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The Changing Shape of Legal Information

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THE CHANGING SHAPE OF LEGAL INFORMATION*

*By David Michels and Mark Lewis***

Sommaire

   Les auteurs argumentent dans cet article que, suite aux pressions technologiques, pas seulement que les perceptions des étudiants en droit vis-à-vis l'information juridique qui ont changé, mais que la forme et la nature de l'information juridique est en train de changer également. Par conséquent, le caractère unique de l'information juridique qui nous a isolés de plusieurs ambiguïtés associées à l'information provenant de d'autres disciplines s'érode graduellement. Ces changements nous forçent à reconsidérer notre approche vis-à-vis l'enseignement des habiletés de l'information juridique, nous éloignant de la recherche de l'information juridique et nous amenant vers la maîtrise de l'information juridique.

Changing Perceptions

As IT, Reference and Instruction Librarians, we have experienced significant changes to the shape of legal information over the past five years. The changes are to both the very nature of legal information and how we perceive it. This can be illustrated by our use of the phrase "legal information." Depending on your age and life situation, the words "legal information" will have created specific images in your mind.

   We are both members of "Generation X," having been born between 1963 and 1978,[1] and have been law librarians for less than a decade. We are computer and web literate and regularly use online legal sources. However, when we hear the term "legal information," our mental image is generally law books on a shelf. This is, in our minds, its primary form.

   Library materials are grouped together by material type and subject matter; the *Statutes of Nova Scotia* are located with provincial legislation and the *Nova Scotia Reports* with other provincial reporters. The materials have predictable forms as with any genre of literature and are easily identifiable to the legally educated as a statute or a case.

   There are also many finding tools to locate relevant materials. If we have a statute and need to know how the courts have interpreted and applied it, we turn to the *Canadian Statutes Citations* index.[2] We then proceed to the case reports section of the library with the list of citations to cases and look them up.

   If we have a case and need to know what happened to it on appeal or if it has been cited by any other cases, we might turn to the *Canadian Case Citations* index.[3] If we want to know if a statute or case decision has been commented on in a book or article we could use the *Index to Canadian Legal Literature*.[4] For the previous generations, digests, annotations and indices made the various parts of legal research accessible.

   Much of the legal information traditionally in print form, such as statutes, treaties, cases, journals and even textbooks now also exist in electronic forms. We regularly use information in this format but our mental concepts remain rooted in a print format. This tendency is even more pronounced amongst our more experienced colleagues who entered law librarianship prior to any digitization of legal materials.

   Most of our law students are "millenials,"[5] having been born after 1982. They have grown up with the digital world and there is a wealth of literature that describes the implications of this.[6] The implications for our own library became apparent in a 2006 law school technology survey of our first year students.[7] We found that 99.1% (n=106) had Internet access from home, 91.1% (n=92) had a laptop, and the overwhelming majority had wireless access or intended to have it. Ninety-five percent (n=76) brought their laptops to class.

   We found that our students are coming equipped with a variety of other digital devices such as ipods, mp3 players, and multi-use cellphones. They are a wired generation. It is becoming increasingly evident at the reference desk and in

1 "Generation X," online: Wikipedia <http://en.wikipedia.org/wiki/Generation_X>.
2 *Canadian Statutes Citations* (Scarborough: Carswell,1994).
3 *Canadian Case Citations* (Scarborough: Carswell,1994).
4 *Index to Canadian Legal Literature* (Scarborough: Carswell, 2001).
5 "Millenials," online: Wikipedia <http://en.wikipedia.org/wiki/Generation_Y#Howe_and_Strauss:_.22 The_Millennials 22>.
6 See Diana Oblinger & James Oblinger, "Is It Age or IT: First Steps Toward Understanding the Net Generation" (2006) 29:2 CSLA Journal 8.
7 *Dalhousie Law School Technology Survey 2005*, First Year Students results [unpublished].

instruction that their perception of legal materials is different from our own. It is the interfaces of online services that spring to their minds rather than the shelves of books.

The traditional tools have their digital counterparts. Using hypertext links and document tagging these tools can deliver related content directly to the researcher's desktop. In the WestlaweCARSWELL database for example, a researcher can look up a specific case and directly link to the history of the case including the full-text of earlier trial level or later appeal decisions, the full text of statutes considered by that case, cases considered by that case, cases that consider the original case, and an index of similar cases. In the American version of the database, researchers can also link to court filings and related articles in legal encyclopaedias, texts and journal articles.

The interconnectivity among these sources is an incredible asset to the researcher but also poses challenges for the student. Part of the task of first year students is to understand the components that make up Canadian law and the legislative process: What are statutes, cases, and bills? In the digital environment, many of the visual cues are no longer there. We are unaware of any research that has considered how the impact of this change in perception of legal information should be presented in instruction.

Changing Shapes

Beyond perceptions, we must also consider specific ways in which legal information itself is changing and how this will influence the ways in which we are equipping students for legal research. We are proposing that the shape of legal information is changing in three ways, which we shall refer to with the analogies of height, depth and width.

Height

"I just need one more case." – Second Year Moot Court Participant

The amount of legal information available is rapidly increasing and this change will require new research skills. The impact of this change on traditional legal research can be illustrated by a 2006 Ontario Superior Court of Justice judgment.[8] The court was asked to determine whether the costs associated with a lawyer's time on legal research was excessive in an era of online searches of electronic databases. The lawyer had billed his client for 10 ½ hours of legal research time to obtain and read the relevant cases. In his judgment, Justice Campbell writes the following:

> Surely in this electronic age, Mr. Hopkins would perform the same task that I, or any other legally trained person, would and "click" the word "mobility" into the QuickLaw website. His computer would then have given him the relevant case law.[9]

The Justice's perception is that computerized legal research should speed up the process, making 10 ½ hours of research unreasonable. We recognize that the statement is likely hyperbole and that the Justice understands that the research process, even online, would be more complicated than as stated. However, when this decision came down, we followed the Justice's advice and "clicked" the key term "mobility" into the Quicklaw database interface of that time period. The result was 2048 judgments found. Since 2048 is the maximum number of judgments that the database would return for a search, the actual results for this search may be substantially more.

The researcher must now engage in a winnowing process to reduce the number of hits to a manageable number or the 10 ½ hours of research may become entirely realistic. To understand what is happening here let us consider another Quicklaw search. We sought to compare the results of both a print and electronic search on the same subject. We chose to inventory every "criminal" case reported in the 2005 *Criminal Reports*, a key judgment reporter series published by Carswell. We found 199 judgments reported in that year. We then searched the Quicklaw database for all "criminal" judgments from 2005. We found 5240 judgments; a difference of 5041 judgments. Why the difference? The answer lies in how the judgments are selected for inclusion. Professor Steve Coughlan of Dalhousie Law School, an editor for the *Criminal Reports*, described the production process as follows:

> Every three weeks, Carswell sends to the editor-in-chief all cases decided in a relevant period. The editor-in-chief reads through the cases to select those to be reported. Approximately one case in two hundred is chosen for the *Criminal Reports*. Carswell places all two hundred in its online database. The selection is partly inclusionary ("this is a Supreme Court of Canada case") but mostly exclusionary ("these 40 *voir dire* decisions say nothing outside their own facts"). The cases are divided among the editors, who write headnotes for the cases, and also write annotations for some cases each issue. A rough estimate would be that 15-30% of the cases include annotations noting key issues in the case, such as how it departs from previous authority or ways in which the policy reflected in the reasoning is desirable or undesirable. On some occasions cases will be selected because there have been a number of decisions on a particular issue: exclusion of evidence, child witnesses, etc. These cases will appear in the same issue, sometimes with a short article about that subject area written by one of the editors or a contributor.[10]

There are several important features of the print process that should be noted: it does not attempt to be comprehensive but rather selective, it is an expert-driven process, and

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8   *Biggin v. Maloney*, 2006 CanLII 7511 (ON S.C. (Fam. Div.))

9   *Ibid.* at para. 10

10 Personal communication (22 April 2006)

it frequently includes expert commentary. In the case of the Carswell or Quicklaw databases, there is no prior expert editorial process for content apart from the addition of appropriate headnotes. The intent is to include all judgments and a variety of tools to enable researchers to filter their searches by the identified criteria of subject, jurisdiction etc. There are added features such as the ability to link to case histories and commentary when available.

What is lacking in the database collections is the same degree of expert winnowing. The onus now has shifted from the editors to the researchers to identify significant decisions relevant to their case. The structure of legal education has not changed significantly in the past five years, yet students now have a greater need to be able to assess independently the information before them, information that previously they could have accepted largely at face value. If our students do not possess the essential skills to manage this flood of information then they will be tempted to change the focus of their research from the *best judgment* of 199 found, to the *good enough judgment* found on the third screen of the 5240 found online.

Depth

"I want to cite it but I don't know what it is." Second Year Research Assistant

Not only is there more information but more kinds of information! Factums, evidence, and unreported cases that previously were only available directly from the trial parties may now be accessible. Evidence may be introduced as video, audio, photos, blogs and podcasts, and courts are struggling with how to manage this kind of information.

To illustrate, an online search of the LexisNexis Quicklaw database of Canadian case judgments in May 2007 found eleven citations to cases that mentioned Wikipedia as an information source. In *Build-A-Vest Structures Inc. v. Red Deer (City)*,[11] Justice Clarkson referred to the Wikipedia definition of a funeral home when considering whether "cremators can be considered a necessary incident of funeral homes."[12]

Conversely, in *Fi v. Canada (Minister of Citizenship and Immigration)*[13] the court noted "the use of information from the Wikipedia website is highly questionable, as the reliability of its sources has not been demonstrated to the Court."[14] In a recent decision of obstruction of a police officer, Provincial

Court Judge McCarroll went to great length to define "blog" and "blogger" (using Google), as the defendant's role as blogger helped explain his presence at a riot taking photographs for online publication.[15] In *Dempsey v. Envision Credit Union*,[16] one party's online posting entitled "John's tested ways to shut down a court proceeding" appears to have been considered as evidence that "the conduct was a deliberate orchestrated series of events intended to frustrate the court's process,"[17] and damages were awarded accordingly.

In the United States, concerns have been raised about the use of Internet sources by judges in writing decisions.[18] Email and electronic documents are now routinely part of the court proceedings, and issues relating to electronic disclosure, management and preservation are hot issues in the profession. In *R. v. Mohammed*,[19] the court wrestled with how to provide reasonable access to massive amounts of digital information. The two sides decided not to request print copies and to rely instead on indexing software to search and cite the relevant documents.

Many traditional print materials have been digitized in recent years but have maintained their essential qualities, especially in PDF or TIFF formats which reproduce the page image. Technology has allowed the development of new forms of academic writing. Netletters and blogs are providing a rich source for current legal commentary usually far faster than traditional print sources.

The Court[20] is a blog which covers recent cases from the Supreme Court of Canada. It includes student comments as well as case comments and dialogue by Law faculty members and barristers. ITCan,[21] the website of the Canadian Information Technology Law Association, provides biweekly netletters that comment on new jurisprudence in the field of IT law. Accompanying this is a blog that allows discussion of the issues raised in these netletters.

Some might argue against the appropriateness of any of these sources for scholarly research. A reference request for an elusive new journal article by Prof. Nedelsky turned up not an article but rather a webcast[22] of a recent conference address. Undeniably scholarly and equal to traditional conference proceedings, these webcasts add nuance to the presentation lost in the translation to print.

So what is fair game? Do you use it or not? When one determines to use a piece of information, how then does one

11 2006 ABQB 869, [2006] A J. No. 1555.
12 *Ibid.* at para. 68.
13 2006 FC 1125, [2006] F.C.J No 1401.
14 *Ibid.* at para. 9.
15 *R. v. LeBlanc*, 2006 NBPC 37, [2006] N B J No. 514 at paras 4 & 38.
16 2006 BCSC 1324, [2006] B C J No. 1988.
17 *Ibid.* at paras 31-33
18 David H. Tennant and Laurie M. Seal "Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Defending a Case?" (2005) 16:2 *The Professional Lawyer* 2.
19 [2007] O J. No 700.
20 *The Court*, online: Osgoode Hall Law School <http://www.thecourt.ca>
21 *ITCan*, online: Canadian Information Technology Law Association <http://www.it-can.ca>.
22 Jennifer Nedelsky & Guilio Silano, *Gay Rights and Religious Expression: An Irreconcilable Conflict?* (4 Oct 2006), online: University of Toronto <http://www.law.utoronto.ca/visitors_content.asp?itempath=5/5/0/0/0&cType=NewsEvents&specEvents=1880>.

cite it? The *Canadian Guide to Uniform Legal Citation*[23] does not have adequate forms for blogs, email, and podcasts even though they are becoming part of the legal drafting milieu. We are faced with a situation where there are too few cut-and-dried rules, but it is imperative that students have the knowledge tools to make these decisions.

Width

"But I have to have it for my paper." 3rd year student, final paper.

Despite the cutbacks that have affected most Canadian academic libraries, our library has significant print holdings in Canadian, Commonwealth, American and International Law. Through our library consortium and various Inter-Library Loan agreements, our clients have access to a national collection of print materials. Law students at our university benefit from special access to online commercial legal services courtesy of Lexis-Nexis Quicklaw, Westlaw*e*CARSWELL and Maritime Law Book.

In the broader academic context, our University Libraries system has responded to the opportunities offered by digital information. Expenditures on electronic resources rose from $1.5 million in 2002 to $3 million in 2005. The number of electronic titles held in 1999 was around 300 but was over 15,000 by 2005. The most significant change is in the usage of these resources. In 2002 electronic resources were accessed 62,000 times. In 2005 electronic resources were accessed 1,325,000 times, an increase of 2100% in just three years,[24] and there is no evidence that this is abating.

Let us consider the use of three key law subscription databases. In the most recent year of statistics (2007-2008) our students downloaded 15,734 articles from Hein Online, retrieved 57,454 documents from LegalTrac and viewed 83,190 records in Index to Legal Periodicals. Add to these subscription databases the wealth of free resources available online from government and other educational institutions. Never in the history of our institution have students had access to more legal information.

But…

To our surprise, in a 2005 LibQual Survey, graduate students and faculty expressed dissatisfaction with their ability to access the materials they believe they need for their research. Why is there a disconnection?

We propose that this is another consequence of digital information. With the explosion of information has come a wealth of online research tools. Online search tools like Google Scholar[25] and sellers' websites like Amazon[26] reveal

a world of information out there. How many of us have enjoyed Amazon's "look inside" features? Subscription indices in the legal field like LegalTrac, Index to Legal Periodicals and Index to Canadian Legal Literature let us know about articles right on point. The reality is that no one can own it all. Students and faculty know that such a book or article exists but it remains outside their grasp. The analogy is to the man who can find nothing to eat in a fully stocked kitchen. We, as information professionals, must be realists. We must be diligent on behalf of our clients to build the best access possible but we must also be prepared to remind them: "You can't always get what you want." In a service context this is extraordinarily difficult. Students must become more aware of information access issues.

Changing Education?

We have argued that students appear to perceive legal information differently from many of us who teach legal research. This by necessity must affect how we approach legal research instruction. We proposed that the structure of today's legal information systems has shifted much of the onus for filtering information from the expert to the end user, our students.

A potential result of this change is a shift from the "best" to the "good enough" when searching legal information. There are new types of possible legal information that defy former guidelines and require new evaluative skills for researchers. Students grapple with issues of information access which will follow them into their legal careers. If our previous models of teaching legal information skills are inadequate for the complexities of the new information world, how do we develop a new model that addresses the challenges our students will face?

We propose that the response to these challenges is found in evolving our educational focus from teaching *legal research skills* to promoting *legal information literacy*.[27] The *Association of College and Research Libraries* (ACRL) defines Information Literacy simply as "the set of skills needed to find, retrieve, analyze, and use information."[28] Most academic librarians will recognize ACRL's five skill standards[29] that measure information literacy:

1. The information literate student determines the nature and extent of the information needed.
2. The information literate student accesses needed information effectively and efficiently.
3. The information literate student evaluates information and its sources critically and incorporates selected information into his or her knowledge base and value system.

23 6th ed. (Scarborough: Carswell, 2006).

24 William Maes, *The Library in Transition. Here Today, Google Tomorrow?* [Presentation at Dalhousie Law School's Professional Development Day, May 2006]

25 online: Google Scholar <http://www.scholar.google.com>

26 online: Amazon <http://www.amazon.ca>.

27 *Introduction to Information Literacy*, online: Association of College and Research Libraries <http://www.ala.org/ala/acrl/acrlissues/acrlinfolit/informationliteracy.cfm>.

28 "What is Information Literacy," online: ACRL Information Literacy <http://www.ala.org/ala/acrl/acrlissues/acrlinfolit/infolitoverview/introtoinfolit/introinfolit.cfm>

29 "Standards Toolkit," online: ACRL Information Literacy <http://www.ala.org/ala/acrl/acrlissues/acrlinfolit/infolitstandards/standardstoolkit.cfm>.

4   The information literate student, individually or as a member of a group, uses information effectively to accomplish a specific purpose.
5. The information literate student understands many of the economic, legal, and social issues surrounding the use of information and accesses and uses information ethically and legally.

Information literacy has garnered little consideration in the literature of legal information or legal education in Canada with the notable exception of Seguin's article, "Ignorance of the Law is No Excuse: a Law Student's Perspective on Developing Legal Information Literacy."[30] The standards and associated outcomes provide a comprehensive structure for our instruction and evaluation. We explored two questions: how well do present legal instruction strategies match these standards and their outcomes; and how can they address the issues identified above?

Traditional legal research instruction certainly equips students to determine the nature and extent of information needed, the focus of standard one. A significant part of formal legal education is directed toward developing a way of thinking about issues in light of the law and articulating those issues succinctly. One can argue over how successful we are in always meeting our goals but this standard does attract much of the law schools' attention.

Much of our library-based training deals precisely with standard two since effectiveness and efficiency are benchmarks of success in legal practice. The development of online information services has inspired many articles and books in our discipline on teaching online search skills. But when considered a little more closely: how effective are we in helping our students understand what tool to use and when? Do they understand when materials in print are more appropriate than those that are digital? Are there times when LexisQuicklaw may be more appropriate than Westlaw*e*CARSWELL or are they really the same thing? When is Google the appropriate tool to use and how will our students evaluate the next incarnation of legal research tools? Presently, our students appear to be struggling to understand these distinctions and our equipping program must address these kinds of questions.

Critical evaluation of legal information has not been a significant issue in the past since it was largely an expert-driven system. As we identified above, the onus has now been shifted increasingly to students to determine the value, appropriateness and utility of legal documents. Now the criteria of reliability, validity, accuracy, authority, timeliness, and point of view or bias must be applied to potential information sources. When does the blog get used? How is the *YouTube* video put into the time-honoured forms? Is Wikipedia on Contracts ever as appropriate as *Waddams on Contracts*?

We may laugh at this question, but our students may not be aware of the difference. Do our programs equip our students to apply these kinds of criteria? Our instruction has to prepare them to understand how all this information can be synthesized into an answer to their legal research question, especially when it might not clearly fit the "legislation-caselaw-secondary literature" paradigm.

Standard four is also addressed in part by our traditional programs. Students are taught to present information in a court- or boardroom-acceptable form using the forms and etiquette appropriate to the context to accomplish their purpose. Presentation technologies, however, are changing how we communicate our message. These new technologies are only beginning to creep into law school classrooms. Most faculty and librarians assume that students are more adept at using new communication technologies and have left them to develop their skills independently. But is this really adequate? In a discipline where effective communication is a cornerstone, we may be failing our students by "letting them figure it out."

Using legal information entails a variety of ethical, financial and social considerations. The growing cost of legal research has been a source of a number of lawsuits. The inability to identify and cite documents appropriately is problematic and the lack of clear guidance and regulation is perplexing for students. Beyond law school, ethical use of information by the individuals, companies and the justice system is a frequent concern. When is it appropriate to use Facebook in considering a job applicant? What constitutes plagiarism when using information posted publicly online? Can a judge use Wikipedia to research material presented in court? When requiring full disclosure, how many gigabytes of digital data is enough? What will that mean for disclosure cost and how will it burden the courts?

It is imperative that students have the opportunity to think through these dimensions of information use. The reality is that the contemporary information culture is moving and will likely continue to move faster than the speed of regulation. The courts and the academy will be playing catch-up for the foreseeable future. If our students are unable to internalize and then apply acceptable information principles, we invite litigation and disciplinary hearings.

Conclusion

There is a need for further research to determine how changes in perception can affect how we teach legal information skills. The shape of legal information is changing and therefore the shape of legal research instruction must also change. We propose that the ACRL information literacy standards and outcomes offer a good model upon which to reconstruct Canadian legal instruction programs to meet the changing needs of contemporary law students. This structure also offers us an opportunity to develop standardized national legal instruction benchmarks that would greatly benefit our increasingly mobile student body and the firms they will join upon graduation. Legal information is changing...will we change with it?

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[30] Although a number of Canadian articles touch on aspects of information literacy, only one article by Pamela Seguin introduced the concept of Information Literacy as it is used in the literature of library and information science. See Pamela Seguin, "Ignorance of the Law is No Excuse: a Law Student's Perspective on Developing Legal Information Literacy" (2005) 30 Can. L. L. Rev. 80