

## Courts struggle to balance privacy and openness in giving access to court files over the Internet

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The age of Internet access to court records has dawned in Canada, bringing with it concerns that easy access to registry files could lead to the misuse of confidential or sensitive information long buried under reams of paper.

British Columbia is leading the way, with online access to some 200,000 court documents and more to come, and the Supreme Court of Canada will decide this fall whether to begin posting factums filed in advance of its hearings.

"It's just the way people communicate now, by and large," the Supreme Court's deputy registrar, Louise Meagher, says of the trend toward making more court records available online.

New court rules will make it mandatory for counsel to electronically file Supreme Court of Canada factums this fall, she notes. The proposal to take the next step and post them on the court's website is a response to the demand among lawyers, academics and law students for access to the legal arguments behind court rulings.

"They're a valuable source of legal knowledge," Meagher told *The Lawyers Weekly*.



Judith Huddart .

Court officials in B.C. recognized the value of their files as early as 1999, launching a web-based service called Court Services Online that provides access to selected court records for a fee of \$6 per file.

"It's about moving to the electronic world, moving the court file to an electronic court file," says Andrew Clark, a consultant to the province's Attorney General's Department, who is spearheading the initiative.

Canada's courts have been posting rulings for years. Some courts have begun posting docket information about upcoming hearings and some court-related information, such as judgments, has long been available through online property registries.

But judges and court officials are only beginning to explore the implications of posting the records behind rulings and dockets — criminal informations and indictments, statements of claim and defence in civil cases, and the orders, affidavits, exhibits and transcripts that round out a court file.

Online access and keyword searches remove the drudgery and expense associated with searching paper records, making it possible for anyone to peruse thousands of court files in seconds. The so-called "practical obscurity" that shields information in paper records is removed, providing ready access to those seeking to find — and possibly misuse — personal information about litigants.

"Right now, even though in theory there's access, the practical fact is that people don't go to court files normally and go through all that paper," says Judith Huddart of the Toronto firm Dranoff & Huddart. She and other family law practitioners worry that information routinely filed in divorce and

custody cases — tax returns, financial and property records, details about children — could fall into the wrong hands.

“We’re concerned in terms of the implications of people being able to easily access information in family law files... think about predators, or people that are stealing identities... family law is the perfect forum for finding out that information.”

But David Coles, a Nova Scotia lawyer who acts for the CBC and other media outlets, rejects the notion that information should be removed from the public record simply because electronic access makes it easier to find. Canada’s courts are open to public scrutiny and should remain open in the Internet age.

“All it’s doing, in my opinion, is providing ready access to what should already be accessible,” says Coles, who practises with the Dartmouth firm Boyne Clarke. “There’s inconvenience and perhaps expense now to exercise one’s right of access. Being able to do it electronically eliminates those barriers, but those barriers aren’t philosophic barriers, they’re just simply practical barriers.”

“Surely the issue is, are they documents that should be public? If they are, then we should facilitate ready access. If, on the other hand, the nature of the document is such that for policy reasons it should not be public, then it doesn’t belong in the public registry.”

The judiciary has been grappling with how to balance privacy concerns and the open court principle since 2003, when a committee of the Canadian Judicial Council released a discussion paper exploring the pros and cons of electronic access to court records.

In 2005 the Judges’ Technology Advisory Committee released a model access policy emphasizing openness but recommending measures to prevent the use of court records “for improper purposes, such as commercial data mining, identity theft, stalking, harassment and discrimination.”

The committee’s main concern is restricting online access to “personal data identifiers” that could be included in court records, such as birthdates, street addresses, e-mail accounts, phone numbers, social insurance numbers and bank account information. Such details should not be disclosed through online databases and everyone who creates or handles court records — counsel, clerks and judges alike — should ensure such information is included only when it is relevant to the case.

Huddart, the past chair of the Canadian Bar Association’s national family law section, helped formulate the CBA’s submission to the advisory committee and says such precautions are prudent.

“It’s a balancing act,” she says. “All courts have to move to the electronic format... We’re burying our heads in the sand if we think this is never going to happen. It’s only a question of when, not whether.”

But Coles is not so sure information — even personal information — can be withheld from the Internet after the fact. “Are we going to go back and somehow edit or censor what happened in the public courtroom... because somebody may be concerned that what was said may be used for an ulterior purpose? This gets really dangerous, if you start after the fact rewriting evidence... what we’re sacrificing is respect for the administration of justice.”

While such information is unlikely to crop up in Supreme Court of Canada factums, Meagher says the court is devising policies that would restrict web access to factums if a publication ban or sealing order is in place.

British Columbia’s online system has been designed with this balancing act in mind. “A big aspect of this whole project has been, what are we allowed to display?” says Clark, the project manager. Court Services Online provides access to records of civil cases — superior court as well as small claims — but criminal and family law files are not accessible. Electronic indexes with “tombstone” information about cases — names of parties, dates of filing, disposition — are also available.

Registry agents and law firms are the biggest users of the system, which provides quick and convenient access to files and makes it faster and cheaper to conduct due diligence research.

None of the information posted exposes litigants to the risk of identify theft or other abuse, says

Thomas Broeren, a lawyer who's a consultant to the project. "Most of the information that's available is stuff that you get out of the phonebook or could get using Canada 411." As well, Clark points out, affidavits and exhibits are not posted online since they may contain sensitive information or unproven allegations.

B.C. plans to begin providing access to basic information about criminal cases later this year, but not the documents themselves. "We're expanding access very cautiously and obviously at the discretion and decision of the judiciary in terms of what becomes available and accessible," says Clark.

Meanwhile, courts in other jurisdictions are moving to systems to e-file documents and considering how much online access to provide. British Columbia signed a deal with the Quebec government in February to share its justice system information technologies, including Court Services Online. Quebec is already a leader in providing court access to rulings.

"It would be wonderful if we could do something on a national basis," notes Huddart. "A lot of this stuff is governed provincially, and that's why you end up with different approaches from province to province. It's very frustrating."