The Best Things in Law Are Free?: Towards Quality Free Access to Primary Legal Materials in Canada

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The development of the World Wide Web in the early 1990's enabled individuals and organisations to deliver electronically stored materials online in a user-friendly and effective manner. Flowing from this major development, the federal government, and some of the provincial governments, have engaged in the practice of placing laws, and in some cases regulations, online. More recently, some courts, and a few tribunals in Canada have begun to publish their decisions on web sites. Such services are currently, for the most part, free. Greater public accessibility to such materials is generally touted as one of the rationales for such a practice. While these developments are positive, and do enhance public access to important primary legal materials, they raise a number of serious issues, only some of which have ever been clearly addressed. Developments in Canada have been marked by their fragmented nature, by unresolved copyright issues, by struggles over ownership and control of such materials, and by a lack of a philosophy of public access.

In this paper I will attempt to address these issues. I will begin by assessing the current situation in Canada, and the need for a centralized and harmonized electronic portal[1] for primary legal materials. I will look

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[1] In the language of the internet, a portal is a single site designed to meet all of a user's needs in one location. Typically these needs are very broadly defined and can include shopping financial services, news and so on. They also tend to be highly commercialised through the sale of ads. In this paper I use the term to capture the idea of "one-stop" access to a wide range of legal materials.

at initiatives in other jurisdictions aimed at providing comprehensive free[2] public access, and will explore the rationales for developing and providing such access. I will also give critical consideration to the proposal for a Virtual Law Library for Canada and the emergent Canadian Legal Information Institute (CanLII)[3]. Through this and other models, I will explore some of the implications and questions raised by the provision of publicly accessible primary legal materials. These will include an exploration of the concepts of "public" and "access", concerns about information monopolies, the role of lawyers as "infomediaries" and the normative implications of "freeing" the law.[4]

I. Publicly Accessible Primary Legal Materials in Canada[5]

It is important to begin with a discussion of the existing state of publicly accessible primary legal materials in Canada. Because CanLII[6] is in a pilot stage, and because I wish to discuss it separately, this initial discussion will exclude the work that is now being done on CanLII. This discussion is important not simply to understand the rather sorry state of affairs which has led to the creation of CanLII, but also to understand some of the limitations and problems faced by CanLII. It also provides a backdrop for the discussion which follows about the nature and significance of public access to primary legal materials.

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2 In the context of publicly accessible primary legal materials "free" can have two connotations: free of charge, and the widest possible public access.

3 Online: http://www.canlii.org.

4 This phrase is often used in relation to free public access sites for legal materials such as AustLII and BAILII. The phrase captures the objective of making the law available free of charge, as well as the idea of breaking the current and traditional information monopolies around law and legal materials.

5 The information regarding websites in this paper is current as of November 16, 2000. Web sites of this nature are bound to change somewhat over time.

6 CanLII is the beginning of an online legal information institute for Canada. Although still a long way from full realization, the ultimate objective is to have a unified searchable database of primary Canadian legal materials, both federal and provincial, including statutes, regulations and case law. CanLII will be discussed in more detail *infra*.

A. Legislation and Regulations

The range of free, publicly available online primary legal materials in Canada is currently quite extensive, and continues to grow.[7] The federal government provides legislation and regulations in an online format. Many of the provinces and territories also provide online statutes, and some provide regulations, with Saskatchewan being a notable exception.[8] Although many such primary materials are available, online compilations of legislation may not be complete.[9] Where provided, legislation is also accompanied by disclaimers and copyright notices. In general, the notices disclaim any responsibility for the accuracy or reliability of reproductions of online materials[10], and warn that the electronic versions are not official versions of the legislation[11]. Copyright notices generally claim ownership in the material, and, in many cases,

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7 The descriptions in this paper of what is available online are accurate as of the time of writing (Fall 2000). It is to be expected that existing online collections will change by expanding to include earlier materials, or by the addition of new features such as degree of access, interlinkability, searchability, and so on.

8 The Government of Saskatchewan web site is designed as a vehicle through which hard or soft copies of legislative enactments can be sold. Actual texts of legislation or regulations are not publicly available online. The Law Society of Saskatchewan maintains a site where they provide access to individual Saskatchewan statutes free of charge. See online: <http://www.lawsociety.sk.ca/NewLook/Links/skstatutes.htm>.

9 For example, the Federal Department of Justice provides a list of statutes which are not in its database. See: online: http://canada.justice.gc.ca/Loireg/notindb_en.html.

10 For example, the disclaimer at the Federal Department of Justice site states: "The Department of Justice assumes no responsibility for the accuracy or reliability of any reproduction derived from the legal materials on this site. The legal materials on this site have been prepared for convenience of reference only and have no official sanction." Users are then directed to consult the official versions "available in most public libraries". This model clearly maintains the primacy of print materials and the centrality of physical libraries as the "portal" through which such materials can be accessed. Online: <http://canada.justice.gc.ca/Loireg/mise_en_garde_en.html>.

11 Some disclaimers specifically instruct users to refer to official versions "for all purposes of interpreting and applying the law". (See, for example: Alberta (Online: http://www.gov.ab.ca/qp/acts.html, and the Federal Government (<http://canada.justice.gc.ca/Loireg/mise_en_garde_en.html>.)

provide a limited licence to reproduce the materials for private, non-commercial purposes.[12]

While some jurisdictions provide online access to regulations, others limit access to statutory material alone.[13] Where online access to regulations is available, the material is not necessarily cross-linked to the relevant legislation. Practices vary from jurisdiction to jurisdiction.[14] Thus, while the federal Department of Justice web site[15] does provide links to statutes along with their regulations, other sites do not offer this functionality. British Columbia currently only provides partial access to online versions of regulations.[16] The regulations that Alberta provides are not linked from the enabling statutes, nor are they indexed according to

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[12] An example of this is from the British Columbia site, where all copying for the purposes of distribution is prohibited without licence, but where "Persons may make a single copy of specific Acts, in whole or in part, for Personal Use or for Legal Use" (Online: < http://www.qp.gov.bc.ca/bcstats/info.htm >). Saskatchewan is an example of an exception to the general rule. The notice on that site states that "no person may copy, transfer, print electronically, distribute or otherwise use this material except in accordance with the Subscription Agreement or with the express written consent of the Queen's Printer".

In New Brunswick, the copyright restrictions are also severe: "The Province of New Brunswick, through the Queen's Printer, owns and retains the copyright for New Brunswick acts and regulations including consolidations. All rights are reserved and any form of reproduction is accordingly restricted." An exception is Yukon Territory which expressly allows free reproducibility of statutory material.

[13] For example, Prince Edward Island provides only online versions of statutes, and not regulations. http://www.gov.pe.ca/law/statutes/index.php3.

[14] The New Brunswick and Newfoundland sites provide an index of statutory instruments which features links to the regulations relating to each statute. (Online: http://www.gov.nb.ca/justice/asrlste.htm, and http://www.gov.nf.ca/hoa/sr/.) In Nova Scotia, although the statutes and regulations are maintained on separate sites, the regulations are indexed according to the legislation under which they were enacted. (For the statutes, see online: http://www.gov.ns.ca/legi/legc/index.htm. For the regulations, see online: http://www.gov.ns.ca/just/regulations/regs/consregs.htm.) However, the statutes site does not contain references to or links to regulations enacted under the particular statutes. It is also not possible to get the text of the relevant statute from the index of regulations enacted pursuant to that statute.

[15] Online: http://canada.justice.gc.ca/Loireg/index_en.html.

[16] Online: http://www.legis.gov.bc.ca/legislation/InternetRegList.htm.

enabling legislation.[17] The Quebec government provides a search engine for its statutes and regulations that offers key word searches.[18] Suffice it to say, the availability of both statutes and regulations, the degree to which they are easily linked to one another may vary widely from one jurisdiction to the next.[19]

Clearly the current arrangement with respect to statutory and regulatory materials has a number of significant drawbacks. It is fragmented; the kind and amount of material available varies from one jurisdiction to the next. It is not integrated; someone wishing to research a topic within provincial jurisdiction would have to visit ten different web sites to search for the information. It may not be up-to-date; most of the sites do not guarantee that the material is current. The material is also not available in an authoritative version. All sites disclaim responsibility and direct users to rely only upon official print versions. In only a few cases are the materials searchable by anything other than the title of the enactment. The general lack of search engines also contributes to the overall lack of real utility of the sites. Finally, the lack, in some cases, of a clear mechanism to link the statutes with their regulations makes the use of these materials more problematic for those who might not realize the importance that the regulations may have in interpreting or applying the law.[20]

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[17] Online: http://www.gov.ab.ca/qp/regs.html.

[18] Online: http://doc.gouv.qc.ca/html/lois_regle_tele_mots_cles.html.

[19] I have not even mentioned the linking of sections of statutes/regulations to the cases which may interpret them. This is certainly not an available feature at any of these governmental sites.

[20] There has been a missed opportunity with digital online states to link regulations directly from enabling sections of the Act, or from sections where some elaboration is provided in the legislation. In this sense, the online materials mimic print materials, and do not fully take advantage of the opportunities presented by hypertext. One can wonder if a dramatic change in presentation of statutory and regulatory materials through the use of hypertext might, in some way, alter the relationship of these types of legislative enactments. At the very least, one might wonder if the result would not be slightly more democratic in that it would become clearer and more public as to what matters are being dealt with in the legislation and which matters are being left to the Minister or to cabinet. While this is technically knowable from the text of the enabling statute, the detail of regulations and their actual contents and scope are not so obvious from reading enabling legislation.

B. Case Law

In common law Canada, case law can be a crucial primary source of legal rules. Even in civil law Quebec, and in areas of law governed by statutes, case law is an important source of interpretations and elaborations of the law. The provision of online legislation without corresponding access to the decisions that interpret it results in a very partial form of access to primary legal materials. In the common law provinces, the lack of ready access to case law also means lack of ready access to the rules of the common law.[21] In Canada, there has been a trend towards making judicial decisions available online. However, as with statutory material, there is no single unified source for free, publicly accessible case law online in Canada.

The situation is even sketchier with tribunal decisions. Although considered to be lower in the hierarchy of legal normativity than regular case law, in a system where administrative tribunals often deal with issues of crucial importance to ordinary citizens[22] the accessibility of law in relation to these tribunals would seem to be of great importance from a public access point of view.

1. Federal Courts and Tribunals

At the federal level, the Centre de recherche en droit public publishes the decisions of the Supreme Court of Canada, and currently makes available decisions from 1986 to the present. The Federal Court of Canada makes the decisions of both the trial and appeal divisions available from 1990 to the present. Both sites provide a search engine to enable key

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[21] Of course, this does presuppose that having access to case law gives a non-legally trained individually meaningful access to the rules the cases formulate. There are also real issues about online cases and access to historical materials. Even where cases are available online, the collections are often only of a few recent years. The task of creating free, publicly accessible historical databases of statutes and cases would be a very daunting one indeed. If ready, free, online public access does become the norm, this may well provide further pressure in common law jurisdictions to "codify" or "restate" the common law rules.

[22] For example, the provision, denial or revocation of social assistance or workers compensation, landlord and tenant matters, labour relations matters, immigration, human rights and so forth.

word searching of the available cases. The Supreme Court site allows for a field search as well, while the Federal Court site provides a subject index. In the case of the decisions of the Supreme Court of Canada, users are warned that:

> "the decisions of the Supreme Court of Canada on this Internet site have been prepared for convenience of reference only. The official versions of decisions and reasons for decision by the Supreme Court of Canada are published in the Supreme Court Reports".[23]

The Federal Court site contains a similar disclaimer.[24] Nonetheless, the site identifies one of the purposes of the site as: "to make available, in the most timely way possible, all Federal Court decisions selected for eventual publication in the official reports series whether in full text or as digests".[25] Decisions on the site appear first as "raw" decisions, and subsequently as reported decisions in the reporter series. The site provides, in electronic version, "the full contents of the official Reports for the Volume years 1993, 1994 and 1995".[26] It is not clear whether these versions are to be treated as equivalent to the print versions.

The Supreme Court of Canada, through LexUM[27] also makes available a further subset of Supreme Court decisions: those dealing with the Canadian Charter of Rights and Freedoms. The decisions are available from 1983 to1995[28], and are sorted by year and volume of Supreme Court Reporter. They also come with a search engine for key word searches, and a further search engine for search by field. This provides a rare

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[23] Online: http://www.lexum.umontreal.ca/csc-scc/en/index/permission.html.

[24] Online: http://www.fct.cf.gc.ca/business/decisions/decisions_e.shtml. Oddly, the disclaimer refers one to specific official print sources for statutes and regulations, but does not make reference to official sources for judicial decisions. Whether this means that the online decisions can be considered as authoritative is unclear. This certainly appeared to be the case on an earlier version of the site which is still active at the time of writing. (See online: http://www.cmf.gc.ca/en/cf/intro.html.)

[25] Online: http://www.cmf.gc.ca/en/cf/intro.html.

[26] *Ibid.*

[27] See discussion of LexUM *infra.*

[28] The explanatory text on the site states that this material was being "made available early on an experimental bases", and that the service would be improved. It is not clear if this means it will be updated to the present. The collection is one provided by the Supreme Court of Canada itself. Information regarding the collection is dated March 18, 1999.

example (in Canada, at least) of a free online searchable case law database that focuses on a specific subject matter.

With the assistance of LexUM, the Tax Court of Canada has also recently begun the practice of putting its cases online. Decisions from 1997 forward are available online. They can be sorted by style of cause, or by date, and can be searched by docket number, by subject matter, or by key word. The decisions available online are not authoritative; the disclaimer states that they are "prepared for convenience of reference only."[29] Users are directed to consult the official court documents for purposes of interpreting and applying the law.

It is possible to find decisions of other federal tribunals on line. Finding these decisions requires some work; while many federal administrative tribunals have web sites, not all publish their decisions.[30] However, some, such as the Canadian Human Rights Tribunal[31] and the Competition Tribunal,[32] do make their decisions available online. In both these cases the decisions are available from 1990 forward.

The online decisions of the Supreme Court of Canada, the Federal Court, the Tax Court, and federal tribunals are available in both French and English. Because these are decisions of bodies established under federal law, they are also subject to the Reproduction of Federal Law Order.[33] This means that, subject to any revocation of or change in the Order, the decisions may be freely reproduced.[34]

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29 Online: http://decision.tcc-cci.gc.ca/en/copyright.html.

30 The practice varies from publishing no decisions online, to publishing summaries of decisions (Canada Labour Relations Board), to publishing decisions (Canadian Human Rights Tribunal, Competition Tribunal).

31 Online: http://www.chrt-tcdp.gc.ca/english/index.htm.

32 Online: http://www.ct-tc.gc.ca/english/cases.html.

33 Reproduction of Federal Law Order, P.C. 1996-1995, December 19, 1996, SI/97-5. Online: http://canada.justice.gc.ca/Loireg/crown_en.html.

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

Although these web sites provide valuable resources for persons searching for decisions of federal courts, they are limited in their usefulness. With the apparent exception of the Federal Court site[35], none of the sites provide authoritative versions; the collections are fairly recent and not extensively historical. They are also not integrated; a decision cannot be tracked from a single site or database through two or more levels of court or tribunal. All of these features make them more suitable for searches for specific items known in advance, rather than for comprehensive research.

2. Provincial Courts and Tribunals

The availability of court decisions online at the provincial level varies widely from one province to the next. In British Columbia, for example, decisions of the Court of Appeal and the Supreme Court are available from 1996 to the present. The decisions are searchable by key word, and searches may be of all decisions by either or both courts, or only of the decisions of specific years in either or both courts. The decisions are said to be made available "for the purpose of public information and research". Copying is permitted for non-commercial purposes[36], "provided that the material is accurately reproduced and an

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35 However, although the Federal Court of Canada site does not disclaim the case reports available online, the Reproduction of Federal Law Order states that copies cannot be represented as official versions. Since this would also apply to photocopies of hard-copy official sources, it is not clear what practical difference there would be between a case downloaded from the Federal Court site and one photocopied from a case reporter for the purposes, for example, of use in legal proceedings. Nonetheless, technology currently available, such as digital signatures, can provide a guarantee of authenticity such that there is no reason why one should not be able to copy an official online version and have an authentic copy. The technology, of course, would need to be implemented. As the federal government has taken a leadership role both with Public Key Infrastructure and with Government Online, any failure to provide authentic online versions should raise questions about the lack of political will to do so.

36 It is not clear whether copying for the purposes of a legal practice would constitute a commercial purpose. Certainly a good case could be made that it was. One might wonder what this means for the use of online materials by lawyers, particularly sole practitioners and those in small firms or in remote areas. These lawyers might not have easy access to collections of primary materials. To the extent that this, and the lack of authenticity of these versions, places on these individuals the onus and expense of obtaining official copies from other libraries, this may result in an

acknowledgment of the source of the work is included."[37] The Alberta courts provide a searchable database of the decisions of the Court of Appeal[38] and the Provincial Court of Alberta[39] from 1998 forward. The database does not contain decisions of the Court of Queen's Bench.

The Ontario Court of Appeal provides a searchable database of judgments from 1998 to the present.[40] The decisions of other courts in Ontario are not currently available online. Prince Edward Island provides a database of decisions of the Supreme Court of P.E.I. (appeal and trial divisions) from 1997 to the present[41]. The database allows searches by area of law or keywords, and can be limited to particular months in particular years. Neither the courts of Saskatchewan nor those of Manitoba provide decisions online; however, the Law Society of Saskatchewan does maintain a searchable database of decisions from the Saskatchewan Court of Appeal, the Court of Queen's Bench and the Provincial Court from 1994 to the present. The province of Quebec makes its judicial decisions available online through the SOQUIJ portal.

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unnecessary and unfair additional cost burden on users of legal services who are of limited economic means and/or who live in remote areas. Currently, law society libraries may help meet the need of those practicing in remote areas. For example, the Law Society of Upper Canada has a photocopying policy titled "The Access to Law Policy" (Approved by Convocation, 28 January, 1996). The policy states that: "The Great Library's comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal, and government proceedings, may be provided to users of the Great Library." The library also provides these materials by fax to those who are unable to access the library in person. It is this policy, along with the practices of the library that resulted in suit being brought by law book publishers. (See: *CCH Canadian Ltd. V. Law Society of Upper Canada*, [1999] F.C.J. No. 1647, at para 2). Even though law societies may seek to meet the needs of their members through similar forms of service, the costs of using such a service (even on a cost-recovery basis) along with the added time and inconvenience, seem to be an unnecessary barrier to access to primary legal materials.

37 Online: http://www.courts.gov.bc.ca/info/permiss.htm.

38 Online: http://www.albertacourts.ab.ca/webpage/ca/ca.htm.

39 Online: http://www.albertacourts.ab.ca/webpage/pc/pc.htm.

40 Online: http://www.ontariocourts.on.ca/appeal.htm.

41 Online: http://www.gov.pei.ca/courts/supreme/index.php3.

However, it is necessary to subscribe to SOQUIJ in order to be able to use it, and fees are charged based upon use of the databases.

Some provincial administrative tribunals also provide their decisions online; however, these are relatively few, and it is not predictable from one jurisdiction to the next what will be available. For example, while the Nova Scotia Human Commission makes decisions from 1999 to the present available online, few other provincial human rights commissions do the same. The Quebec Human Rights Tribunal has the most extensive database of decisions (from 1991 to the present).[42]

The situation in Quebec is quite different from that in other provinces because of the creation of SOQUIJ[43]. SOQUIJ was established by legislation in Quebec[44] and has as its mandate the provision of guaranteed access to Quebec case law.[45] More specifically, its mandate includes the duty to "promouvoir la recherche, le traitement et le développement de l'information juridique en vue d'en améliorer la qualité et l'accessibilité au profit de la collectivité"[46]. This mandate is interesting because it does not identify free public access as the primary public benefit; rather, it envisages a public benefit, which would flow indirectly from a generally improved quality and accessibility. The access envisaged here may be indirect for users of legal services, through improved access by lawyers, particularly those in smaller practices or more remote locations.

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[42] This tribunal is composed of judges of the Provincial Court of Quebec. These materials are made available in conjunction with LexUM. See online: http://www2.lexum.umontreal.ca/qctdp/en/. LexUM also makes available the decisions of the Professions Tribunal of Quebec (1998 to present) and the Conseil de la magistrature du Quebec. See online: http://www.lexum.umontreal.ca/qctp/index.html and http://www.lexum.umontreal.ca/cmq/index.html.

[43] Société québecoise d'information juridique.

[44] *Loi sur la société québecoise d'information juridique*, L.R.Q. c. S-20. Online: <http://www.soquij.qc.ca/prod/societe/equipe/loisoquij.html>.

[45] In the words of the Deputy Minister of Justice of Quebec, "Soquij est là avec un mandat clair, legislative de garantir l'accès à la jurisprudence." *Wilson & Lafleur Ltée* c. *Société québecoise d'information juridique*, [2000] J.Q. No. 1215, at para 21.

[46] Article 19.

SOQUIJ is required by law to publish and disseminate legal information in association with the '''Éditeur officiel du Québec. It is also charged with using information technologies to increase the access for the legal community and ordinary citizens. By law, SOQUIJ is provided with copies of all decisions of Quebec courts and tribunals[47], and performs an editorial function of selecting which decisions are considered to be of importance.[48] These decisions are then published, both in print form and in searchable electronic databases.[49] While SOQUIJ is not a commercial service in the strict sense, as it is a public agency[50], access to the materials is either through the purchase of publications or through paid subscriber access to the databases. A recent court decision loosened to some extent the control which SOQUIJ exercised over these key primary legal sources[51]. However, the prospect for free public access to the materials appears dim.

One significant problem with finding case law from provincial jurisdictions is the lack of any form of centralized access. Each jurisdiction offers different levels of access to court decisions. The current system reflects a vertical rigidity, which confines users to exploring case law on a province-by-province basis. While it is the case that courts in one province are not bound by the decisions of courts in other provinces, the fact remains that decisions of courts in other provinces which are on point may be persuasive authority. The existing online approach is antithetical to a use of case law that focuses on principles and concepts rather than jurisdictional impermeability. The problems of access are exacerbated in the case of tribunals. It becomes extremely difficult to know which tribunals in which jurisdictions are posting decisions. At this level any meaningful legal research is impossible using official web sites. Integrated commercial databases must still be used for any comprehensive electronic search. Although some basic information of use to members of the public may be available from free web sites, even a member of the

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47 Art. 1 of *Règlement sur la cueillette et la séléction des décisions judiciares*, c. S-20r0.1. Tribunal decisions are provided where there are written reasons for a decision and where there is an agreement with SOQUIJ for their publication.

48 Art. 21

49 Art 2 of the regulations.

50 Art 11 establishes that SOQUIJ acts as a mandatary of the government.

51 *Wilson & Lafleur, supra* at note 46.

public who wished to find out, for example, how labour relations boards, for example, treat a particular issue in different jurisdictions, would have a difficult and time-consuming task ahead of them. At best their efforts would provide only partial results. These results would be limited both by geography and by time, particularly since historical databases (even very recent history) are generally not available.

C. Centralized Access Points

Given the range of different sites available at the federal and provincial levels, and across different types of "law", including case law, statutes and regulations, having a single portal through which users can access the disparate sites would be of some value. In Canada, at least two such centralized sites exist[52]. One is the Access to Justice Network (ACJNet), and the other is LexUM. ACJNet is self described as:

> "an electronic community that brings together people, information, and educational resources on Canadian justice and legal issues. It uses new technologies to create and distribute products and services and to facilitate broad base consultations. ACJNEt is the only nationwide service dedicated to making law and justice resources available to all Canadians in either official language."[53]

While it is, in fact, not the only nationwide service of its kind, nonetheless, ACJNet holds out a particular access mission: "The primary purpose of this site is to give Canadian citizens access to Canadian federal and provincial statutes, regulations and legislative information."[54] ACJNet is sponsored by the federal Department of Justice, the Legal Studies Program at the University of Alberta, the Université de Montreal, and Web Networks, a private company.

LexUM is the other organization which has created a centralized site to provide access to legislation, regulations and case law from across the country. It also provides links to some international law resources, and links to other information of interest particularly to lawyers and

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[52] Excluding, for the time being, the pilot site CanLII.

[53] See online: http://www.acjnet.org/, (under "About ACJNet).

[54] Online: http://legis.acjnet.org/index_en.html.

academics. LexUM operates out of the Centre de recherche en droit public of the faculty of law of the Université de Montréal, and also operates the Supreme Court of Canada database of decisions. The site contains a central index of resources available, with links to the web sites which contain the information. ACJNet has a similar structure in terms of providing basic information, although it goes beyond what is provided at LexUM in that it also aims to make law accessible to the general public through providing value-added materials for non-lawyers. Thus, for example, it provides lesson plans on legal issues for schools, links to a variety of law-related online resources, and public legal education materials. Both LexUM and ACJNet operate bilingual sites.[55]

While both of these sites perform an important function of providing a central point of access to online legal materials, they have their own limitations. For one thing, the most that they can do is provide centralized links to the very diverse and widely distributed material online. They do not provide a unified, searchable database for these materials. Further, their own accuracy and reliability is vulnerable to the ever-changing nature of the sites to which they link. At the time of writing, for example, one site contained more links to legislative materials than the other, and some "dead" links were present. The risk of falling out of date in terms of the links provided is real.

Beyond these technical limitations, these sites are hindered by current attitudes towards online legislative materials and case law. Until governments are willing to provide authoritative electronic versions of legislation and regulations, and until courts are willing to do likewise with decisions, and until there is a means to provide historical material online, no free, publicly accessible online site is likely to be able to come close to replicating a library as a point of access for legal materials. This is unfortunate as, unlike law libraries, Internet connections are becoming widely available, and have the potential to be a very far-reaching tool for public access to legal information.

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[55] This does not mean that all of the content is bilingual. Neither site engages in translating primary materials. However the user interfaces and original text at each site is available in either French or English.

D. Commercial Services

Two primary[56] online commercial services exist in Canada that provide more comprehensive searchable databases of legislation, regulations, court and tribunal decisions from all jurisdictions in Canada. These services also provide value-added elements, including databases of law journal articles, digests, more global searches, news wires, headnotes and other materials. One service, Quicklaw, has been in existence since the 1980's, and is widely used by lawyers, law students and academics across the country. The second service, e-Carswell, has been recently developed, and it is not yet as widely used as Quicklaw. While both services are extremely useful for legal research by lawyers and academics, they are not particularly accessible to the general public, largely because of cost. Neither service provides free public access, which is not particularly surprising given that they are commercial ventures. The fee structure for use of the services is geared towards practicing lawyers, making the cost of these services too high for ordinary individuals. The cost would be prohibitive for most legal academics and law students, although Quicklaw has a history of providing free access to these constituencies. Recently e-Carswell has also provided free access to law professors.[57] In any event, neither service is committed to providing free access to any constituents, and current access conditions are subject to change. Both Quicklaw and e-Carswell make available, through contractual arrangements with publishers, material which is edited, selected or supplemented by law book publishers. Thus many of the cases in the databases have headnotes, and some databases reflect the selected cases found in particular published case reporter series. Because of agreements with publishers, these services are also often able to provide significant historical materials. Both services treat their databases in a proprietary manner. Although there are real issues about the extent to which they might claim copyright in any of the primary legal materials on their sites, even with value added features such as headnotes or indexing[58],

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[56] Maritime Law Book also provides an online service that is less extensive than Quicklaw or e-Carswell. (Online: http://www.mlb.nb.ca/). For the list of case reporters available through the Maritime Law Book site see: online: http://www.mlb.nb.ca/products.htm.

[57] This access was made available in September 2000.

[58] *CCH Canadian Ltd., supra* note 37.

users of the sites are constrained in their dealings with the materials by strict licence agreements.

Other digital materials are also being made available through law libraries by commercial publishers. These may include searchable collections of caselaw or statutory material, as well as other research-oriented tools. However, the complex licence arrangements for these products prevents any widespread remote access by users to these resources.[59] The rise in competition in the provision of commercial online legal services has meant that such services have actually become less comprehensive and more fragmented. Thus, when Maritime Law Book set up its service in competiton with QuickLaw, it pulled its titles from the QuickLaw database. The same has occurred with e-Carswell. As a result, even users of commercial services are unable to find a single centralized electronic source for Canadian case law.

II. Publicly Accessible Primary Legal Materials in Other Jurisdictions

There exist at least two strong models of free, publicly accessible legal research web resources outside of Canada: the Australasian Legal Information Institute (AustLII), and the Legal Information Institute at Cornell University (LII). As will be seen, these models were influential in the establishment of the newly created CanLII.[60]

AustLII was launched in 1995, and represents a joint effort between the Law Faculties at the University of Technology in Sydney, and the University of New South Wales. AustLII received its original funding primarily through academic sources, although it currently receives funds from other public sources. From its inception was intended to "provide a

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59 These commercial products have no shelf life. They are only available in the libraries as long as the licence fees are paid and the terms are complied with. As soon as a library discontinues a subscription to such a service, the materials "disappear" from their collection. In a time of shrinking library budgets, this form of commercial licence agreement poses some serious questions about continuity of access to some primary legal materials where provided through commercial services.

60 CanLII makes reference to these two Legal Information Institutes in their introductory materials. Online: http://www.canlii.org/about.html.

"research infrastructure" for research in Australian law, by the free provision of primary and secondary Australian legal materials on the World Wide Web, using innovative methods of hypertext and text retrieval".[61] This goal expanded when it was realized that "practising lawyers and administrators and community organisations used AustLII as much as academics and students"[62]. Not only have the objectives broadened, since its inception AustLII has expanded to include materials from other jurisdictions in Australasia. The objectives of AustLII have been not simply to provide free access to legal materials, but to develop software and other tools necessary to do this in an effective and research-friendly manner.[63] In addition, AustLII is a centre for research on legal computerisation. This research includes the use of artificial intelligence in document search and retrieval over the web, providing web resources to remote communities, and legal indexing[64]. AustLII has created most of its own key software and web interfaces, including their search engine and indexing software.

The main focus of AustLII is on primary legal materials such as statutes, regulations and case law from courts and tribunals. AustLII has been able to provide historical materials (up to a point) through access to the materials collected for an earlier government initiative called SCALE[65]. Thus for some materials at least, collections of case law date back twenty years or more. For reasons of limited resources, AustLII does not maintain a significant collection of secondary materials, with the exception of some specialized funded collections, although the site contains links to other home pages which may provide such materials. In fact, one of the stated goals of AustLII with respect to secondary legal materials is to provide an indexing of such materials, rather than to host the materials themselves on their site.

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61 Graham Greenleaf et al, "The AustLII Papers—New Directions in Law via the Internet" (1997) 2 The Journal of Information Law and Technology (JILT). Online: http://elj.warwick.ac.uk/jilt/LegInfo/97_2gree/.

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 SCALE is the online legal information service established by the Australian Attorney-General's Department. It can be found online: http://law.agps.gov.au/.

At the time of AustLII's inception, there existed: "no effective or affordable public access to legal information; a lack of competition in the provision of commercial products; and such products as did exist were largely the recycling of primary legal materials with little value-adding but very high prices."[66] The concerns which led to the establishment of AustLII were not simply for lay access to legal materials; access for lawyers in remote locations or in small law offices to affordable and adequate collections of legal materials was also identified as a problem.[67] There was also a concern that without setting a strong precedent for free and publicly accessible materials, the temptation for governments to create user-pay access to materials covered by Crown copyright might come about.[68] Many of these concerns are ones that are relevant in Canada.

An additional objective was to provide these materials in a usable form. That is, they would have to be authoritative versions, capable of citation. An online collection of materials is of limited use if hard copy volumes are required in order to actually rely upon or cite the materials in formal proceedings or research. To this end, AustLII has advocated the development of a medium- and vendor-neutral citation standard.[69] Beyond primary materials, AustLII also hosts some secondary materials such as law reform commission reports, and it aims to be "a central access point for Australian public secondary legal information."[70]

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[66] Greenleaf, *supra* note 62, at online: http://elj.warwick.ac.uk/jilt/LegInfo/97_2gree/green4.htm.

[67] *Ibid*.

[68] Graham Greenleaf et al, "A Restatement of AustLII—Moving Access to Law into the 21st Century" Online: http://www2.austlii.edu.au/~graham/AALS/Restatement-A.html.

[69] "A court-designated case citation standard would have many advantages: writers would be able to cite other decisions without making assumptions about the particular publications available to their readers; readers would be able to find decisions cited in whatever "court reports" they have at hand (print or electronic); the creation of automated hypertext links and searches would be enhanced greatly; potential copyright difficulties in citation use would be avoided; and the official citation for a case will be known as soon as a court or tribunal releases it." Greenleaf *et al*, *supra* note 62 at: online: http://elj.warwick.ac.uk/jilt/LegInfo/97_2gree/green4.htm. A citation standard of this kind has already been developed and proposed in Canada.

[70] *Ibid.* Essentially what this means is that it provides the necessary links to this information.

The success of AustLII has been such that it is being used as a model for parallel developments in the United Kingdom. This is with AustLII's explicit cooperation; part of its public access mission has it offering its key software to other jurisdictions that seek to build similar free, publicly accessible collections.[71] The British system, known as BAILII[72] (British and Irish Legal Information Institute) was launched in pilot form in the United Kingdom on March 14, 2000, with the Irish launch on April 5, 2000. At the time of its launch, BAILII consisted of fourteen databases from five jurisdictions.[73] It is projected that it is "entirely possible that an AustLII equivalent will be fully operational within two years."[74]

In the United States, the Legal Information Institute (LII) hosted at Cornell Law School serves as a central site for free access to a wide variety of U.S. legal materials. Like AustLII, the LII does not charge fees for access, nor does it allow commercial advertising. The LII is supported by Cornell Law School, grants, gifts, and by consulting work done by its directors.[75] Gifts have been solicited from users through online fund-raising campaigns. The self-declared mission of the LII is: "To carry out applied research on the use of digital information technology in the distribution of legal information, the delivery of legal education, and the practice of law"[76], and "To make law more accessible not only to U.S. legal professionals but to students, teachers, and the general public in the U.S. and abroad."[77] These objectives are similar to those of AustLII and marry a free public access initiative with goals of legal research and the development of technology. Like AustLII, the work of the LII involved not simply acquiring and providing free online legal materials, but also involved working on developing a useful format and functionality for legal documents, and developing software tools for searching and sorting legal documents. LII also provides a free e-mail current awareness service, as

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71 For example, CanLII has also adopted AusLII's SINO search engine.

72 Online: http://www.bailii.org.uk.

73 Laurence Eastham, "Freeing the Law—An Acronym Waiting to Happen." (2000) 31 The Law Librarian 30 at 33. The five jurisdictions are: Ireland, Northern Ireland, England, Wales and Scotland.

74 *Ibid.*

75 Online: http://www.law.cornell.edu/lii.html.

76 *Ibid*.

77 *Ibid.*

well as other e-mail bulletin services. LII has also developed disk-based products which are available to the public and which are used in high schools and colleges in the U.S.[78]

III. "Freeing" Canadian Law

Although strong models exist outside of Canada, and although the Centre de recherche en droit public has apparently shared many of the goals of AustLII and Cornell's Legal Information Institute, progress in Canada has been painfully slow to date. The recent development of a neutral citation standard has been a positive step forward[79], and the recent launch of CanLII offers some hope. However, there remain significant technical barriers to success that include: lack of standardized document formatting, lack of historical materials in electronic form, and the need to negotiate across a range of governments. More significant barriers have to do with the level of commitment to the idea of free public access, and perhaps even to the lack of consensus around the concepts of public and access.

A. Developing a philosophy of access to legal materials in Canada

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78 *Ibid.*

79 *Neutral Citation Standard*. Adopted by the Canadian Judicial Council, June 8, 1999. See online: http://www.lexum.umontreal.ca/citation/en. It is no accident that LexUM has taken a leadership role in creating and implementing this standard. A neutral citation standard is essential to the development of workable electronic legal research materials. It enables proper citation of court and tribunal decisions regardless of format. As noted by the founders of AustLII, "One of the most pressing needs in the development of a policy for public legal information is for a method of citing the decisions of courts and tribunals that is independent of any particular publisher or particular medium of publication." (Greenleaf, *supra* note 62, at http://elj.warwick.ac.uk/jilt/LegInfo/97_2gree/green4.htm. The main sponsors of the Citation Standard are indicative of the broad range of interests in creating such a standard. The sponsors are: Department of Justice (Canada), Department of Justice (Quebec), Canadian Judicial Council, Fonds pour la formation de chercheurs et l'aide à la recherche (FCAR), Federation of Law Societies of Canada, Legal Research Network, Wilson & Lafleur Ltd, Canadian Association of Law Libraries and Quick Law.

Numerous justifications have been put forth in support of the view that the public has a right of access to legal materials. Some of these points may seem quite obvious. Clearly, if individuals are to be bound by and held accountable under the law, they are entitled to know what the law is. The caution from criminal law that "ignorance of the law is no excuse" is often cited to bolster this view.[80] Beyond being bound by criminal laws, however, it is also argued that democracy and constitutionalism require citizen access to the law and its institutions:[81]

> Dans un état de droit, où chacun est soumis aux lois et où chaque individu est regi par elles, par des règlements et, faut-il le reconnaitre, par le droit prétorien, il est essentiel que les citoyens soient en mésure d'échanger et de critiquer librement l'ensemble de ces règles. Si l'établissement d'une veritable démocratie commande que les citoyens doivent pouvoir s'éxprimer et critiquer librement les institutions qui les régissent, participant de ce fait à leur evolution, il nous apparait evident que ces échanges et ces critiques doivent également viser les fruits de ces institutions. Pour nos fins, céla fait évidemment référence aux décisions judiciares.[82]

In the view of the Court of Appeal of Quebec, the Quebec government was reacting to its obligation to make public the law when it enacted the legislation that established SOQUIJ:

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[80] Peter W. Martin argues that "Better access and improved communication have been consistent targets throughout the history of printed law—from Sir Edward Coke who translated the classic Littleton's Tenures from "Law French" into English so that it might be understood "seeing that ignorance of the law is no excuse". Peter W. Martin and Jane M.G. Foster, "Legal Information—A Strong Case for Free Content, An Illustration of How Difficult "Free" May be to Define, Realize, and Sustain", (2000). Online: http://www4.law.cornell.edu/working-papers/open/martin/free.html.

[81] In the words of the Court of Appeal for Quebec: « il est neamoins utile de souligner l'importance dans notre societe d'un libre acces aux procedures et aux decisions judiciaries» . (*Wilson & Lafleur*, *supra* note 45, at para 23).

[82] *Ibid*., at para 25. (Commenting that free and open discussion in a democracy of the governing institutions should include the ability to freely and openly discuss or criticize the fruits of these institutions.)

> « en adoptant la Loi sur la société québécoise d'information juridique, l'Assemblée Nationale a clairement reconnu son
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> obligation—fondamentale et d'intéret public—d'assurer la diffusion de la jurisprudence d'ici. Considérant les principes démocratiques, la reconnaissance legislative de ce devoir allait de soi.[83]

The democratic imperative behind the dissemination of the law is also emphasized by one of the co-founders of LII: "Efforts to make law more accessible, more understandable, more clearly expressed are ultimately efforts to make law more effective and in a democracy, more accountable."[84] In *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, the defendant Law Society also invoked constitutional values as a public policy argument against extending copyright protection to cases reported in commercially published case reporters. Counsel for the Law Society argued that the public interest lay in the "due administration of justice, in maintenance of the rule of law, and in the enhancement of basic constitutional values."[85]

It has also been argued that primary legal materials and information "which is produced by courts and governments, ought to be in the public domain and it ought to be something which ordinary people can access."[86] Similarly, it has been argued that: "public policy should aim to

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83 *Ibid.,* at para 30.

84 Martin et al, *supra* note 81.

85 *CCH Canadian Ltd., supra* note 36, at para 68. The judge in the case was not particularly persuaded by this argument, at least with respect to the subsistence of copyright in the defendant publishers case reports: "I am not satisfied that the role of the defendant, let alone of its Great Library, is such as to entitle it to override any copyright interests that the plaintiffs have or might have in the works in issue. Put another way, I am not satisfied that the public interest in the due administration of justice, the maintenance of the rule of law and the enhancement of basic constitutional values through relatively equal, unrestricted access to the law would be significantly impaired through recognition and enforcement of any copyright interests that the plaintiffs might have in the works in issue." (at para 168). Nevertheless, the court did not find copyright to subsist in the headnotes or other value-added notations in the case reports published by the plaintiffs.

86 Eastham, *supra*, note 74, at 34. There really are two issues embedded here—the first is the issue of whether free access should be available to the public in the sense of easy, open access. The second turns on the other meaning of free. In Canada, and in

maximise access to public legal information because this supports access to justice… and supports the rule of law."[87] The rule of law has been asserted by others as a justification for widespread dissemination of primary legal materials. Writing on Crown copyright, W.T. Stanbury noted: "The social benefits of the rule of law (effected by statutes, regulations and court judgments) requires the widest distribution of the content of the laws, etc."[88] While the benefits inherent in wide distribution of legal materials are highly touted, issues of cost and control remain. These arise largely in the context of debates around Crown copyright.

B. Crown Copyright and Access to Primary Legal Materials

The conceptions of the strong public interest inherent in public access to primary legal materials seem somewhat at odds with the continued existence in Canada of Crown copyright. Crown copyright essentially provides for copyright to be held by the Crown (federal or provincial), in works "prepared or published under the direction or control of Her Majesty or any government department."[89] In addition, it provides for a perpetual right in the Crown to legislative enactments and judicial decisions.[90] David Vaver is critical of the anachronistic nature of Crown

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some other commonwealth jurisdictions, crown copyright raises problems of access in the sense that government retains control in the form of a perpetual copyright over legislation and judicial decisions. In the United States, the position is quite the contrary—legislation and court decisions are expressly part of the public domain, and are not subject to copyright restrictions.

[87] *Ibid.*

[88] W.T. Stanbury, "Aspects of Public Policy Regarding Crown Copyright in the Digital Age" (1996) 10 I.P.J. 131, at 136. In Canada, Jacques Frémont has argued that the jurisprudence of the Supreme Court of Canada supports the view that access to primary legal materials has a fundamental role to play in democratic governance. (Jacques Frémont, "Normative State Information, Democracy and Crown Copyright", (1996) 11 I.P.J. 19.

[89] *Copyright Act*, R.S.C. 1985 ch. C-42 as amended by R.S.C. 1985, c.10 (1st Supp.); c.1 (3rd Supp.); c. 41 (3rd Supp); c. 10 (4th Supp.); S.C. 1988, c. 65; 1990, c. 37; 1992, c. 1; 1993, c. 15; c. 23; c. 44; 1994, c. 47; 1995, c.1; 1997, c. 24; c. 36; 1999, c. 2., s. 12.

[90] Section 12 of the *Copyright Act* establishes Crown copyright: "without prejudice to any rights or privileges of the Crown….". The perpetual copyright in legislation and

copyright, and notes that with the exception of the UK, Ireland and Italy, no European state claims to protect its official texts in that manner.[91] In the United States, there is no equivalent to Crown copyright, and "judges there have since the nineteenth century asserted that the people's laws belonged to the people."[92] The lack of Crown or state copyright in the United States is described as "a matter of public policy".[93] It is also confirmed in law.[94]

One purported justification for Crown copyright is particularly relevant in the context of online materials. Crown copyright has been asserted as a means of ensuring some form of quality control over print versions of the law. This quality assurance could be argued to be essential to maintaining order. The same concerns with accuracy are perhaps reflected in the host of disclaimers attached to all online government sites providing primary legal materials. Yet apart from the fact that technology does exist to ensure the integrity of such documents, it is difficult to see any basis for the anxiety over quality at this point in history. As Vaver notes, "Government control or licensing does not guarantee accuracy any more than unlicensed private sector publishing guarantees inaccuracy."[95]

In spite of the anachronistic nature of Crown copyright, government control over its published materials also offers the possibility for governments to charge money for any reproduction of the materials. In many Commonwealth jurisdictions, Canada included, where Crown

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court decision is said to flow from Crown prerogative predating the enactment of the *Copyright Act*.

91 David Vaver, *Copyright Law*, (Toronto: Irwin Law, 2000) at p. 93. The French situation can be described as follows: "since justice is done in the name of the French people, judgments and orders written by judges may be reproduced freely." (Andre Francon, "Crown Copyright in Comparative Law: The French Model, Continental Europe and the Berne Convention", (1996) 10 I.P.J. 329 at 335. See David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 93.

92 *Ibid.*

93 *Ibid.* For a summary of the public policy reasons, see David Vaver, "Copyright and the State in Canada and the United States", (1996) 10 I.P.J. 187 at 192-195.

94 See s. 105, *Copyright Act 1976*.

95 Vaver, "Copyright and the State", *supra* note 96, at 200. Vaver also notes that in the United States, where such material is in the public domain, there has been no great crisis brought about by inaccuracies. (*Ibid*. at 213).

copyright exists, it forms a potentially serious barrier to free dissemination of the primary sources of law. As Martin notes,

> Stripped of all nuance, this is a legal doctrine that law, including legislation, agency rules, and the opinions of judges, is covered by copyright, with that copyright held by the government. Those who would publish law in any form, print or the new digital alternatives must secure permission. And that permission can be conditioned on payment of royalty, flatly denied, or deliberated over interminably. This approach cannot honestly be attributed to a single rationale, but it might be represented by the thought that legal texts… are too important for the government to allow uncontrolled publication. The revenue and other returns flowing from "official" or "authorized" printers and the vested interests of public printers may be a significant reason for the endurance of this doctrine.[96]

The danger of governments seeing a potential financial windfall in licensing fees for Crown materials is a matter of some concern.[97] Yet, as Stanbury notes, the costs of creating these materials are inherent in the judicial and parliamentary system, and are not linked to any economic incentive based on sales or licence fees: "Raising the government's return on its copyright materials will not call forth more supply of intellectual effort unless government begins to produce copyright materials as a business activity rather than as a by product of its traditional activities."[98] Thus as a matter of copyright policy, there are strong arguments against governments charging for use of their copyright materials.

The Reproduction of Federal Law Order is a recent federal government attempt to mitigate the impact of Crown copyright without having to actually abolish it. The Order allows for the reproduction of

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96 Martin, *et al*., *supra* note 81. David Vaver also notes that Crown copyright dates back to "seventeenth-century Britain, when talk of treason and sedition was rife, [and] the power was asserted as a form of censorship over everything published." (Vaver, *Copyright Law*, *supra* note 94, at 93.) It is worth noting, however, that in Canada at least, the federal government has permitted reproduction of case law and statutory materials by commercial legal publishers without charge. (Stanbury, *supra* note 89, at 134).

97 Stanbury, *supra* note 89, at 138.

98 *Ibid.*

primary legal materials in federal jurisdiction without need to seek permission or pay fees. However, the Order is limited in at least two important respects. It can be revoked at any time, and it can only apply to materials under federal jurisdiction. To date, no province in Canada has enacted a comparable order.[99] In particular, Québec, through SOQUIJ, seems willing to fight in court to retain its own monopoly over primary legal materials, particularly judicial and tribunal decisions.[100]

In his article on Crown copyright, Frémont argues that the so-called information age has changed the relationship between the Crown and primary legal materials.[101] He takes the view that because:

> "[…] the normative growth of the State seems to follow an exponential curve, it becomes, if not squarely unconstitutional, at the very least democratically unfair to submit citizens to an increased duty to keep informed about their duties, without correlatively imposing on the State a duty to disseminate efficiently and at minimal cost its normative information. In this context, any restriction to the free circulation of State information invoking Crown copyright appears to violate the spirit, if not the letter, of the rule of law."[102]

Frémont's argument is thus more nuanced than a simple call for the abolition of Crown copyright as a (potentially menacing) anachronism. Rather, he focuses on the free dissemination of primary legal materials as being integral to the State's constitutional obligations towards its citizens.

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[99] According to David Vaver, Ontario announced in 1999 that it would follow suit. However, it has not yet done so. *Ibid.* at 98.

[100] *Wilson & Lafleur v. SOQUIJ* [1998] A.Q. no. 2762. Frémont notes that it is paradoxical that in Quebec: "tourist information is massively distributed on the internet . . . [while] neither laws, regulations nor court judgments interpreting them are currently accessible without considerable financial investment." (*Supra,* note 89 at 32.)

[101] Frémont, supra note 89, at 31. Frémont writes: "This duty of the State to disseminate the norm, as is the case for the duty of the individual to inform him or herself, cannot be understood in the same way today as in the times of Queen Anne."

[102] *Ibid*.

C. Defining the Public

In any discussion of providing free public access to legal materials, a definition of the "public" is crucial. This is so because it helps to focus on an understanding of who is being served and what their needs might be. This in turn can shape the nature of the service provided.

If one were to consider the current market for legal materials, one might quickly assume that the primary public for such materials is composed of lawyers, academics, law students, and public officials. Yet that subset of the broader public forms the public for these materials not simply because they are the part of the public most interested in legal materials, but because they are the subset which needs the materials for the purpose of work and profit, study, or for day-to-day operations. They are also a subset capable of paying for access to the rather costly materials.[103] In a context where private publishers have come to dominate law publishing, the idea of a "public" can easily be conflated with that of a "market". As the directors of initiatives such as AustLII and the LII have discovered, the "public" for legal materials is much broader once they become free[104], and broader still once they are not constrained in their scope by market forces. As expressed by a founder of the LII: "In 1995 it was still possible to make the assertion that most use of published law products was made by lawyers. That may no longer be so, if it ever was, and the distinctions that made such a claim possible are breaking down."[105]

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[103] Although services such as Quicklaw and e-Carswell provide free access to legal academics, with Quicklaw also providing free access to law students.

[104] Note that with both AustLII and LII, the initial audiences were broader than anticipated. The user statistics for AustLII are: "Educational institutions (about 30%), the legal profession and business (25%), community organisations (15%), government (10%), and 20% from overseas." (Federation of Law Societies of Canada, *Toward A Business Plan for a Canadian Virtual Law Library*, March 2000, at 15. Online: http://www.flsc.ca/english/committees/technology/reports/businessplanmarch2000.pdf.) Similarly, "The Cornell digital law library reports over 2.25 million hits a week with a very strong audience beyond legal professionals and legal educators." (*Ibid*., at 15).

[105] Thomas R. Bruce, "Some thoughts on the Constitution of Public Legal Information Providers". Online: http://www4.law.cornell.edu/working-papers/open/bruce/warwick.html.

Not only is the "public" interest in legal materials much broader when not constrained by issues of access and cost, but the range of "law" of interest to this public is perhaps also broader: "our definition of 'public access' to law has implicitly but dramatically changed. We must now imagine an expanded public seeking smaller and more relevant granules of information, and seeking it via the Internet."[106] This redefining of the "public" for legal information is important, both to appreciating the need and demand for free public access, but also in shaping any system of free public access to serve this broader public which may not have been well served in the past by commercial legal publication services.[107] Finally, although law publishing has tended to focus on domestic markets, the notion of "public" for freely accessible materials may be much broader. The notion of "public" for both AustLII and LII goes beyond national boundaries; both sites see the public they serve as extending to include all members of the global community with an interest in the respective laws and legal systems of Australia[108] and the United States.[109]

The importance of defining the public for the purposes of a free, publicly accessible online source of legal materials is crucial. The discussion document for a business plan for a VLLC, prepared for the Federation of Law Societies of Canada, is disturbingly lacking in this regard. In the statement of vision for the VLLC, the first item related to access for lawyers and legal professionals, while the fifth and final point was "free access to the laws and judgments of Canada by Canadian citizens through some form of public access system such as a component of the VLL Internet site or terminals in public libraries".[110] In this vision

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[106] *Ibid*.

[107] As noted by Bruce, "large electronic publishers still lose comprehensiveness as one moves lower and lower in the hierarchy of the courts—and closer and closer to the concerns of the average private citizen" (*Ibid*.).

[108] AustLII itself has gone multi-jurisdictional, reaching out to include legal materials from Australasia.

[109] The discussion paper for a VLLC prepared for the Federation of Law Societies of Canada (*supra*, note 105) at one point described the pubic for such a site as being Canadian citizens. This was either an inexplicable attempt to limit access to the site, or an indication that the conception of the public was not well thought through.

[110] *Toward a Business Plan*, *supra*, note 105, at 5-6. It is worth noting, however, that the document is internally inconsistent to the extent that the concept of free public access takes on greater and lesser degrees of importance at different points in the document.

the “general” public appears is a secondary to the legal community. The document went on to refer to “some form of public access system”, which suggested that something more limited and formalized than the Internet was envisaged. In addition, the VLL document set a priority for materials on the proposed site which in turn reflected the priorities of the practising bar:

> As a starting point it is suggested that the VLL focus on the primary statutory and regulatory enactments (federal, provincial and territorial), the reports of decisions from the Supreme Court of Canada, the Federal Appeal Court, and the Appeal courts of each provincial and territorial jurisdiction. It could then expand to include the reports of decisions in the lower courts and from tribunals, commissions and other judicial bodies[111].

This top-down hierarchical approach certainly favours the interests of the legal community over a broader understanding of the “public”. Bruce, for example, notes that the commercial databases Lexis and Westlaw also favour this approach: “certainly neither Lexis nor Westlaw is a good source of the more localized legal information that impacts private citizens far more directly and frequently than the rulings of distant if important appellate courts.”[112]

SOQUIJ also presents an interesting case through which to explore the notion of the “public” for legal materials. Article 19 of the legislation establishing SOQUIJ sets out its mandate to promote research and the development of legal information “en vue d’en améliorer la qualité et l’accessibilité au profit de la collectivité.” Yet access that is only available for a fee is not likely to benefit the general public. It is more likely to benefit lawyers in small firms and more remote locations by providing them with access equivalent to that of lawyers in more urban areas. If that is the case, then the public benefits only indirectly, through the better access of their legal representatives, should they choose to retain them and pay for their services. One could argue that this view of public access is highly paternalistic.

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[111] *Ibid*., at 6.

[112] Bruce, *supra* note 106, at 4 of 29.

D. Access

Public access to legal materials has always existed in one form or another. An argument for greater or different public access suggests a need for something other than what has traditionally been provided. Typically, federal and provincial governments distributed copies of their statutes and regulations to public libraries as part of their public information program. Law libraries would also make their much broader collections of primary legal materials available, at least on a limited basis[113], to members of the public. However, conducting a search for specific legal materials in hard copy form could be a daunting task without the assistance of librarians. Libraries, however, would vary greatly in terms of available human and book resources, and based on geographic location. Access to law libraries is further limited to those who live near one of the small number of law libraries in Canada, or to those who were able or willing to travel some physical distance to access those materials. Access to document delivery services operated by libraries to provide materials to remotely located areas would depend not only on the individual's ability to pay for the service, but also on the individual's ability to indicate, from a remote location, precisely what materials they desired.

The limited nature of "traditional" forms of access can be illustrated by one of the surprising consequences of "freeing" the law discovered by both AustLII and the LII at Cornell. The availability of searchable online databases of primary legal materials has given rise to new privacy concerns that did not exist when the same materials were available on library shelves or in commercial online databases. The concerns arise because of the possibility of searches by surname. While names are currently reduced to initials in published versions of some family matters and young offender cases, the widespread free distribution of materials online could exposes a great deal of other activity by individuals to widespread public view. The response of both AustLII and LII to this issue has been to shift the burden to government and the courts

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[113] Lending privileges with respect to primary legal materials are generally not extended. This means users either have to remain on site to use the materials, or must photocopy them.

to ensure that appropriate levels of citizen privacy are maintained.[114] Nonetheless, the fact that the issue has arisen demonstrates that the level of access created by a site providing free online primary legal materials far exceeds that provided by traditional models.

It is reasonable to ask whether, even if a need for greater public access to legal information were established, online legal information would constitute an appropriate response to this need. If public access to computers and internet connectivity were poor, greater online access would not offer significant public benefits. Canada is currently rated very highly in terms of connectivity worldwide.[115] Recent federal government initiatives have also resulted in every public school in Canada having some form of internet connectivity. More and more households in Canada have connections to the internet, and the growing availability of high speed telephone and cable access has improved the quality of connectivity for many households. In addition, the vast majority of public libraries in Canada have internet connections, and thus access is also available through these public facilities.

The availability of free online primary legal materials would not close off existing traditional modes of public access. It would simply open another avenue. Unlike certain commercial services, libraries would also be able to count on continued access to a reliable and (ideally) authoritative collection of primary materials, thus making choices about other supplemental commercial collections and services easier. A centralized Internet site has other advantages too. Currently there is a vast amount of legal information on the World Wide Web of widely divergent quality. A centralized Canadian site on a Legal Information Institute model can provide some order in the chaos, arguably improving the quality of the kind of access which will inevitably exist in an incoherent and piecemeal form.

In 1995, Harry Arthurs raised a number of concerns about the impact of the "knowledge explosion" on the legal profession. With respect to computer access to legal information, he noted:

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[114] This is an issue for other forms of publicly accessible government materials as well, as they are brought online.

[115] Industry Canada statistics show that in 1999, 49% of Canadians were accessing the Internet. Canadian Internet Commerce Statistics, Summary Sheet. Industry Canada, August 22, 2000. Online: http://strategis.ic.gc.ca/using/en/e-comstats.pdf?front=e.

> The advent of on-line searches will not guarantee equal access to legal knowledge, much less fair legal outcomes. On the contrary, the growing importance of computers may even reinforce existing tendencies within the profession to an unequal distribution of capital, power, knowledge, clienteles and rewards. Soon we may have a two-tier profession: those who can afford to log on and those who cannot.[116]

In the absence of free, online public access, these concerns remain very real today. Commercial online services are expensive and the costs are borne much more easily by large firms than by small. Commercial databases, search tools and compilations are also very expensive, and as noted earlier, can only continue to exist in a firm's collection so long as the ongoing licence fees are paid. As publishers move away from print versions[117] to CD ROM versions of certain materials, the cost burden becomes even more severe for libraries and law firms. In this context, free, publicly accessible online primary legal materials provide a guarantee of general public access that benefits not only smaller and more remote law firms, but also the larger public. It also places a check on the ability of commercial publishers to monopolize legal information.[118]

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116 Harry Arthurs "A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?" (1995) 18 Dalhousie Law Journal 295, at 308.

117 To this point I have not given much discussion of the access provided by commercial law book publishers. This is largely because their products have not been geared towards or suited to those who are not legal professionals, or in the case of some publications, entrepreneurs. Materials are typically priced well beyond the means of an average consumer, and they generally presuppose a significant level of legal knowledge. They are also often in areas of little relevance to ordinary consumers, ad may not be generally available in bookstores. More recently, some publishers have aimed publications at, if not the "general" public, at least at a public that may not have particular legal training. Irwin Law, for example, publishes a series of books called "Essentials of Canadian Law". While suitable for reference by legal professionals, these books are also accessible to some non-lawyers

118 It still leaves room for publishers to develop value-added legal materials. The VLL document explores the relationship of commercial publishers to any such venture, clearly acknowledging that publishers are likely to feel threatened. The document presents the argument that: "Publishing companies will be empowered to move beyond the simple fragmentation of legal materials into those which are offered by Company A versus those which are held by Company B. These firms must meet the challenge to move to a competitive and lucrative market environment which focuses

To this point, I have been discussing access as if it simply means the ability to bring materials to the party seeking the materials (or the seeker to the materials). However, there are other elements to the concept of access that are worth considering. In this paper I have made numerous references to cost issues. The cost of gaining access to legal materials can be a significant barrier both for ordinary members of the public, community or advocacy groups, whether they seek the information on their own or through the agency of small law firms, sole practitioners or lawyers in remote areas. In the current context, such costs can be high. Physical access to law libraries may involve time costs for travel as well as the underlying costs of transportation. Document delivery is also expensive. The lack of access to trained information professionals (such as in a larger firm with its own library) can also increase costs, and fees for access to commercial online databases are not insignificant.

While free, publicly accessible primary legal materials online might well reduce costs of access to legal materials significantly[119], the reductions in cost are only meaningful if such online materials can be relied upon as authoritative, are relatively complete and comprehensive, and are not bogged down in a tangle of disclaimers and copyright limitations. The costs of information intermediation may be reduced or may remain depending on how the material is made available. Hypertext markup, linking to relevant companion materials[120], and user-friendly search engines can add significant value to such collections. Finally, value-added materials such as instructive explanatory texts or public legal education materials may also improve quality of public access.[121]

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on the utilisation, interpretation, reorganisation, analysis, software tool development and management of this judicial raw material." (*Toward a Business Plan*, *supra* note 105, at 16).

[119] Connectivity would be available for many from home, or if not from home, though public libraries or schools. Of course, the costs for printing remain, though they may well be less than the traditional costs of photocopying, particularly if the printing is done on one's home computer.

[120] Of course, there is a risk of relying on this kind of service. Nonetheless, for a certain segment of the public it may well be better than nothing.

[121] Access must also be to the kinds of information required by a more general public. Thus, for example, tribunal decisions may well be more important than decisions from appellate level courts.

E. Access and the Legal Profession

Public access to primary legal materials cannot really be discussed without also discussing the issue of public access to legal services. One justification for traditional, limited modes of distribution of primary legal materials (and their concentration within law libraries) was the view that the public could only have meaningful access to these materials via the intermediation of trained legal professionals. While this may still be the preferred or optimal mode of access, it is unrealistic to believe that this form of access is a reality for all but a subset of the "public". Recent publicity around the shocking state of legal aid in this country reveals that only the poorest of the poor have access to legal aid, and then only for criminal and some family law matters.[122] A significant number of poor, working class and even middle class households cannot afford access to legal services, nor are they eligible for legal aid. This state of affairs has given rise to a number of "alternative" paralegal services, including immigration consultants, paralegal services, title-searching services, self-help books and kits, and more recently, online delivery of standard form contracts for a very wide variety of legal circumstances.[123] Clearly, the public is becoming more and more reliant upon alternative sources of legal information. While there are perhaps legitimate concerns about giving widespread access to un-intermediated primary legal materials, it would be arrogant to assume that individuals are better off with no legal information than with that gathered by themselves.

The legal profession has always jealously guarded its "turf", and alternative modes of delivery of legal or paralegal services have faced challenges from the legal profession in the past. The role of the profession in relation to any free online distribution of primary legal materials thus deserves some attention. It was the Federation of Law Societies of Canada which commissioned the preliminary study in relation to a Virtual Law Library for Canada, and that early document gave some cause for concern. In spite of the core vision espoused in the VLL document, the document itself raised a number of red flags that highlighted both the need for a clear and consistent vision of the public and public access, and the

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[122] See Melina Buckley, *The Legal Aid Crisis: Time for Action*, (Canadian Bar Association, 2000). Online: http://www.cba.org/Advocacy/PDFfiles/Paper.pdf.

[123] For a very small sample of what is available, see online: http://www.weblaw.ca; http://www3.computan.on.ca/bukhari/forms.html; http:// www.canlegal.ca.

shape such a project could take depending on the interests it was primarily designed to serve.[124] Thus, while both AustLII and LII were started with the express goal of providing free public access, and they operate to serve that goal, the VLL document stated:

> It is an ambitious and altruistic goal to allow the public access to detailed statutes, laws, regulations, and judgements. The principle may be wanting when candled against the practice. There is a cost to developing a site that is publicly comprehensible let alone publicly accessible. However, without a very strong public access and public education focus the VLL will quickly be labelled as a tool for lawyers only. Should that happen, it would likely close some funding doors which are aimed at providing funds for projects that have a broad based utilisation and impact.[125]

This rather disturbing statement clearly illustrates the problem of leaving such a venture solely in the hands of the legal profession.[126] "Free public access" appears quickly reduced to the means by which some sources of funding will be accessed. Of course, as the document notes,

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[124] Although the VLL document makes repeated reference to free public access, there appear to be a number of qualifications or verbal hesitations in this regard. At one point the document stated: "To the extent possible the core vision includes the desire for free and open access." (*Toward a Business Plan*, *supra* note 105, at 8) This statement is qualified enough to raise some concerns. The authors go on to suggest that an exception to the rule of no-cost public internet access "may exist for downloaded materials from the site which are used in the day-to-day business of society non-members for situations requiring "official" documents/citations." (*Ibid*). Not only is it difficult to see how users of a free and public site could be charged a) based on their non-member status and b) based on the intended use of the downloads, it is somewhat disturbing to note that it would be those acting in "competition" with lawyers who would be required to pay for access. This could include unions, professional associations, business, paralegals and ordinary citizens.

[125] *Toward a Business Plan*, *supra* note 105, at 8.

[126] A recent publication suggests that lawyers may have a self-interest in not "freeing" the law: "Internet technology may be a threat to the legal profession as a whole. The Internet, in particular the World Wide Web, has put access to information much more easily in the hands of any individual with Internet access – an ever-increasing number of people." *The Future of the Legal Profession: The Challenge of Change: A Report of the Young Lawyers' Conference*. (Canadian Bar Association, August 2000) at 35.

concern about losing these sources of funding "is only an issue if the societies will seek funding outside of the profession and the foundations."[127] In such a context, free public access becomes, not the starting point for the venture, but a vulnerable aspect of it. Cognizant of the problems inherent with working on such a venture with private sector interests, Cornell's LII strives to carry out its activities "in partnership with but not under the control or direction of such other key actors as law firms, bar associations, public law making and applying bodies, commercial publishing and other academic institutions."[128]

In the end, it is also important to remember that not all justifications for public access to legal materials are linked to the need for legal services. There is also the issue of access to the stuff of popular discourse about law and legal institutions. For example, high profile cases that get discussed on the news, Supreme Court of Canada decisions which affect lives, or which cause concern, outrage or public debate, all become the subject of popular discussion and debate. While journalists provide some form of infomediation with respect to court decisions and legislation, there is no justifiable reason why members of the public should not have ready access to the materials that are at the heart of such debates.

IV. The Virtual Law Library of Canada & CanLII

In March 2000, a subcommittee of the Federation of Law Societies of Canada published a document titled "Towards a Business Plan for A Canadian Virtual Law Library". The purpose of this document was to: "review the current literature, examine examples of digital law libraries in other countries, interview potential stakeholders, and develop a beginning business plan for a Canadian Virtual Law Library."[129] The "overriding, primary objective" of this proposed VLL is to:

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[127] *Toward a Business Plan*, *supra* note 105, at 8. Note the next passage in the documents states: "Furthermore, it is unlikely that federal and provincial courts would be as open to providing their materials at no costs to a VLL site that did not have a strong public access approach." (at 9).

[128] Online: http://www.law.cornell.edu/lii.html.

[129] *Toward a Business Plan*, *supra* note 105, at p. 4

> "provide an up to date, public, single source of authentic copies of primary legal materials, historical and current, for all jurisdictions which can be searched and researched at the same time from one place, and the results downloaded as the authoritative version of e.g., a judgement or a statute."[130]

In this respect, the VLL shares some of the objectives of AustLII and LII. The ability to access current and authoritative material from a single internet site and to have these materials made searchable is a key goal certainly, of AustLII. The objective does not extend to secondary materials that "are considered the business of private sector publishers."[131]

According to the VLL document, the initial primary materials content of the VLL would include: statutes and regulations of federal, provincial and territorial governments, municipal by-laws, court and tribunal decisions and First Nations Band by-laws and other acts of governance. The site, it was envisaged, could later be expanded:

> "to include legal materials such as research documents, rules of court, lists of commercial publisher offerings, and links, digital catalogues, interlibrary loans, journal access, and reviews, papers and articles. Links to other sites in this country and around the world would be included."[132]

This core vision for a Canadian VLL matched those espoused by LII's such as Cornell's and AustLII.

The concept of a VLL for Canada was given shape by the recent launch of CanLII. CanLII is a pilot project operated by LexUM with the support of the Federation of Law Societies of Canada.[133] The choice of

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[130] *Ibid*., at 5

[131] This is similar to AustLII except to the extent that AustLII provides access to government source secondary materials such as law reform commission reports and other government documents. The importance of these materials in a public-oriented legal information institute may be quite different from their importance in a site oriented towards the legal community (see discussion of the public, *infra*).

[132] *Toward a Business Plan*, *supra* note 105, at 6.

[133] The Federation of Law Societies met in August 2000 and adopted "CanLII's Road Map". The nature of the partnership arrangement is unclear, however, and it remains to be seen to what extent the law societies will influence the orientation of the site.

realizing CanLII through LexUM, with its experience and its university affiliation and history of commitment to free public access is encouraging.

Currently CanLII is a very limited LII, largely because of the barriers that still remain in Canada surrounding free access to primary legal information. CanLII has gathered the actual digital collections from many of the federal, provincial and court operated sites discussed earlier, and housed them at their site. This permits them to provide a search engine[134] that will allow for universal searching of these collections as a whole, or by particular jurisdiction or collection.

The collections offered through CanLII are as incomplete as those discussed earlier, largely because they are based on materials available on existing online court and government sites. Most date back only a few years, and many courts are not represented.[135] Further, some databases of court judgments are incomplete. While the information on the CanLII site indicates that negotiations are underway with other courts and provinces to house the information on the CanLII site, there is no timeline to indicate when this information will be available.

The site also demonstrates the top-down approach to gathering primary legal information that was demonstrated in the VLL document. Currently only two tribunal collections are represented on the site, and this only because they are LexUM collections.[136] At this early stage CanLII can hardly be criticized for this; they are clearly starting by incorporating materials that are already reasonably available to them.

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[134] The search engine provided is SINO, developed by AustLII, and available free to LII's which share AustLII's vision. For a description of SINO, see online: http://elj.warwick.ac.uk/jilt/LegInfo/97_2gree/green1.htm at para 1.4.2.

[135] Some courts, like those of Manitoba and Saskatchewan do not have decisions available online, and as a result have no prepared material to provide to CanLII. In the case of Saskatchewan, it is not clear that the government is willing to make such materials available free online. The Law Society of Saskatchewan has provided CanLII with its own databases of Saskatchewan decisions; however, this collection is incomplete and clearly unofficial. A number of the courts whose decisions are currently available through their own sites are not yet available through CanLII. This can be a function of incompatible formats. Without a digital publishing standard for courts, tribunals and legislatures in Canada, the operation of an LII like CanLII will be hampered.

[136] The tribunals are the Quebec Human Rights Tribunal and the Professions Tribunal.

Because of government approaches to online legal information, the material available cannot be warranted as authoritative or even necessarily up-to-date. Thus CanLII warns that the site "does not offer, at the current stage, the quality required" for official use of the materials.[137] Nonetheless, it is also stated that "CanLII's objective is to eventually publish files that can be used for professional purposes."[138] Until such time, the resource is of limited use to legal professionals and the public as: "verifications should be made with [the] respective originating authority [of the documents] before using them for any professional purpose".[139]

A further limitation of the CanLII site remains the thorny problem of Crown copyright. CanLII states that "any total or partial reproduction by any means, of any document found on CanLII remains subject to reproduction rules emanating from its original source"[140]. The site notes that "these conditions may vary from a jurisdiction to the other, so the user should look for the applicable rules before proceeding to any reproduction of the documents herein."[141] Crown copyright clearly renders burdensome any use of materials found on this site, particularly absent any collective position being taken by all levels of government. Action by federal and provincial governments to ensure the same level of access to these materials, in essence to "free the law" from Crown copyright, is required.

At this point in time, a brief tour of the current CanLII site can only highlight its significant shortcomings. For the most part, however, these shortcomings flow not from CanLII, but from the environment in which it currently operates. As noted earlier, this environment is one which is (inadvertently or not) hostile to a system of free, public access to

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[137] Online: http://www.canlii.org/disclaimers.html.

[138] *Ibid*. Without this functionality, it is unlikely the Federation of Law Societies would remain interested in the venture.

[139] *Ibid*. Note the use of "professional" in relation to the purpose. Another way of phrasing it could have been "for any purpose for which an official version is required". The choice of "professional" may indicate an orientation towards the legal profession. The lack of authoritativeness of the documents is a major drawback of the site. The vision of an LII is to provide usable authoritative versions. As the capacity exists to provide such versions electronically, one can only hope that courts and governments will take steps to ensure that online materials have the quality required to provide meaningful public access.

[140] *Ibid.*

[141] *Ibid.*

primary legal materials. The major structural or institutional barriers include the persistence of Crown copyright, the lack of available digital historical materials, the lack of authoritative electronic versions, and the lack of technical conformity of materials from one jurisdiction to another. Other more intangible barriers include the lack of a clear consensus around the virtue of free public access to legal materials, and struggles even over the meaning of “access” and “public”. It is to be hoped that the creators of CanLII can overcome these hurdles and work towards a unique Canadian public legal resource.

Conclusion

Should the law be free? Throughout this paper I have moved towards the conclusion that it should; both in the sense of being widely available and without charge. Yet it is difficult to point to anything in the experience of other jurisdictions that demonstrates a quantifiable increase in public legal knowledge or awareness, improved access to justice or enhanced democratic values. Although these are important touted benefits of LII’s, they are difficult to measure at the best of times, and hardly measurable so early in the history of these unique electronic institutions. The only quantifiable measures available relate to the number of “hits” or the level of actual access by members of a broader public to LII’s. In the case of both AustLII and Cornell’s LII, the level of access from non-legal professionals has been sufficient to satisfy both those institutions that the greater pubic good is being served. To the extent that this provides a compelling argument for LII’s the argument is as strong in Canada.

The current system for publication and distribution of legal materials in Canada creates a tendency towards information monopolies that can be argued to be inherently problematic. Crown copyright provides one such monopoly; the fact that publication of legal materials is largely in the hands of commercial publishers who focus on the needs of legal professionals is arguably another. The expectation that lawyers and the legal profession are the appropriate infomediaries for legal information is suggestive of yet another form of monopoly. “Freeing” the law is as much about liberating the law from these quasi-monopolies as it is about increasing quality and reducing costs of public access.

Although law remains a highly specialized field of knowledge and although no amount of free public access will change that fact, this alone

is not a sufficient reason to restrict or limit access. Sufficient justifications remain for allowing individuals ready access to a reliable source of primary legal materials (either on their own or through their less "powerful" legal representatives). Although it is again too early to measure, the added value of hypertext mark-up and customized search engines may well provide the public with an unprecedented level and quality of access. The potential for improved quality of access through technological tools, as well as through value-added content (either through LII's or through commercial publishers) designed for new and emerging public markets for legal materials remains something for the future. Nonetheless, it is a benefit which cannot be realized without first creating a viable Legal Information Institute.