Submission on the Discussion Paper: *Open Courts, Electronic Access to Court Records, and Privacy*

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission is the product of collaboration between several groups within the Canadian Bar Association, including the National Media and Communications Law Section, the National Family Law Section and the National Privacy Law Section, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association

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I. INTRODUCTION

The Canadian Judicial Council (CJC) is the first organization in Canada to initiate discussion on electronic access policies relating to court records. The discussion paper, *Open Courts, Electronic Access to Court Records, and Privacy* (the discussion paper), prepared by the Judges' Technology Advisory Committee (JTAC) on behalf of the CJC, provides an extensive background against which we can consider the implications of public access to court records. Legislative and functional inconsistencies between Canadian jurisdictions are highlighted, together with the potential advantages and danger of misuse of an electronic medium.

II. GENERAL COMMENTS

The Canadian Bar Association (CBA) appreciates this opportunity to consider the issues concerning the "open courts" principle, electronic access to court records and privacy. The discussion paper is of interest to several groups within the CBA, including the National Family Law, Privacy Law and Media and Communications Law Sections. The competing concerns raised in the discussion paper have been echoed throughout our discussions. In this submission, we highlight points of agreement, as well as points of difference.

The JTAC does not recommend a model policy, but focuses instead on a framework for establishing electronic access policies. We hope that our comments will assist in

developing such a framework so that, eventually, through further consultation, a model policy can be developed.

The discussion paper provides an excellent overview to initiate discussions on national policies for electronic access to court records. While the CJC clearly should play a pivotal role in developing a policy for such electronic access, given courts' supervisory and protective power over their own records, it is equally important that other interested groups with responsibility for, or an interest in, such policies also play a key role in policy development. Development of policies must continue to include lawyers, court staff, members of the public and other interested groups, as well as the judiciary. Well-developed electronic access policies will require open debate among all participants within the justice system. Any model policy must be guided by existing Canadian law pertaining to both the "open courts" principle and the protection of privacy.

III. BALANCING COMPETING VALUES

The subject of electronic access to court records involves two important Canadian values: the right of the public to transparency in the administration of justice, and the right of individuals to privacy. The discussion paper notes[1] that the Supreme Court of Canada[2] (SCC) has given greater recognition to the constitutionally protected right to open courts than to the fundamental value of privacy.

Conclusion 5 of the discussion paper explains that the concept of "open courts" includes both the right to be present in the courtroom while proceedings are being conducted and the right to access the court record upon which the judicial disposition was based. Our Constitution has entrenched the "open courts" principle to ensure that all members of the

1 See conclusion 3.

2 *The Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Edmonton Journal v. The Attorney General for Alberta*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick* (Attorney General), [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 94 C.C.C. (3d) 289 (S.C.C.).

public are given the opportunity to scrutinize the basis upon which judicial decisions are made. Without such transparency, the public's scrutiny of our justice system runs the risk of being stifled. In short, informed comment requires access to court records.

The scope of the court's willingness to protect privacy is an evolving area of the law. The Supreme Court of Canada has recently commented that, with respect to personal information held by institutions of the federal government, "the protection of privacy is necessary to the preservation of a free and democratic society."[3] In *Lavigne*,[4] Gonthier J. referred with approval to the reasons of LaForest J. in *Dagg v. Canada (Minister of Finance)*.[5] In regard to personal information held by governments, LaForest J. stated that "[t]he protection of privacy is a fundamental value in modern, democratic states." He went on to say that "[p]rivacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s.8 of the *Canadian Charter of Rights and Freedoms*.[6] Certain privacy interests may also adhere in the s.7 right to life, liberty and security of the person."[7] Admittedly, these cases refer to the right to remain silent in the criminal law context.

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

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3 See *Lavigne v. Canada* (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773 at para. 25. See also *Canada (Information Commissioner) v. Canada (Commissioner of the R.C.M.P.)*, [2003] S.C.J. No. 7, at para. 26 where Gonthier, J. makes this point in relation to the importance of the right to privacy.

4 *Ibid.*

5 [1997] 2 S.C.R. 403 at paras. 65-66.

6 See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

7 See *R. v. Herbert*, [1990] 2 S.C.R. 151, and *R. v. Broyles*, [1991] 3 S.C.R. 595.

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

IV. POLICY ISSUES

Before establishing policies governing electronic access to court records, the relative differences between the paper and electronic media must be considered.[8] There is legitimate room for argument as to whether a principled justification exists for differentiating between electronic and paper access, but there are in any event practical reasons for such differentiation.

A carefully developed policy would be invaluable in facilitating the transition from paper to electronic access, as it could ensure a consistent, well-grounded approach. Ideally, basic principles should be determined before initiating a new approach. However, the fact that a policy has yet to be established should not justify lengthy delays in moving forward with electronic access. A pilot project, in which electronic access is allowed on the same basis as access to the paper environment, may be helpful to determine what, if any, problems will likely need to be resolved.

1. Paper Versus Electronic Environments

For the purpose of this debate, the main difference between paper and electronic access is the "practical obscurity"[9] of paper records, on the one hand, and the easy accessibility

8 See conclusion 11, which states that it is "essential" that these differences be considered.

9 According to the discussion paper, "practical obscurity" has come to mean the relative inaccessibility of individual pieces of information or documents created, filed and stored using traditional paper methods compared to the accessibility of Information contained in or documents referred to in a computerized compilation. The reality of practical obscurity has both limited openness and provided privacy protection. Electronic access would produce a significant change along both these parameters, requiring consideration of rules to address when and how Internet access should be available.

of electronic records, on the other. The awkwardness of accessing paper records stored in a public courthouse places inherent limitations on the ability of individuals or groups to access those records. In contrast, electronic records are easy to search, can be searched in "bulk" combining various key factors (e.g. divorce and children) and can potentially be accessed from any computer.[10]

* * *

One perspective[11] on the issue of electronic access is that the disappearance of "practical obscurity" does not justify preventing access to documents that are part of the public record. Rather, easy access to court records and docket information through electronic means would make public access more meaningful. Practical barriers, for example, pertaining to geography or finances, would be minimized by accessibility through the Internet.

If problems arise because of electronic access to court records, they can be addressed through various safeguards, such as blanket or partial prohibition of bulk searches, identification of anyone searching certain files if ordered by a judge or, if demonstrated to be necessary, requiring searchers to access information on-site only. Attempting to create different policies for paper and electronic access would only likely result in inconsistent treatment. Court staff would have to be trained with regard to two different policies and systems of access, increasing the risk of errors.

There is currently no consistent approach to determining what should comprise docket information, with whom it should be shared or to whom it should be made available. However, the overriding principle should be that the entire contents of the court record are available to the public, unless a specific judicial order has been made that seals all or part of the court file, or a statute prohibits access. Any discussion about limiting the documents contained in a court file ought to be informed by the "open courts" principle,

10 This is an issue upon which the interested Sections of the CBA have divergent opinions.

11 The National Media and Communications Law Section of the CBA is generally allied with this perspective.

and in consultation with all of the interested parties, including representatives of the media, supporters of privacy rights, lawyers, and others.

* * *

Another perspective[12] is that there are important reasons that justify applying the "open court" and "open counter" principles for obtaining paper records, but limiting or denying access via the Internet. Once information is made electronically available, it is impossible to retract, and can do grave damage to the lives of persons identified. The information cannot be recaptured, and the means and channels for its dissemination and recombination are nearly limitless. The sealing order process provides an inadequate response to these problems.

Canadian laws already contain exceptions to the general rule of openness, clearly recognizing exceptions as appropriate to protect the special privacy interests of children. If an exemption is necessary under the *Youth Criminal Justice Act*, for example, family law cases provide equally compelling justification for such protection, as the children involved usually have no choice or even a voice in the litigation. Given the information available from divorce pleadings, including children's dates of birth, names of schools and income tax returns that contain social insurance numbers, conclusion 19 is appropriate:

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

Although court dockets typically contain minimal information, they could unduly expose parties' privacy interests if available electronically. In addition, because dockets contain different information depending on the particular jurisdiction, and because most dockets

12 The National Family Law and National Privacy Law Sections of the CBA are generally allied with this perspective.

include only the first few names of the parties in a multi-party action, there are inconsistencies in the way in which personal information contained in dockets is maintained and disclosed across Canada. Accordingly, Internet access to docket information should not be available to the public.

Summary

While the exact exceptions to the principle that court documents should be publicly available have yet to be determined, the CBA acknowledges that any exceptions would be exceptions to the presently recognized *Charter* right under section 2(b) of the *Canadian Charter of Rights and Freedoms.*

2. Potential Risks of Electronic Access

The CBA recognizes that electronic access to court records creates potential for misuse and abuse. For example, web publication of court records allows untested allegations contained in pleadings to have a much broader impact on the adversaries. Those interested in the information for either legitimate journalistic purposes or for illegitimate prurient interests, can program search engines for prominent names or other key factors. Extensive "bulk" searches by category, or "data mining" is possible electronically, but not currently possible in the paper medium.[13] This practice is very lucrative and already widely used for the development of commercial marketing databases, and for investigation into the personal lives, including medical history, of potential employees, debtors, or those purchasing insurance policies.

Such information can also be used for criminal purposes. For example, sexual predators could search court records for the names and ages of children of recently divorced parents. If the social insurance number, income tax information or bank account information is referred to in a record, those numbers, together with the relevant names,

13 See, for example, court records that are available electronically in jurisdictions around the world at website, www.worldlii.org.

could readily be detected by automated programs and packaged for use in identity theft. In the US, federal judges have agreed not to include social security numbers and bank account numbers in decisions and other publicly available materials.[14]

Electronic access may impact on access to justice. Litigants with very sensitive matters could face an increasingly difficult choice of either preserving their privacy or having their day in court. Excessive electronic access to court records could, ironically, limit access to justice by making the loss of privacy too high a price to pay for recourse to the justice system. Those for whom litigation is not a choice (for example, defendants, third party witnesses, victims, and accused) would not even have such an option.

3. Possible Options

While the right of the public to transparency in the administration of justice has to date generally prevailed over an individual's right to privacy, there will clearly be instances where privacy rights should prevail. Numerous pieces of legislation now exist that protect certain privacy rights.

Another currently available protection is for individuals to apply to the court to seal certain documents or to ensure anonymity. A party wanting to restrict public access to a court file will bring a motion, on notice to the media,[15] and a judicial determination will be made in the clearest of circumstances that a sealing order is required.[16] Once such a discretionary order has been made, it will trump any right of the public to gain access to all or part of the court record.

However, the discussion paper rightly points out the current lack of consistency in judicial approaches to sealing files. This inconsistency generates obvious problems for media representatives, and also makes it difficult for lawyers to advise their clients whether and when they should be requesting such orders. For example, some courts in

14 http://www.privacy.uscourts.gov/policy.html.

15 *Dagenais*, *supra*, note 2 at 310.

16 *Ibid*, note 2 at 327; see also *Edmonton Journal*, *supra*, note 2 at 1336.

Ontario now require counsel to notify the media when applying for a publication ban, while courts in other jurisdictions may not. The discussion paper notes that:

> [117] …the provincial legislation and regulations often do not enumerate the factors upon which the court might make an order for anonymization. This makes it a challenge for counsel to advise their clients when one of the privacy protections will be invoked…

To improve uniformity in application, conclusion 20 states that:

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

One of the challenges for representatives of the media, in their role as guardians of the public interest, is the difficulty often encountered in determining when an application for a publication ban, sealing order or *in camera* order has been made. Possible solutions for this problem would be to ensure that the party making the application put the media on notice or for the court to establish a website on which any applications for a sealing order or anonymization order would be listed, providing the media with an opportunity to respond.[17] However, from the perspective of clients involved in sensitive litigation, this very notification might also serve as a deterrent to seeking a sealing order, as the notification process itself would potentially wave a red flag.

While either court orders or legislated rules may be appropriate responses for many of the cases which will raise significant privacy concerns, they may offer inadequate protection in other sensitive cases. Family law, criminal law, estates and trusts matters, bankruptcy proceedings, incompetency hearings, certain types of tort and professional negligence matters, personal injury matters, tax cases, and wrongful dismissal actions are examples of cases that have the potential for serious breaches of privacy through overly broad electronic access. Where web access is available for part or all of a court file,

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17 During the past year, the Canadian Bar Association passed a resolution urging that the government, in consultation with the bar, adopt notification procedures for sealing orders or anonymization orders (see Resolution 03-01-M).

including the evidence filed in a matter, the difference to the privacy interests of the individuals involved can be tremendous.

In considering what court records should be widely available electronically, the impact on litigants, particularly those in family law cases, must be considered in light of the "open courts" principle. The discussion paper highlights several examples, including the financial statements, income tax returns, professional assessments of the needs of children, witness statements, affidavits or declarations describing parental behaviour where custody or access is an issue, and experts' reports about the value of property frequently found in family law files. In addition, professionals such as accountants, mental health physicians and child psychologists may have an interest in ensuring that their work product is not used for purposes other than that for which it was intended. However, if electronic access is to be employed for family law matters, we agree with the discussion paper's conclusion that:

> [145] If the official court version of the court file is an electronic file, then archiving and retention systems must be altered to accommodate that medium.

Policies within court offices may also require modification to ensure that an electronic file is available and accessible. This is particularly applicable to family law cases, as applications to vary child and spousal support are routine, and the preceding file is often important to establishing whether there has been a "material change in circumstances."

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

Safeguards can be implemented that would minimize the impact of such breaches and maintain the principle of openness. Redaction (deletion) of personal information contained in court records is a possibility, although it would create challenges in practice.

Open electronic access to court records could be available only for limited types of records. For example, if judicial decisions relating to family law matters are made widely available on the Internet, then sensitive personal information could be removed from those decisions. A version of such a policy is applied in Quebec, where certain decisions, such as those involving family law, are only available with the initials of the parties. France goes further, and applies such a policy to all judicial decisions posted online. The types of personal information that might be kept out of electronic records include social insurance numbers, birth dates, financial account numbers, health information, children's full names, ages and identifying characteristics (unless material to the issues in the proceeding), detailed financial and tax information, home addresses and property values.

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

It is essential that an effective public education process be developed so that potential litigants have clear notice in advance as to just how public their files may become if electronic access is permitted. Such a public information process must do more than rely on individual lawyers to advise clients. It must also ensure that unrepresented litigants are made aware of court access policies. This is especially an issue in areas such as family law, where aspects of a person’s or family’s private life routinely appear in the court record. We believe that conclusion 33 of the discussion paper is therefore critical to setting up electronic access policies:

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

V. SPECIFIC ISSUES

1. Definitions

Under paragraph 5 of the discussion paper, the definition of "court record" includes "pleadings, orders, affidavits, etc; that is to say, documents created by the parties, their counsel or a judicial official or his/her designate". Accordingly, a document filed by someone other than those listed in the definition would not be considered a "court record". A broader definition of "court record" would be more appropriate, and should include any document filed in the court record (other than judicial administration records, referred to in paragraph 6 of the discussion paper).

Given that the right of the public to open courts has been enshrined as a constitutional rule, the definition of "public" must include all individuals, commercial enterprises and representatives of the media.

2. Privacy Legislation, and the Exemption for Material Disclosed for Journalistic Purposes

Federal and provincial privacy laws are based on ideals of an open, transparent government policy that ensures public access to information held by government, while protecting the privacy of those identified in the material. Such legislation does not apply to court records and also specifically exempts personal information collected, used or disclosed for journalistic purposes.[18]

In the absence of comparable legislation in most provinces, as of January 1, 2004, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) will apply to most commercial activity in those provinces.[19] Part 1 of PIPEDA addresses

18 *Personal Information Protection Act* (Alberta), section 4(3)(c); *Personal Information Protection Act* (BC), section 3(2)(b); *An Act respecting the Protection of Personal Information in the Private Sector* (Quebec), section1.

19 "Commercial activity" is defined in section 1 of PIPEDA as being, "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists."

personal information[20] in the private sector, and is intended to establish rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information, but also the need of organizations[21] to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. However, this Part does not apply to "any organization in respect of personal information that the organization collects, uses or discloses for journalistic… purposes and does not collect, use or disclose for any other purpose." The same is true in similar legislation enacted in Quebec, B.C., and Alberta.

While PIPEDA does not apply directly to the courts,[22] it outlines the right of private sector entities to collect court information and to use and disclose the information. This provision now applies broadly to commercial activities of organizations, even within a province, and may well constrain access that may be given to such entities. At the same time, all Canadian statutes that address this privacy issue have chosen to exempt journalistic activities from their scope, assumedly because of section 2(b) of the *Charter*, protecting freedom of expression. The balance that the framework seeks between open courts and privacy must reflect the same policy considerations. However, even if there is room for debate about the 'direct' purpose of information contained in court records, it seems evident that use by information brokers, for example, would not be authorized.

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20 "Personal information" is defined in section 1 of PIPEDA as being "information about an identifiable individual, but does not include the name, title or business address or telephone number of an organization."

21 "Organization" is defined in section 1 of PIPIDA as including "an association, a partnership, a person and a trade union."

22 However, see Regulation SOR/2001-7, section 1(d) which states that personal information contained in judicial or quasi-judicial records may only be made available to the public without consent "where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the record or document."

VI. CONCLUSION

The draft framework is not intended to impose a uniform policy on all Canadian courts, but it is likely to serve as a guideline for all jurisdictions to assist in making decisions about electronic access to court records. We trust that our suggestions will assist the JTAC in striking the optimal balance between the competing interests of the constitutionally protected right of the public to transparency in the administration of justice, and the fundamental right of the individual to privacy.