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

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

In this article the author explores the move in several jurisdictions towards providing primary legal materials online without charge. In Canada the federal government, most provincial governments and many courts currently provide some form of online access to primary legal materials. However, this is not done in a unified, comprehensive or systematic manner. The author evaluates the "legal information institute" model as it has emerged in Australia, the United Kingdom and the United States, and considers whether such a model would be useful or workable in Canada. In the course of this assessment, the author canvasses such issues as the "public" for primary legal materials, the meaning of "access" to such materials, the problems of Crown copyright, information monopolies and the normative implications of "freeing" the law.

Dans cet article, l'auteur explore un nouveau service mis sur pied dans plusieurs juridictions grâce auquel il est maintenant possible d'avoir accès aux documents juridiques de base en direct, sans frais. Au Canada, le gouvernement fédéral, la plupart des gouvernements des provinces et bon nombre de tribunaux fournissent un accès direct quelconque aux documents juridiques de base. Cependant, il s'agit pour l'instant d'initiatives disjointes qui ne peuvent prétendre à la rigueur et à l'exhaustivité d'un système unifié. L'auteur se penche sur le modèle du «legal information institute» que l'on retrouve en Australie, au Royaume-Uni et aux États-Unis et s'interroge sur la possibilité d'adapter celui-ci au contexte canadien. Pour les fins de son évaluation, l'auteur tente de cerner le public cible éventuel pour de tels documents, les conditions d'accès, les difficultés posées par la protection des droits d'auteur de la Couronne, les aléas des monopoles d'information et enfin les implications normatives d'une libéralisation du droit.

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Introduction

The development of the World Wide Web in the early 1990s 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 Canadian courts and tribunals 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 enhance public access to important primary legal materials, they also 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, unresolved copyright issues, struggles over ownership and control of such materials, and the lack of a public access philosophy.

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 consider 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 critically analyse the proposed Virtual Law Library for Canada (VLLC) and the emergent Canadian Legal Information Institute (CanLII).[3] Through these 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]

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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.
2. In the context of publicly accessible primary legal materials I will argue that "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.

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 in Part IV, this initial discussion will exclude the work that is now being done on CanLII. This overview 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.

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. Most 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 the online materials,[10] and warn that the electronic versions are not official

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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 in Part IV.

7. The descriptions in this paper of what is available online are accurate as of the time of writing (Spring 2001). 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>.

versions of the legislation.[11] Copyright notices generally claim ownership in the material and, in many cases, 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 materials alone.[13] Where online access to regulations is available, the materials are 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 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, and the

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11. Some disclaimers specifically instruct users to refer to official versions "for all purposes of interpreting and applying the law". (Online: <http://www.gov.ab.ca/qp/acts.html>; see also online: <http://canada.justice.gc.ca/Loireg/mise_en_garde_en.html>.

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". Online: <http://www.qp.gov.sk.ca>. 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." Online: <http://www.gov.nb.ca/justice/discla-e.htm>. 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, not regulations. Online: <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>.

17. Online: <http://www.gov.ab.ca/qp/regs.html>.

18. Online:<http://publicationsduquebec.gouv.gc.ca/fr/loisreglements/html/tele_mots_cles.dbml.>.

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 materials 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 materials are current. The materials are 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 an overall lack of real utility of the sites. Finally, the absence, 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]

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 interpretation and elaboration of the law. The provision of online legislation without a 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 means a lack of ready access to the rules of the common

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 statutes 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.

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 seems to be of greater 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, making decisions available 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 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 its purposes as: "to make available, in the most timely way possible, all Federal Court decisions selected for eventual publication

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21. Of course, this presupposes that having access to case law gives a non-legally trained individual 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.

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

24. Online: <http://www.fct-cf.gc.ca>. 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>.

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 official reporter series. The site provides, in electronic form, "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 equivalents 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 the Supreme Court Reporter. They also come with a search engine for key word searches, and a further search engine for searches by field. This provides a rare example (in Canada, at least) of a free online searchable case law database that focuses on a specific subject matter.

The Tax Court of Canada has also recently begun the practice of putting its cases online. Decisions from 1997 onwards are available online. They can be sorted by style of cause or by date, and can be searched by docket number, subject matter or key word. Users of the site are cautioned to use "due diligence in ensuring the accuracy of the materials reproduced", and are given permission to copy the materials for non commercial purposes so long as the copies are "not represented as an official version of the material reproduced."[29]

It is also possible to find decisions of federal administrative tribunals online. Discovering these decisions requires some work, for 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 onwards.

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25. Online: <http://www.cmf.gc.ca/en/cf/intro.html>.
26. *Ibid.*
27. See discussion of LexUM, below.
28. The explanatory text on the site states that this material was being "made available early on an experimental basis", and that the service would be improved. Online: <http://www.lexum.umontreal.ca/csc-scc/en/index.shtml>. 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. Online: <http://www.lexum.umontreal.ca/csc-scc/en/index/permission.html>.
29. Online: <http://www.tcc-cci.gc.ca/copyright_e.htm>.
30. The practice varies from publishing no decisions online, to publishing summaries of decisions online (Canada Labour Relations Board), to publishing complete decisions online (Canadian Human Rights Tribunal, Competition Tribunal).
31. Online: <http://www.chrt-tcdp.gc.ca/english/index.htm>.

The online decisions of the Supreme Court of Canada, the Federal Court, the Tax Court, and federal administrative 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]

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 provides authoritative versions. The collections are fairly recent; they are 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. These limited features make them more suitable for searches of 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 keyword. 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".

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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." *Ibid.*

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.

Copying is permitted for non-commercial purposes,[36] "provided that the material is accurately reproduced and 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 onwards. The database does not, however, contain decisions of the Alberta 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. 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 provides decisions online (although changes are anticipated in Saskatchewan by the Fall of 2001); 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

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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 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 [hereinafter *CCH Canadian Ltd.*]. 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.pe.ca/courts/supreme/index.php3>.

SOQUIJ portal.[42] However, it is necessary to subscribe to SOQUIJ in order to be able to use it, and fees are charged based upon database use.

Some provincial administrative tribunals also provide their decisions online; however, these are relatively few, and are not consistent from one jurisdiction to the next as to 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).[43]

The situation in Quebec is quite different from that in other provinces because of the creation of SOQUIJ. 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 traitment 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 that flows indirectly from a generally improved quality and accessibility. Consequently, 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.

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 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 in selecting which decisions are considered to be of importance.[48] These decisions are then published, both in print form and

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42. Société québecoise d'information juridique.

43. 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> and <http://www.lexum.umontreal.ca/cmq/index.html>.

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 (C.A.Q.) [hereinafter *Wilson & Lafleur*].

46. *Supra* note 44 at art. 19.

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. *Supra* note 44 at art. 21.

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 that SOQUIJ exercised over these key primary legal sources.[51] However, given its existing legislation and the administrative structure of SOQUIJ, the prospect for free public access to the materials appears dim.

One significant problem with locating case law from different 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 courts in one province are not bound by the decisions of courts in others, the fact remains that decisions of courts in other provinces which are on point may be of persuasive authority. The existing online approach is antithetical to a precedent based system 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 is available to members of the public from free web sites, even members of the public who wished to find out, for example, how labour relations boards 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, as their findings 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", *i.e.* 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

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49. *Supra* note 47 at art. 2.
50. *Supra* note 44 at art. 11. This article establishes that SOQUIJ acts as a mandatary of the government.
51. *Wilson & Lafleur, supra* note 45.

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 not, in fact, the only nationwide service of its kind, ACJNet nonetheless 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] The site provides a series of links to available online resources. 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, as well as links to other information of particular interest to lawyers and academics. LexUM operates out of the *Centre de recherche en droit public* of the faculty of law of the Université de Montréal, and is also home to the Supreme Court of Canada decision database. 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 by 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 the important function of providing a central point of access to online legal materials, they have their limitations. For one thing, the best that they can do is provide centralized links to the diverse and widely distributed material online. They do not

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52. Excluding, for the time being, the pilot site CanLII.
53. See online: <http://www.acjnet.org/acjeng.html>, (under "About ACJNet).
54. Online: <http://legis.acjnet.org/index_en.html>.
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.

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.

D. Commercial Services

Two primary[56] online commercial services exist which 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, global searches, newswires, headnotes, and other materials. One service, Quicklaw, has been in existence since the 1980s 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 as well, although Quicklaw has a history of providing free access to these constituencies. Recently e-

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>.

Carswell has also provided free access to law professors.[57] In any event, neither service is committed to providing free access to any of its constituencies, 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] users of the sites are constrained in their dealings with the materials by strict licence agreements.

Other digital materials are also made available through law libraries by commercial publishers. These may include searchable collections of case law, statutory material, or other research-oriented tools. However, the complex licence arrangements for these products prevents any widespread remote access.[59] Moreover, 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. For example, when Maritime Law Book set up its service in competition 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 reporters online.

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57. This access was made available in September 2000.
58. *CCH Canadian Ltd., supra* note 36.
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.

II. *Publicly Accessible Primary Legal Materials in Other Jurisdictions*

There exist at least two examples 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[61] 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 it was intended to "provide a "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".[62] This goal expanded when it was realized that "practising lawyers and administrators and community organisations used AustLII as much as academics and students".[63] Not only have the objectives broadened, since its inception AustLII has expanded to include materials from other jurisdictions in Australasia, such as New Zealand, Fiji and Vanuatu. 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 so in an effective and research-friendly manner.[64] 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.[65] 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.[66]

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

61. Online: <http://www.austlii.edu.au>.

62. 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/>.

63. *Ibid.*

64. *Ibid.*

65. *Ibid.*

66. 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/>.

Thus for some materials at least, collections of case law date back twenty years or more. Due to 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 index of such materials, rather than to host the materials themselves on their site.

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."[67] The concerns which led to the establishment of AustLII were not limited to lay access to legal materials, but also included providing access for lawyers in remote locations or in small law offices to affordable and adequate collections of legal materials.[68] There was also an express 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 prove irresistable.[69] 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 and 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.[70] Beyond

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67. Greenleaf, *et al. supra* note 62, at online: <http://elj.warwick.ac.uk/jilt/LegInfo/97_2gree/green4.htm>.

68. *Ibid.*

69. 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.html>.

70. "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.

primary materials, AustLII also hosts some secondary materials such as law reform commission reports, and aims to be "a central access point for Australian public secondary legal information".[71]

The success of AustLII has been so impressive that it is being used as a model for parallel developments in the British Isles. AustLII has been explicitly cooperative in this regard; part of its public access mission includes offering its key software to other jurisdictions seeking to build similar free, publicly accessible collections.[72] The British system, known as BAILII[73] (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.[74] It is projected that it is "entirely possible that an AustLII equivalent will be fully operational within two years."[75]

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, LII does not charge fees for access, nor does it allow commercial advertising. LII is supported by Cornell Law School, grants, gifts, and by consulting work done by its directors.[76] Gifts have been solicited from users through online fund-raising campaigns. The self-declared mission of LII is "[t]o 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",[77] and "[t]o 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".[78] These objectives are similar to those of AustLII and marry a free public access initiative with the goals of legal research and the development of technology. Like AustLII, the work of LII involves not simply acquiring and providing free online legal materials, but also includes developing a useful format and functionality for legal documents, and creating software tools for searching and sorting legal documents. LII also provides a free e-mail current awareness service, as well as other e-

71. *Ibid.* Essentially what this means is that it provides the necessary links to this information.
72. For example, CanLII has also adopted AusLII's SINO search engine.
73. Online: <http://www.bailii.org.uk>.
74. 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 [hereinafter Eastham].
75. *Ibid.*
76. Online: <http://www.law.cornell.edu/lii.html>.
77. *Ibid.*
78. *Ibid.*

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.[79]

III. *"Freeing" Canadian Law*

Although strong models exist outside Canada, and despite the fact that the *Centre de recherche en droit public* apparently shares many of the goals of AustLII and LII, progress in Canada has been painfully slow to date. The development of a neutral citation standard,[80] and the recent launch of CanLII have been positive steps forward and offer some hope. However, there remain significant technical barriers to success. These include a lack of standardized document formatting, a lack of historical materials in electronic form, and the need to negotiate across a range of governments and jurisdictions. More significant barriers relate to 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 Public Access Philosophy for Legal Materials in Canada*

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 shibboleth from criminal law that "ignorance of the law is no excuse" is often cited to bolster this view.[81] Beyond being bound by criminal laws,

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79. *Ibid.*

80. *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." *Supra* note 62, at online: <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.

81. Martin and Foster argue 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 & 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> [hereinafter Martin & Foster].

however, it is also argued that democracy and constitutionalism require citizen access to the law and its institutions:[82]

> 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.[83]

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:

> en adoptant la Loi sur la société québécoise d'information juridique, l'Assemblée Nationale a clairement reconnu son 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.[84]

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."[85] 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

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82. In the words of the Court of Appeal for Quebec: "il est néamoins utile de souligner l'importance dans notre société d'un libre accès aux procédures et aux décisions judiciaries". *Wilson & Lafleur*, *supra* note 45, at para. 23.

83. *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.)

84. *Ibid.*, at para. 30.

85. Martin & Foster, *supra* note 81.

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."[86]

It has also been argued that primary legal materials and information "which [are] produced by courts and governments, ought to be in the public domain and it ought to be something which ordinary people can access."[87] Similarly, it has been argued that "public policy should aim to maximise access to public legal information because this supports access to justice. . .and supports the rule of law".[88] 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: "[t]he 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."[89] 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.

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86. *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 publisher's 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, *ibid.*, 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.

87. 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 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.

88. *Ibid.*

89. W.T. Stanbury, "Aspects of Public Policy Regarding Crown Copyright in the Digital Age" (1996) 10 I.P.J. 131 at 136 [hereinafter Stanbury]. 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 [hereinafter Frémont].

B. *Crown Copyright and Access to Primary Legal Materials*

The commitment to a strong public access philosophy for primary legal materials is 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."[90] In addition, it provides for a perpetual right in the Crown to legislative enactments and judicial decisions.[91] David Vaver is critical of the anachronistic nature of Crown copyright, and notes that, with the exception of the UK, Ireland, and Italy, no other Western European state claims to protect its official texts in this manner.[92] 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."[93] The lack of Crown or state copyright in the United States is described as "a matter of public policy".[94] It is also confirmed in law.[95]

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, it could be argued, is essential to maintaining order. This concern with accuracy is perhaps best reflected in the host of disclaimers attached to all online government sites providing primary legal materials. Quite apart from the fact that technology does currently exist which could be used to ensure the integrity of such documents, it is difficult to see any basis for the anxiety over quality at

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90. *Copyright Act*, R.S.C. 1985, c. 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 [hereinafter *Copyright Act*].

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

92. David Vaver, *Copyright Law*, (Toronto: Irwin Law, 2000) at 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." See Andre Francon, "Crown Copyright in Comparative Law: The French Model, Continental Europe and the Berne Convention", (1996) 10 I.P.J. 329 at 335.

93. *Ibid.*

94. *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 192-95.

95. See *Copyright Act*, 17 U.S.C. § 105 (1976).

this point in history. As Vaver notes, "[g]overnment control or licensing does not guarantee accuracy any more than unlicensed private sector publishing guarantees inaccuracy."[96]

In addition to the anachronistic nature of Crown copyright, government control over its published materials also offers the possibility for governments to charge for any reproduction of the materials. In many Commonwealth jurisdictions, Canada included, where Crown copyright exists, it forms a potentially serious barrier to free dissemination of the primary sources of law. As Martin and Foster note,

> [s]tripped 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.[97]

The danger of governments seeing a potential financial windfall in licensing fees for Crown materials is a matter of some concern.[98] However, as Stanbury notes, the costs of creating these materials are inherent to 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."[99] Thus as a matter of copyright policy, there are strong

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96. Vaver, "Copyright and the State", *supra* note 94 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.

97. Martin & Foster, *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 92 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.

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

99. *Ibid.*

arguments against governments charging for the use of copyright materials.

The *Reproduction of Federal Law Order*[100] 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 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 applies only to materials under federal jurisdiction. To date, no province in Canada has enacted a comparable order.[101] In particular, Québec, through SOQUIJ, seems willing to fight in court to retain its own monopoly over primary legal materials, and in particular judicial and tribunal decisions.[102]

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.[103] 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.[104]

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.

C. *Defining the Public*

In any discussion of providing free public access to legal materials, a definition of the "public" is crucial. This is because it helps focus understanding on whom 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

100. *Supra* note 33.

101. According to David Vaver, Ontario announced in 1999 that it would follow suit. However, it has not yet done so. *Supra* note 92 at 98.

102. *Wilson & Lafleur c. SOQUIJ*, [1998] A.Q. no. 2762 (C.S.Q.). 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 a considerable financial investment." *Supra* note 89 at 32.

103. Frémont, *ibid.* 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."

104. *Ibid.*

composed of lawyers, academics, law students, and public officials. Yet this 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 the subset capable of paying for access to the rather costly materials.[105] 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 LII have discovered, the "public" for legal materials is much broader once primary materials become free,[106] and broader still when not constrained in their scope by market forces. As expressed by a founder of 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."[107]

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."[108] This redefinition of the "public" for legal information is important, not only to appreciate the need and demand for free public access, but also in shaping any system of free public access. Such a system would need to serve this broader public which may not have been well served in the past by commercial legal publication services.[109] Finally, although historically law publishing has tended to focus on domestic markets, the notion of "public" for

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105. Although services such as Quicklaw and e-Carswell provide free access to legal academics, and in the case of Quicklaw to law students as well.

106. 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> [hereinafter Toward a Business Plan]. 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.

107. 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> [hereinafter Bruce].

108. *Ibid.*

109. 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.*).

freely accessible materials may be much broader. Both AustLII and LII go 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[110] and the United States.[111]

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 relates to access for lawyers and legal professionals, while the fifth and final point is "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".[112] In this vision the "general" public is manifestly secondary to the legal community. The document goes on to refer to "some form of public access system", which suggests that something more limited and formalized than the internet is envisaged. In addition, the VLL document sets a priority for materials on the proposed site which, in turn, reflects 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.[113]

This top-down hierarchical approach certainly favours the interests of the legal community over the broader understanding of the "public". Bruce 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."[114]

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

111. The discussion paper for a VLLC prepared for the Federation of Law Societies of Canada at one point described the public 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. *Toward a Business Plan*, *supra* note 105.

112. *Ibid.* at 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.

113. *Ibid.* at 6.

114. Bruce, *supra* note 106.

Finally, 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."[115] 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 if they can afford to pay for their services. One could argue that this view of public access is highly paternalistic and disturbingly inegalitarian.

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 programs. Law libraries also make their much broader collections of primary legal materials available, on a limited basis,[116] to members of the public. However, conducting a search for specific legal materials in hard copy can be a daunting task without the assistance of librarians. Libraries, however, vary greatly in terms of available human and book resources. 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 are able or willing to travel some distance to access those materials. Access to document delivery services operated by libraries to provide materials to remotely located areas depends not only on ability to pay for the service, but also on persons' ability to indicate, from a remote location, precisely what materials they desire.

The limited nature of "traditional" forms of access can be illustrated by one of the surprising consequences of "freeing" the law as discovered by both AustLII and LII. 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

115. *Supra* note 44 at art. 19.

116. 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.

of searches by surname. While names are currently reduced to initials in published versions of some family and young offender cases, the widespread free distribution of materials online could expose 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 to ensure that appropriate levels of citizen privacy are maintained.[117]

It is reasonable to ask, even if a need for greater public access to legal information were established, does online legal information 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, however, is currently rated very high in terms of connectivity worldwide.[118] 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, thus permitting access through these public facilities.

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 to the chaos, arguably improving the quality of the kind of access that would otherwise exist in an incoherent and piecemeal form. 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 continue to provide access to a reliable and (ideally) authoritative collection of primary materials, thus making choices about other supplemental commercial collections and services easier.

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

118. Industry Canada statistics show that in 1999, 49% of Canadians were accessing the internet. Canadian Internet Commerce Statistics, Summary Sheet. Industry Canada (22 August 2000).

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:

> 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.[119]

In the absence of free, online public access, these concerns remain 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[120] to CD-ROM versions of certain materials, the cost burden becomes even more severe for libraries and smaller 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 the larger public. It also places a check on the ability of commercial publishers to monopolize legal information.[121]

To this point, I have been discussing access as if it simply means the ability to bring materials to the party seeking them (or the seeker to the materials). However, there are other elements to the concept of access that

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119. Harry Arthurs "A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?" (1995) 18 Dal. L. J. 295 at 308.

120. To this point I have not addressed the question of 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, and 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.

121. 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 on the utilisation, interpretation, reorganisation, analysis, software tool development, and management of this judicial raw material." *Toward a Business Plan*, *supra* note 106 at 16.

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 and 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 can also increase costs, and fees for access to commercial online databases are not insignificant.

While free, publicly accessible primary legal materials online might significantly reduce costs of access to legal materials,[122] 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,[123] 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 the quality of public access.[124]

E. *Access and the Legal Profession*

Public access to primary legal materials cannot really be discussed without also addressing 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 use, it is unrealistic to believe that this form of access is a reality for more than a subset of the "public". Recent reports about the shocking state of legal aid in this country reveal that only the

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122. 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.

123. 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.

124. 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.

poorest of the poor have access to legal aid, and then only for criminal and some family law matters.[125] 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 wide variety of legal circumstances.[126] Clearly, the public is becoming increasingly reliant upon alternative sources of legal information. While there are perhaps legitimate concerns about giving widespread access to unmediated 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 shape such a project could take depending on the interests it was primarily designed to serve.[127] Thus, while both AustLII and LII were started with the express

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125. See Melina Buckley, *The Legal Aid Crisis: Time for Action*, (Canadian Bar Association, 2000), online: <http://www.cba.org/Advocacy/PDFfiles/Paper.pdf>.

126. 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>.

127. 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 106 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 based on their non-member status, and based on the intended use of the downloads, it is also 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.

goal of providing free public access, and 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.[128]

This rather disturbing statement clearly illustrates the problem of leaving such a venture solely in the hands of the legal profession.[129] "Free public access" appears quickly reduced to the means by which some sources of funding will be accessed. Of course, as the document notes, concern about losing these sources of funding "is only an issue if the societies will seek funding outside of the profession and the foundations."[130] 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, 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."[131]

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, and Supreme Court of Canada decisions 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

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128. *Toward a Business Plan*, *ibid.* at 8.

129. 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.

130. *Toward a Business Plan*, *supra* note 106 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." *Ibid.* at 9.

131. Online: <http://www.law.cornell.edu/lii.html>.

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 *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."[132] The "overriding, primary objective" of this proposed VLL is to

> 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.[133]

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."[134]

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 is 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.[135]

This core vision for a Canadian VLL matched those espoused by LII and AustLII.

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132. *Toward a Business Plan*, *supra* note 106 at 4.

133. *Ibid.* at 5.

134. 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).

135. *Toward a Business Plan*, *supra* note 106 at 6.

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

Currently CanLII is limited 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 its site. This permits it to provide a search engine[137] that will allow for universal searching of these collections as a whole, or by particular jurisdiction or collection.

The collections offered through CanLII are based on materials available on existing online court and government sites and, as such, share many of the same limitations. Most date back only a few years, and many courts are not represented.[138] 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 presumed in the VLL document. Currently only two tribunal collections are represented on the site, and only because they are LexUM collections.[139] 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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136. 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.

137. 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>.

138. 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.

139. 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.[140] Nonetheless, it is also stated that "CanLII's objective is to eventually publish files that can be used for professional purposes."[141] 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".[142]

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".[143] 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."[144] 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 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

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140. Online: <http://www.canlii.org/disclaimers.html>.

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

142. *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.

143. *Ibid.*

144. *Ibid.*

more intangible barriers include the lack of a clear consensus around the virtue of free public access to legal materials, and struggles 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 argued 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 electronic Legal Information Institutes, 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 LIIs, 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 are 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 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 the 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 very 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 LIIs 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.