basis responsibility for de-identifying judgments on a uniform, standardized basis. Otherwise, access to such judgments will be inconsistent, and de-identification where it occurs will not likely be in a standardized form. We therefore urge the Judges Technical Advisory Committee to develop and implement a de-identification policy that is consistent with the Discussion Paper's conclusion that "The right to open courts generally outweighs the right to privacy."

Howard R. Berge, Q.C., President, The Law Society of British Columbia

[70] Indeed, one of the conclusions of the Discussion Paper was:

*"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."*

[71] The Canadian Bar Association provided a helpful list of information to potentially redact from electronic records:

- Social insurance numbers;
- Birth dates;
- Financial account numbers;
- Health information;
- Children's full names, ages and identifying characteristics;
- Detailed financial and tax information;
- Home addresses;
- Property values.

In the US, it has been suggested that lawyers be required to file two different versions of documents, a complete copy and one with certain identifying information removed. The Law Society does not support this approach. Such a policy would raise difficulties of implementation, and would in fact change the role of lawyers in litigation if they were required to delete certain information from the documents they file. There would also be a need for a mechanism to resolve disputes about the information to be deleted.

The increase in unrepresented litigants is a particular concern. Whatever system is adopted should ensure that such persons are not hindered in preparing their cases.

Frank N. Marrocco, Q.C., The Law Society of Upper Canada

[72] However, a number of submissions pointed to the problems associated with requiring the parties to submit different versions of their records, or to take responsibility for deleting some personal information. These concerns included inconsistent practices, potential disputes, and increasing the burden on litigants.

[73] There was a stronger consensus surrounding both the feasibility and desirability of de-identification standards for electronic versions of judgments. Courts can take on this responsibility. Apart from creating de-identification standards to work in conjunction with publication bans, special privacy concerns arise in the context of e-access which include concerns regarding identity theft, stalking, and commercial uses of personal information. Therefore the provision of remote access to judgments might require its own de-identification protocols.

[74] In conclusion, there was a strong consensus regarding the desirability of de-identification standards for judgments and court responsibility for such standards. There were many concerns regarding the feasibility of implementing de-identification standards with respect to other types of court records.

### **Suggested Framework for a Model Access Policy**

[75] In light of the foregoing synthesis of the responses to the Discussion Paper, the following are suggestions for the basis upon which a model access policy might be developed:

1. The Dagenais/Mentuck test provides an appropriate framework for balancing the right of the public to have access to court information with the right of individuals to preserve their privacy and other important values such as the proper administration of justice.
2. The new context of preparation and storage of court information in digital formats and the widespread availability of electronic networks to give access to this information has changed the “practical obscurity” that was inherent in a paper-based environment. This new “e-access” context calls for a re-assessment of the conditions in which access to court information is provided to the public.
3. Adapted to the context of e-access, the Dagenais/Mentuck test would allow restrictions on court information where:
  - (a) such restrictions are necessary to prevent a serious risk to the rights of individuals to protect their privacy or to other important interests such as the proper administration of justice;
  - (b) the restrictions are carefully tailored to minimally impair the open courts principle; and
  - (c) the salutary effects of the restrictions outweigh their deleterious effects on the open courts principle, taking into account the continuing availability of this information at court houses, the desirability of facilitating access for purposes strongly connected to the open courts principle, and the need to avoid facilitating access for purposes that are not connected to the open courts principle.
4. Unrestricted e-access to court information facilitates uses, such as bulk searches and downloads and commercial data-mining practices, which have a weak connection to the open courts principle but serious effects on individual rights to privacy and to the proper administration of justice.
5. Many of these privacy concerns may be addressed through the careful tailoring of an access policy rather than through a complete

restriction on e-access. Options can include replicating the practical obscurity of paper records, providing different levels of access to different categories of users, removing personal identifiers from records, and requiring parties to seek a court order to require restrictions on access. It is very likely that a mix of these options will have to be adopted, depending on the particular legal and practical context of each court.

6. Restrictions on access to court information may therefore be justified in a principled manner according to the *Dagenais/Mentuck* framework stated hereabove.
7. There was strong agreement in the responses to the Discussion Paper with respect to the potential problems associated with permitting unrestricted bulk searches of electronic court records, especially if commercial entities could engage in forms of data-mining. There was also strong agreement that unrestricted e-access could raise a number of other privacy concerns, including identity theft and the possibility of harassment.
8. The responses to the Discussion Paper were not unanimous with respect to the desirability, and feasibility, of the types of restrictions on e-access that are available to address privacy concerns. However, some conclusions on access to court information may be drawn:
  - (a) There is a general consensus that unrestricted bulk searches should not be permitted to the public generally;
  - (b) There is a general consensus that remote public access should be provided to judgments, with privacy concerns dealt with through de-identification protocols for which courts would be responsible;
  - (c) There are mixed views regarding remote public access to docket information, partly because of the inconsistent cross-jurisdictional approaches to what is included within docket information. Suggestions to deal with privacy concerns with docket information included implementing de-identification protocols, charging fees for remote access, providing remote access only to specific categories of user, or restricting remote access entirely;



- (d) There is a general consensus that remote public access to the contents of all court records was not desirable. Suggestions to deal with privacy concerns with court records include implementing de-identification protocols, indicating that a document exists without providing details regarding its contents, providing differing levels of access to different categories of users, and exempting “sensitive” records from remote e-access entirely.

### **Appendix A: Conclusions of the Discussion Paper**

The Conclusions outlined in the Discussion Paper (available at <http://www.cjc-ccm.gc.ca/article.asp?id=2403>) are as follows:

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.
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.

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.
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.
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; (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.
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; 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.
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: List of Commentators on the Discussion Paper**

Allan P. Seckel, Deputy Attorney General, British Columbia

Terrence J. Matchett, Q.C., Deputy Minister of Justice and Deputy Attorney General, Alberta

Doug Moen, Q.C., Deputy Minister of Justice and Deputy Attorney General, Saskatchewan

Bruce A. MacFarlane, Q.C., Deputy Minister of Justice and Deputy Attorney General, Manitoba

Mark Freiman, Deputy Attorney General and Deputy Minister Responsible for Native Affairs, Ontario

Louis Dionne, Le sous-ministre de la Justice, Québec

Douglas J. Keefe, Q.C., Deputy Minister of Justice, Nova Scotia

Patsy G. MacLean, Deputy Attorney General, Prince Edward Island

The Honourable Chief Judge E.J.M. Walter, Provincial Court of Alberta

The Honourable Chief Justice Catherine A. Fraser, Alberta

The Honourable Chief Justice Allan H. Wachowich, Court of Queen's Bench of Alberta

The Honourable Chief Judge Raymond E. Wyant, The Provincial Court of Manitoba

The Honourable Chief Justice Brian W. Lennox, Ontario Court of Justice

L'Honorable Juge en Chef Guy Gagnon, Cour du Québec

The Honourable Chief Justice Alban Garon, Tax Court of Canada

Raymond D'Aoust, Assistant Privacy Commissioner, Office of the Privacy Commissioner of Canada

David Loukidelis, Information and Privacy Commissioner for British Columbia

Frank J. Work, Q.C., Information and Privacy Commissioner of Alberta

Lisa M. Austin, Assistant Professor, University of Toronto Faculty of Law

Howard R. Berge, Q.C., President, The Law Society of British Columbia

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The Honourable J.E. Côte, Justice of Appeal, Court of Appeal of Alberta

Carl F. Dombek, Chair, Licence Appeal Tribunal, Ontario Ministry of Consumer and Business Services

Anne P. Kothawala, President and CEO, The Canadian Newspaper Association