

## Chapter 3

### **The Market for Law-Related Information in Canada: The History of Legal Publishing in Canada**

*No one – layman or lawyer – can have reasonably full knowledge of how the law affects what he or his neighbours are doing without recourse to reports of judicial decisions as well as to the statutes of the realm.<sup>1</sup>*

- 3.1 The History of Law-Related Publishing in Canada
- 3.2 Growth and Consolidation within the Legal Publishing Industry
- 3.3 Impact of the Canadian Law-Related Publishing Market on Access to Information

It was argued in Chapter 1 that access to law-related information is – or should be – a fundamental right. Access, however, by definition assumes a body of law-related information that can be accessed:

It is fundamental to any legal system that the law be available in a timely fashion, in a citeable form to facilitate its use, and in a complete form to provide certainty; be adequately indexed and organized to ensure access; be widely distributed and available through the society to support the idea of fairness and justice; and be understandable through the use of appropriate language as well as through the availability of analyses of it.<sup>2</sup>

As discussed in Chapter 1 and 2, there are various types of law-related information. Two of the main types of law-related information – legislation and case law – are initially first officially generated by the government through legislatures and the

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<sup>1</sup> Sachs, L.J., *The Incorporated Council of Law Reporting for England and Wales v. Attorney-General and Another*, [1972] Ch. 73 at 92.

<sup>2</sup> Paul T. Murphy, “The Role of Publishing Houses in Developing Legal Research and Publication in Canada” in *Contemporary Law: Canadian Reports to the 1990 – International Congress of Comparative Law, Montreal, 1990* (Cowansville, Qué.: Éditions Yvon Blais, 1992) 732 at 733.

courts. The government also publishes a variety of other law-related information written by government employees, Ministers of the Crown and employees of Crown corporations. However, private legal publishers play a very important role in the creation of law-related information in Canada, including the publication of (unofficial) legislation and case law and secondary legal resources such as books and journals that explain or comment on the law. In this chapter I will examine the legal publishing industry in Canada with a view to seeing how access to law-related information is affected by several factors unique to the industry in this country and common to the legal publishing industry throughout the world. Among other things, it will be seen that the relatively small market in Canada for legal materials has negatively impacted access and affected the types of law-related materials that get published by private publishers. First, I will review the history of law-related publishing in Canada followed by a review of the growth of the industry into the modern age, growth which has resulted in the consolidation of the major legal publishers into three families of companies. I conclude with a brief overview of the impact that some of the unique features of the Canadian legal publishing industry have had on access to law-related information.

### **3.1 The History of Law-Related Publishing in Canada**

Fortunately, the history of legal publishing in Canada has been well documented, particularly by Canadian law librarians.<sup>3</sup> My review will therefore be brief and focus on those historical aspects that impact access to law-related information.

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<sup>3</sup> See, for example, the individual chapters in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997).

In early colonial days, there was not much of a domestic publishing industry at all; instead, reliance was placed on importing books from Britain or the United States:

From the outset the book trade was organized to import books and periodicals, just as other mercantile activities brought in manufactured goods: this was a corollary of being a colony, which existed to absorb excess populations and to serve as a market for home products, as well as to ship out raw materials. Since most British North Americans were farmers and woodsmen with neither the cash nor the inclination to buy books, a handful of booksellers imported works for a small group of readers who were chiefly government servants, garrison officers, the clergy, teachers, merchants, and ladies. These were the people, most of them city dwellers, with the time and means for serious or leisure reading, even in adversity.<sup>4</sup>

As might be expected, due to the small population of early colonists and a relatively low literacy rate, the market in colonial Canada for books was very small. Many early booksellers went broke due to the small market for books.<sup>5</sup> The small size of the market in Canada for law-related materials that existed in early days has not really changed all that much over the last 200 years; the market in Canada remains small, segmented and quite specialized.

The first printing press in Canada started operations in Halifax in 1751, two years after the city was established as a garrison and a General Court established. The second printing press arrived in Québec in 1764; their initial uses were primarily for government printing:

The printing press was not brought to Canada in 1751 and 1765 to enlarge the literary and philosophical horizons or to spread the word of God, and certainly not to advance the cause of free speech and democracy, even though in time it became an important instrument for all those causes. It came as an adjunct to the military and civil authorities, to uphold law, order, and good government through the dissemination of official newspapers and proclamations.<sup>6</sup>

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<sup>4</sup> George L. Parker, *The Beginnings of the Book Trade in Canada* (Toronto: University of Toronto Press, 1985) at 13.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at 24-25.

These presses, and the printers who operated them, would also publish materials that were not necessarily law related:

Out of such early printing offices came not only government documents and handbills, statutes and reports of trials, but also the miscellany of printed products that small communities would need – anything from school books to sermons, business forms, almanacs and news sheets.<sup>7</sup>

In fact, many of the early publishers relied on their printing contracts with the government as the official King’s Printer to survive the otherwise unpredictable nature of publishing and bookselling:

For generations, . . . government patronage was the key to survival. All six governments needed a printer for the official gazette and a steady flow of proclamations and statutes, and eventually for the annual journals of the councils and assemblies. In return the printers obtained commissions as King’s Printers, which carried either an annual salary or payment for each order.<sup>8</sup>

One early method by which laws were made available in early Canada, at a time when literacy rates were low, was through the use of an official “crier,” a practice dating back as far as 1541 in England where town criers would be appointed to read important government announcements aloud in public squares:

The saide clerkes . . . shall . . . appoint a criar to make proclamacions, and to call the iuries, and to do other thinges as becometh a criar of a court to do.<sup>9</sup>

Posting new promulgated laws on the church door was another method of publication. In 1753 in Nova Scotia, for example, *An Act Declaring What Shall be*

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<sup>7</sup> Vivienne Denton, “Canadian Law Publishers: A Look at the Development of the Legal Publishing Industry in Canada” in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 16.

<sup>8</sup> *Ibid.* at 26.

<sup>9</sup> 1541 Act 33 Hen. VIII, c. 12 §19.

*Deemed a Publication of the Province Laws*<sup>10</sup> states that “for the Future, Notice being given in the *Nova Scotia Gazette*, or other publick News Paper, or by affixing such Notice on the Church Door at Halifax” shall be deemed to be a “full and proper” publication of such law. Proof of this practice is the publication of certain police regulations in 1809 in Québec when the official public crier is purported to have published the regulations by reading them aloud and then posting them on the Church door, confirmed by his marginal notes on the posted regulations:

I do hereby certify that I have on the 28th day of February, the 1st & 2d March 1809, published the within Regulations of Police in English and French Language throughout all the City of Montreal and the Suburbs, and on the 2d & 3d March, being two market days, on three different places on the old Market place only, each day. Montreal 3d March 1809.<sup>11</sup>

It has been suggested that governments in early Canada used their control over their printers as a form of censorship and control; if the government did not like other material that the printer was publishing, the printer risked losing the patronage and going out of business:

Governments saw their printers as public relations instruments and often required them . . . to post a bond for security and to ‘submit the perusal of the proposed contents [of the newspaper] to the Magistrates in the said Court of Sessions . . . .’ Swift and effective punishment took the form of loss of patronage, a call to the Bar of the Assembly for a humble apology to the House, or even a term in prison without trial.<sup>12</sup>

It appears that American publishers during this same time were subject to much less censorship or control by the government, a factor that likely relates to cultural and political differences between the two countries, something which will be touched upon in Chapter 4 on the discussion of Crown copyright:

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<sup>10</sup> 11. Geo. 3 c. 19.

<sup>11</sup> Source: Library and Archives Canada, “Impressions: 250 Years of Printing in the Lives of Canadians – Judicial and Political” at 3. Available online: <<http://www.collectionscanada.ca/2/10/h10-223-e.html>>.

<sup>12</sup> *Supra* note 4 at 26.

Throughout the eighteenth century a different state of affairs existed in the American colonies, which had been founded for a variety of reasons, some of them by religious and political dissenters from the Old World, others by private commercial adventurers. Yet no matter what their spiritual or secular origins, each colony had an elected assembly that managed its own internal business and political affairs with a freedom not given to the inhabitants of Acadia, Newfoundland, or New France.<sup>13</sup>

By the early 1800's, government libraries were being started and were captive purchasers of law-related materials. Legislative libraries began in what is now Québec (1791), Ontario, Charlottetown (1826) and St. John (1832).<sup>14</sup> The first law libraries in Canada were established in Halifax and Ontario in 1838,<sup>15</sup> but as has been noted “[s]ince these collections were closed to the general public or available only to citizens of the provincial capitals, readers therefore had to find other ways of getting books and sharing their costs.”<sup>16</sup>

### **Legal Publishing in the Maritimes**

Nova Scotia continued to be an important early source of law-related publishing. In 1814, Butterworths (England) published the *Vice-Admiralty Reports*, the first ever volume of reported cases of common law in Canada.<sup>17</sup> In 1832-33, Joseph Howe of Halifax published the 4-volume *An Epitome of the Laws of Nova Scotia* written by Nova Scotian scholar, lawyer and politician Beamish Murdoch, described as Nova Scotia's

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<sup>13</sup> *Ibid.* at 10.

<sup>14</sup> Denton, *supra* note 7 at 18; Parker, *supra* note 4 at 95.

<sup>15</sup> Denton, *ibid.*

<sup>16</sup> *Supra* note 4 at 95.

<sup>17</sup> Jane MacDonald, “Law Reporting in Nova Scotia and Newfoundland: A History” in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 118 at 119. Article also published in (1994) 19 Can. L. Libraries 7.

“Blackstone.”<sup>18</sup> D.C. Harvey notes that it was remarkable that Murdoch was only thirty-two at the time the *Epitome* was published; equally remarkable was that it was published at all given the limited market – a single province – for such a work.<sup>19</sup> Murdoch’s effort made him a pioneer in legal publishing in Canada, although it does not appear that this publication had much effect outside of Nova Scotia:<sup>20</sup>

[T]he fact remains that no single writer, before or since Murdoch, attempted an epitome of all the laws of Nova Scotia or of any other Canadian province. Murdoch therefore stands as a pioneer in the field of rendering provincial laws intelligible to the general community; and he speaks to us out of the leisure and faith of the last century with haunting importunity.<sup>21</sup>

In 1877, the first volume of the *Nova Scotia Reports*, covering cases from 1834 to 1851, was published by James Thomson with the second volume being published in 1855 by Alexander James, covering the years 1853 to 1855. Although Thomson and James purport to have published these volumes due to the importance of making cases available to the public, it has been pointed out that they likely expressed these sentiments in order to guarantee their payment for their efforts:

Jennifer Nedelsky, in her comprehensive work on law reporting in the Maritimes, goes into great detail about the government’s involvement in reporting Nova Scotia cases. The earliest reported cases in the province were published on the initiative of individuals who believed it was necessary to make reports of cases available to the bar and the public. The government provided a wage for these men, although Nedelsky’s research shows the money was often appropriated unwillingly.

Both Thomson and James mention in their prefaces that it was necessary for the public to have access to the decisions of the courts of Nova Scotia. James comments, “by bringing the proceedings of our Courts more directly within the influence of public opinion, it will tend to foster and preserve a good understanding, between the public at large, and those engaged in the administration of the laws.” Nedelsky questions whether the reporters actually

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<sup>18</sup> D.C. Harvey, “Nova Scotia’s Blackstone” (1933) 11 Can. Bar. Rev. 339.

<sup>19</sup> *Ibid.* at 340.

<sup>20</sup> Bora Laskin, “Legal Scholarship and Research in Canada” (1970) 4 Gazette 42 at 43-44.

<sup>21</sup> *Supra* note 18 at 344.

believed the general public had an interest in the activities of the court, or if James and Thomson were indulging in rhetoric to convince the legislature of the importance of making this information available (and thus ensuring the reporters were paid a salary to do the work).<sup>22</sup>

In 1866, Carswell took over publication of the *Nova Scotia Reports* but the government still had authority to appoint the official court reporter under s. 7 of the *Judicature Act*.<sup>23</sup> MacDonald points out that the provincial Law Society also had a role in legal publications under s. 63 of the *The Barristers and Solicitors Act*,<sup>24</sup> a situation similar to that in New Brunswick, Ontario and other provinces:

The first law reports in each province were typically funded and promoted by the law society. Early court reporters appointed by the government or by local law societies found printers locally for their reports, often using the King's Printer or a local newspaper office.<sup>25</sup>

In New Brunswick, Sadler notes that “[I]aw reporting in New Brunswick in the early years was a mixture of private and public enterprise.”<sup>26</sup> Legislation provided for the appointment of court reporters in New Brunswick:

[I]t shall be the duty of such reporter by his personal attendance or by any other means in his power, to obtain true and authentic reports of such opinions, decisions and judgments; and such reporter shall publish not less than two hundred copies of the same in pamphlets after each term of the said Court.<sup>27</sup>

A number of individual lawyers over time were appointed as court reporters. Sadler discusses the importance with which these endeavours were regarded by noting that the

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<sup>22</sup> *Supra* note 17 at 120.

<sup>23</sup> S.N.S. 1886, c. 50, s. 7.

<sup>24</sup> S.N.S. 1899, c. 27, s. 63.

<sup>25</sup> *Supra* note 7 at 17.

<sup>26</sup> John Sadler, “Maritime Entrepreneurism: The History of Law Reporting in New Brunswick and Prince Edward Island” in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 106 at 107. Article also published in (1993) 18 Can. L. Libraries 106.

<sup>27</sup> *An Act to Provide for Reporting and Publishing the Decisions of the Supreme Court*, S.N.B. 1836, c. 14.

preface to Volume 3 of the *Nova Scotia Reports* commented on the importance of “chronicling the evolution of New Brunswick law as distinct from British and American”<sup>28</sup>:

To its practitioners, law reporting was more than a means of earning extra income. It was viewed as a public service. Until the government-sponsored system died out in 1929 a total of thirteen men were appointed as reporters. On average they spent 10 years in the post. All were lawyers, most were native born New Brunswickers, and many went on to distinguished careers within and outside the legal profession. Several became judges, others pursued journalism or entered politics.<sup>29</sup>

In 1879, Carswell took over the publication of the *New Brunswick Reports*.

In colonial Newfoundland and Prince Edward Island, which did not have a large military presence or a civil bureaucracy, eking out a living as a printer was extremely difficult in the late 1700’s since their “isolated farmers and fisherman . . . had little need for printers’ services.”<sup>30</sup> Even more recently in those provinces, there has been very little case law reporting likely due to the small size of the market there:

It is unclear why Prince Edward Island never developed a more sustained set of indigenous reports. One likely possibility is that the small size of the market made the venture commercially unattractive. It has been suggested that the provincial bar was able to get by without formal reports by obtaining decisions directly from the courts either informally or on a subscription basis.<sup>31</sup>

Carswell also started the *Eastern Law Reporter* which ran from 1906 to 1914 and included cases from Nova Scotia, New Brunswick and Prince Edward Island but it was

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<sup>28</sup> John Sadler, *supra* note 26 citing G. Marquis, “‘A Hard Disciple of Blackstone’: David S. Kerr, 1809-1886” (1986) 35 U.N.B.L.J. 182 at 183.

<sup>29</sup> *Supra* note 26.

<sup>30</sup> *Supra* note 4 at 34.

<sup>31</sup> *Supra* note 26 at 108.

discontinued, presumably because it was unprofitable.<sup>32</sup> More recently, in the 1960's, Maritime Law Book started publishing its own set of provincial case law reports for the Maritimes, a reporter series that eventually spread to all jurisdictions across the country.

## Ontario

In Ontario, the 1823 *An Act Providing for the Publication of Reports of the Decisions of His Majesty's Court of King's Bench in this Province*<sup>33</sup> provided for the publication of case law in the province. The preamble to this Act describes the reality that the cost of case law reporting would exceed any revenues generated by the publication:

Whereas from the infant state of this colony, the publication of the decisions of his Majesty's court of king's bench in this province *would be attended with more expense than the probable sale of reports thereof would compensate*, whereby individuals are prevented reporting the same; and *whereas it is extremely desirable for the information of the public, that some public record of the judicial opinion of the judges of the said court should be kept . . .* [emphasis added]

However, “the early Ontario reporters had trouble making ends meet and the reports were sporadic,”<sup>34</sup> a situation similar in other provinces. In Ontario, as with other provinces in the West, the provincial Law Society also played a role in the publication of case law, a role that continues to today. Under Bylaw 23 of the Law Society of Upper Canada<sup>35</sup>, the Law Society continues to be obliged to provide copies of the *Ontario Reports* to each of its members and “may make provision for the distribution of copies of reasons for judgment on such terms as Convocation may from time to time determine.”

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<sup>32</sup> *Supra* note 17 at 121.

<sup>33</sup> 4 Geo IV, c. 3 (1823).

<sup>34</sup> *Supra* note 7 at 17.

<sup>35</sup> Law Society of Upper Canada, “Bylaw 23 – Publications of Case Law.” Available online: <[http://www.lsuc.on.ca/services/bylaw\\_23.jsp](http://www.lsuc.on.ca/services/bylaw_23.jsp)> (Last amended: May 28, 1999).

Early Ontario case law reporters included *Taylor's King Bench Reports* (1823-1827) and *Draper's King's Bench Reports* (1828-1831), named after their reporters; both sets of reporters lost money.<sup>36</sup> Other earlier reporters, published by the Law Society, included *Upper Canada Queen's Bench Reports* (U.C.Q.B.), the *Upper Canada Chambers Reports* (U.C. Chamb.), the *Error and Appeal Reports* (U.C. E & A.) and the *Upper Canada Chancery Reports* (U.C. Ch.).<sup>37</sup> The *Ontario Appeal Reports* (1872) and the *Ontario Reports* (1882) both became the *Ontario Law Reports* (1900-1931), after which time the current *Ontario Reports* began (1932 to current). The Law Society has contracted out the publication of the *Ontario Reports* to a number of different publishers, including Canada Law Book in the early days, followed by Carswell for awhile. Currently, it is being published by Butterworths. It is suspected that the publisher makes a profit from the advertisements that appear in the weekly softcover versions of the *Ontario Reports*.<sup>38</sup>

One negative effect of the Law Society's role in publishing case law in Ontario is that the Ontario provincial government has neglected its own obligations to make case law more widely available:

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<sup>36</sup> Anne Matthewman, "Volumes of History: The Legal Profession and the Development of Law Reporting in Ontario" in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 80 at 82. Article also published in (1996) 21 Can. L. Libraries 7.

<sup>37</sup> *Ibid.* at 83.

<sup>38</sup> *Ibid.* at 89.

The involvement of the profession both monetarily and editorially has meant that the Ontario government, and more specifically the Ministry of the Attorney General, has had very little to do with case reporting. Over the years various articles and reports have decried this seeming lack of interest and also the lack of monetary support. In 1891, T.G. Browning stated that the government should recognize its obligation and rather than the profession having to do so, pay for the publication of reports since, “It is the public weal, the general administration of justice, that calls for the preservation of precedents, creates the necessity for their publication.” Browning’s pleadings were in vain. Many years later in the *Report on the Administration of Ontario Courts* the Commission authoring the report made the recommendation that the Law Society and the profession should not have to bear the costs of case reporting. Citing the administration of justice in its reasoning the members of the Commission said “we believe that some form of subsidization is both necessary and desirable.”<sup>39</sup>

## Québec

Legal publishing in Québec has also been a mixture of public and private enterprise. Tanguay and Boyer<sup>40</sup> describe three major phases of legal publishing in Québec:

(i) **the publishing “free for all” (1727-1891)**: during this period, case law was published in newspapers and various nominate reporters. Legislation in 1850<sup>41</sup> imposed a levy on all Québec lawyers to fund publication of law reports, the *Lower Canada Reports*.<sup>42</sup>

(ii) **the organizational period (1892-1973)**: This period was marked by “the collective efforts at rationalization and organization of case law publishing and

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<sup>39</sup> *Ibid.* at 81.

<sup>40</sup> Guy Tanguay and Daniel Boyer, “Annals of Québec Case Law Reporting” in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 92. Article also published in (1994) 19 Can. L. Libraries 186.

<sup>41</sup> *An Act to Assign Fixed Annual Salaries to Certain Officers of Justice in Lower Canada and to Form a Special Fund out of the Salaries, Fees, Emoluments and Pecuniary Profits Attached to their Offices*, Prov. C. 1850, c. 37.

<sup>42</sup> *Supra* note 40 at 94.

dissemination by the bar” (including the publication, for example, of the *Rapports judiciaires officiels de Québec*) and “the flourishing of individualistic and idiosyncratic digests” (including the *Annuaire de jurisprudence due Québec*)<sup>43</sup>

(iii) **the period of systemization (1974-current)**: A significant event during this period was the creation in 1976 of the *Société québécoise d’information juridique* (SOQUIJ), a Crown corporation whose statutory mandate is to “cooperate with the Québec Official Publisher in publishing judicial decisions rendered by the courts and the quasi judicial tribunals of Québec.”<sup>44</sup> SOQUIJ makes decisions available in print (including the case law reporter *Recueil de jurisprudence du Québec*) and through an online database subscription; it is self-financed through sales of its products and services.<sup>45</sup>

### **Western Provinces**

Early law reporting in the West first started with each of the provincial Law Societies: in British Columbia the Law Society was the publisher of the official law reports from 1867 to 1947, in Alberta from 1907 to 1932, Saskatchewan from 1907 to 1931 and Manitoba from 1883 to 1963.<sup>46</sup>

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<sup>43</sup> *Ibid.* at 96.

<sup>44</sup> *An Act respecting the Société québécoise d’information juridique*, R.S.Q. 1977, c. S-20, s. 21.

<sup>45</sup> See “SOQUIJ: An Overview” Available online: <<http://www.soquij.qc.ca/societe/english.html>>.

However, a recent government news release, discussed *infra* in the final conclusions section of this thesis, mentions the possible dissolution of SOQUIJ in favour of the provincial government directly publishing legislation and case law, leaving it up to the private sector to provide added value law-related materials.

<sup>46</sup> Denton, *supra* note 7 at 18.

Fraser, writing about early legal publishing in British Columbia recounts the tale told by Mr. Justice H.P.P. Crease in a letter in 1877 in which the judge describes the ordeals of going on the judicial circuit by packhorse, sometimes traveling hundreds of miles to arrive at the next town. The letter describes the supplies necessary for the trip, including a portable law library:

The Judge has to carry with him for himself and his attendant and packer, tents, baggage, food, cooking utensils, and camp equipage of every kind, and blankets; ford rivers, scale mountain-sides, camp and sleep out seven and six weeks at a time, sometimes subject to an Egyptian plague of mosquitoes.

The Supreme Court Judge as a matter of absolute necessity has to carry with him, in addition to the above, all Law Books he will require in every branch – Chancery, Probate, Common Law . . . some 500 lbs., with freight at 25 cents per lb.<sup>47</sup>

When Butterworths (U.K.) decided to open a Canadian office in Winnipeg in 1912, this marked an important beginning of modern legal publishing in Canada:

The year of Butterworth's entry into Canada, 1912, was a banner year in Canadian legal publishing. It also marked the beginning of the *Dominion Law Reports* by the Canada Law Book Company, and of the *Western Weekly Reports* by Burroughs & Co. of Calgary. Burroughs had recently broken away from Canada Law Book to set up his own company. In 1919, he started the ambitious publication of the *Canadian Encyclopedic Digest (Western)*.<sup>48</sup>

In most cases, the discontinuance of the publication by the Law Societies of case law reports in the early to mid 1900's was filled by existing commercial publications, such as the *Western Weekly Reports* (Carswell) and the *Dominion Law Reports* (Canada Law Book). But eventually, more recent provincial law reports were published again for

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<sup>47</sup> Joan N. Fraser, "Case Law Reporting in British Columbia" in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 43 at 45. Article also published in (1993) 18 Can. L. Libraries 47.

<sup>48</sup> Ken Whiteway, "Prairie Quires: The History of Law Reporting in Manitoba and Saskatchewan" in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 69 at 70. Article also published in (1993) 18 Can. L. Libraries 7.

each of the provinces, e.g., the *British Columbia Law Reports* (Carswell) and the *Alberta Reports* (Maritime Law Book), to name a few examples.

### 3.2 Growth and Consolidation within the Legal Publishing Industry

By the turn of the last century, the major legal publishers that still exist today (albeit in slightly different corporate format) – Carswell, Butterworths, and Canada Law Book – started to expand their catalogues of publications and assert their presence in the market over smaller publishers. By 1929, G.F. Henderson was lamenting the “very high cost of legal literature” in Canada,<sup>49</sup> but was hopeful that the then recently launched *Canadian Encyclopedic Digest* would be a valuable addition to the legal literature and be supported generally by the profession. But even during the first half of the 20th century, Canadian law books were primarily British. In 1952, the Managing Director of Sweet & Maxwell mentioned the small size and regionalized nature of the Canadian legal market as a reason why there were still so few domestically written and published legal treatises:

We have felt for some years that something could be done to help the Canadian practitioner by producing English standard works, either with separate notes giving references to the appropriate Canadian law, or with special supplements, and we have discussed the suggestion with our Canadian associates in Toronto. Nothing has so far come of it because of the conviction on the part of the Canadian publishers *that such a course would have little or no effect on the sale of books in Canada, and we must say that our own inquiries . . . supported the publisher’s view.*

*It is obvious that whatever scheme is adopted is bound to be fairly expensive in editorial fees and in additional printing costs, and unless we can see a reasonable chance of recovering these by a substantial expansion of the Canadian market, we do not feel justified in going to the additional expense of the Canadian market . . . .*

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<sup>49</sup> G.F. Henderson, “Condensing the Law” (1929) 7 Can. Bar. Rev. 60.

*Further complications are, of course, bound to arise from the fact that there is not one single jurisdiction in Canada, and that the laws of the various provinces frequently vary, so that for the Canadian lawyer it will often be necessary to provide perhaps five or six separate statements on the position in the various provinces.*

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We have also considered the possibility of publishing separate editions of some of our text-books for the Canadian market, but we have, like the Canadian publishers, thought that *the Canadian market is too small in most cases to support a separate edition.*<sup>50</sup> [emphasis added]

Four years later, in 1956, a Canadian Bar Association Committee on Legal Research bemoaned the sad state of the legal publishing in Canada and the lack of a domestic legal literature and a body of legal scholarship that was still far too small for a country such as Canada:

[T]he Canadian legal order is now developing its own distinctive characteristics more rapidly than we are analysing and recording that development. The result is that in too many fields of law (speaking of the common-law provinces) we are dependent on an English text for a Canadian solution, and, while in some cases that will be sufficient, in an increasing number it is becoming quite inadequate. Canada should by now have passed beyond her present degree of dependence upon Halsbury's Laws of England and its converter volumes. In Quebec there has been a considerable volume of legal writing on the basic civil law in recent years, but here too there are many gaps and many new legislative fields unilluminated by scholarship.<sup>51</sup>

By 1970, Bora Laskin, then a judge of the Ontario Court of Appeal, described the legal literature landscape in Canada as improving in some areas but still lacking a wide body of Canadian-published legal treatises on a number of Canadian topics:

The past ten years has seen an increase in the number of legal periodicals published in Canada; in the gross but not relative (to the number of full-time law teachers) in volume of scholarly writing; and in the number of graduate and research programmes offered in Canadian law schools. It would have been odd were it otherwise. Case law books have proliferated, some monographs have been written, research projects on a variety of problems are engaging many law

<sup>50</sup> M.W. Maxwell, "Encouraging Canadian Law Books" (1952) 30 Can. Bar. Rev. 956.

<sup>51</sup> "Report of the Committee on Legal Research" (1956) 34 Can. Bar. Rev. 999 at 1017.

teachers, but Canadian texts on such basic subjects as torts, contracts, criminal law, and administrative law, to mention a few that are needed are still to be written for the common law lawyer. The civilians in Quebec are a little better off in this respect.<sup>52</sup>

Some Canadian legal texts were published during that era in the area of mining, shipping and railway law because of the unique Canadian circumstances for these topics, but in other areas – particularly common law areas – reliance was still made on British authorities, especially since the Canadian market was so small:

None [i.e., Canadian legal texts] were needed as badly in the old common law fields where English texts were in adequate supply. Unless the Canadian text was first class, and able to compete in a wider market, there did not seem to be much point in providing more of the same under a Canadian imprint . . . .<sup>53</sup>

There are three main reasons for the growth in Canadian legal literature over the last 40 years: (i) the rise of modern legal education and the move to a more academic or scholarly form of legal education has meant that more law professors and law students were writing law-related publications; (ii) in recent times there has been a growth in interdisciplinary and multidisciplinary research across all fields of study including the notion of “law as a social phenomena”; this has also resulted in more law-related publications; and, (iii) the introduction of the *Charter* in 1982 has also resulted in an increase in legal and scholarly writing due to the *Charter*’s impact on a broad segment of society.<sup>54</sup> However, during the past forty years, the “situation for Canadian legal publishing remains essentially the same as it did in 1977, with a relatively small market, high production costs and regionalization.”<sup>55</sup>

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<sup>52</sup> *Supra* note 20.

<sup>53</sup> *Ibid.* at 45.

<sup>54</sup> Neil A. Campbell, “A Survey of Canadian Legal Bibliography” in Martha L. Foote, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 1 at 10. Article also published in (1996) 21 Can. L. Libraries 241.

<sup>55</sup> *Ibid.* at 9.

In the last few decades, the major Canadian legal publishers started to acquire smaller “niche” publishers. For example, Carswell – one of the oldest legal publishers in Canada has acquired a number of small companies in addition to being acquired itself. In 1913, Sweet & Maxwell (U.K.) became a part owner of Carswell. More recently, in 1987, Thomson acquired Carswell and Sweet & Maxwell (and West Publishing in 1996). In 1991, Carswell merged with another Canadian publisher, Richard De Boo. Carswell also acquired a Québec publisher, Les Editions Yvon Blais, in 1997. Likewise, Butterworths Canada, itself owned by international conglomerate Reed Elsevier, acquired Canadian database provider Quicklaw in 2002. The parent company of CCH Canadian – Wolters Kluwer – has recently acquired a number of other legal publishers, including Aspen Law and Kluwer Law International.

This same consolidation that was happening in Canada was also happening in the United States and elsewhere with the “the continual monopolization and internalization of the legal publishing industry.”<sup>56</sup> Currently, the bulk of legal materials and legal information published in the private sector in Canada and around the world emanates from one of three “family” of companies:

- **The Thomson Corporation** (Canada): Major legal publishers that are part of the Thomson family include West (and Westlaw), Sweet & Maxwell, Carswell, Bancroft-Whitney, Clark Boardman Callaghan, Foundation Press, Lawyers Co-op, and Warren Gorham & Lamont.
- **Reed Elsevier** (Holland): In the Reed Elsevier family are the following major legal publishers: LexisNexis, Butterworths, Quicklaw, Lancaster House, Tolley Publishing, Mathew Bender, Shepard’s and Michie.

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<sup>56</sup> *Ibid.* at 2 and 11.

- **Wolters Kluwer** (Holland): Major legal publishers that are part of the Wolters Kluwer family include CCH, Prentice Hall, Kluwer Law, Little, Brown & Company, Aspen Law, Wiley Law Publications.

These three major “parents” of legal publishing in the United States (and around the world) – Thomson, Reed Elsevier and Wolters Kluwer – control 90% of the legal publishing business in the United States.<sup>57</sup> Similar data does not appear to be available for the Canadian market where these three companies also dominate a large part of the market; the experiences in Canada are very similar to the experiences in the United States, albeit on a smaller scale:

The history of legal publishing in the United States mirrors that of the publishing industry as a whole. In the beginning there were many publishers, mostly local, who catered to their particular market. There were many reasons for this including the difficulties of transportation and communication. As the nation spread across the continent the numbers grew. But, as transportation and communication improved, it became possible for publishers to serve markets far removed from their home office. Consolidation was inevitable and continues. Multimedia conglomerates dominate information delivery and publishing.<sup>58</sup>

In Canada, the three major law publishers in the private sector that are part of these “Big 3” families – Carswell, Butterworths Canada and CCH Canadian – also dominate a large part of the market. Small publishers who have “survived” independent of these three include Canada Law Book (although there was a failed merger attempt at one point with Reed Elsevier in 1996),<sup>59</sup> Emond Montgomery Publications (although they are now a “division” of Canada Law Book)<sup>60</sup> and Irwin Law (although at one point they were part

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<sup>57</sup> John Dethman, “Trust v. Antitrust: Consolidation in the Legal Publishing Industry” (2002) 21 Legal Ref. Serv. Q. 123 at 124.

<sup>58</sup> *Ibid.*

<sup>59</sup> Denton, *supra* note 7 at 21.

<sup>60</sup> Canada Law Book, “Associated Companies.” Available online: <<http://www.canadalawbook.ca/acomp.html>>.

of the Quicklaw family, but when Quicklaw was acquired by LexisNexis Canada, Quicklaw divested itself of Irwin Law due to *Competition Act* concerns).<sup>61</sup>

### 3.4 Impact on Access to Information

It could be argued that the legal publishing industry in Canada – both the private and public and non-profit publishing sectors – adequately serves the needs of most practicing lawyers. For example, lawyers are able to purchase, use or access a variety of legal materials, both primary and secondary resources. For lawyers who do not have their own print collection of resources, they are usually able to subscribe to the commercial online legal databases or use the print (and online) resources at a local courthouse law library, an option not always available to non-lawyers.<sup>62</sup> And for the cost of online searches, lawyers are generally able to conduct their online searches on a “break even” basis by passing the costs of the online searches to the client and ultimately to the losing side in a lawsuit.<sup>63</sup> However, even for some lawyers, the situation is still far from ideal, although it has likely improved slightly in the last twenty years:

The problem of research time is more serious in Canada than it is in the United States or England. There can be but few lawyers here who would not agree that the means of access to judicial decisions in this country are woefully inadequate. The indexes, digests, citators and abridgments are, at best, crude, and the textbook literature is, in most fields, limited. Research in this country is more

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<sup>61</sup> News release, “LexisNexis Butterworths Canada Completes Acquisition of Quicklaw” (16 July 2002). Available online: <<http://www.lexisnexis.ca/about/releases.php#news1>>.

<sup>62</sup> The Great Library of the Law Society of Upper Canada, for example, attempts to restrict access to “members” only. The primary function of the Great Library is “to meet the legal research and information needs of Law Society members by providing access to information, documents and services necessary to the practice of law” (see The Law Society of Upper Canada, “Great Library – Access & Use” (Last updated: December 17, 2004). Available online: <[http://library.lsuc.on.ca/GL/about\\_access.htm](http://library.lsuc.on.ca/GL/about_access.htm)>.

<sup>63</sup> See Lisa A. Peters, “Recovery of Legal Research Expenses in Taxations and Assessments of Costs” (1997) 55 *Advocate* 79. See also Section 1.1.2, Ted Tjaden, “Recovery of costs and disbursements for legal research” in *Legal Research and Writing*, 2nd ed. (Toronto: Irwin Law, 2004).

difficult, takes longer, is more costly and more frustrating than it is in most other places.<sup>64</sup>

For the layperson, there are a number of factors identified above and summarized below that are endemic to the Canadian legal publishing industry that act as barriers to access to law-related information:

- **Delays in official publications of legislative material:** The federal and most provincial governments are unacceptably slow in ensuring that print or online versions of legislation are current and up-to-date. The exception to this is Ontario's e-laws project, which provides free access to Ontario statutes and regulations that are current and up-to-date within 24 hours.<sup>65</sup> The federal government legislative website, by way of contrast, is generally several months out-of-date. Print versions of legislation published by the official government Queen's Printer are notoriously out-of-date, with annual statutes sometimes not being published for 8 to 12 months after the end of a session or calendar year:

The government does a poor job of providing access to its publications and data bases. Little effort is put into marketing. It is often difficult to know how to obtain access. There are often considerable time delays in publishing legal information.<sup>66</sup>

- **Lack of "official" status of online government versions of legislation:** Despite the convenience and low cost for government to publish legislation online, the continuing reluctance of the federal and provincial governments to make their online version an "official" version forces users to rely on the print-based

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<sup>64</sup> Getz, *supra*, Chapter 2, note 39.

<sup>65</sup> Ontario, "E-Laws – Home Page." Available online: <<http://www.e-laws.gov.on.ca>>. The E-laws website is discussed in more detail in Chapters 5 and 6.

<sup>66</sup> Denis Marshall, "Crown Copyright: Navigating the Waters" (1993) 18 Can. L. Libraries 175 at 176.

“official” Queen’s Printer version, which will often be out-of-date and not consolidated. The federal government, for example, has the following disclaimer on their legislative website:

The Department of Justice Canada assumes no responsibility for the accuracy or reliability of any reproduction derived from the legislative material on this site. The legislative material on this site has been prepared for convenience of reference only *and does not yet have official sanction*. For all purposes of interpreting and applying the law, users should consult:

- the Acts as passed by Parliament, which are published in the “Assented to” Acts service, Part III of the Canada Gazette and the annual Statutes of Canada, and
- the regulations, as registered by the Clerk of the Privy Council and published in Part II of the Canada Gazette.

The above-mentioned publications are available in most public libraries.<sup>67</sup>

This reluctance to make online versions of legislation official apparently stems from a concern over security and tampering with the data.<sup>68</sup> However, given the ability to verify online sources from other print sources, this risk is not very realistic and is overly cautious, especially since the risk of forgery exists even in a print only environment:

It is contended that the potential for deliberate manipulation of text, to commit fraud or with some other evil intent, is much exaggerated. This potential has always existed with print-based legislation, but, as is the case with print-based text, there are simply too many alternative sources that can be used for verification. Such an act could only be successful by alteration of the text on the government server, which will be well protected by fire-walls and backups.<sup>69</sup>

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<sup>67</sup> Department of Justice Canada, “Laws – Note from the Department of Justice” (Last updated: 7 March 2005). Available online: <<http://laws.justice.gc.ca/en/note.html>>.

<sup>68</sup> Nicholas Pengelley, “A Not Unhappy Place: Web-based Legislation in Australia and Canada” (2001) 26 Can. L. Libraries 139 at 142.

<sup>69</sup> *Ibid.*

- **No online historical legislation:** Although computer technology and the Internet have made it easy for government to publish their legislation online, to date, what is generally available by governments is only the current version of the legislation. There are little or no archival or historical versions of legislation online.<sup>70</sup> As such, a person needing to research anything other than the current version of a statute or regulation generally has no choice but to use print resources, which may not be easily available except for at major academic or courthouse law libraries. Given the declining costs of digitizing print material and making it searchable and browsable, there really is no excuse for governments not making older legislative material available online.
- **Unavailability of some case law:** Although most – but not all – Canadian courts are making their recent decisions freely available online, either through their own websites or on CanLII, Canadian administrative tribunals have been much slower to do so. Not much has improved since Murphy’s description of the situation in 1997:

An unpublished review of provincial administrative boards . . . for the Canadian Law Information Council counted some 1,260 “law making” boards in the ten provinces and [the then] two territories. There would seem to be insufficient economic incentive to publish the vast majority of this law. It remains available in a spotty manner, usually through the board by writing or phone for a specific decision. Unfortunately, the decisions are usually not indexed.<sup>71</sup>

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<sup>70</sup> One exception to this is the Alberta Heritage Digitization Project’s Retrospective Law Collection available at <[http://www.ourfutureourpast.ca/law/law\\_home.asp](http://www.ourfutureourpast.ca/law/law_home.asp)> where Alberta statutes have been digitized from 1906 to 1990 and made available online at this site for free, with plans to digitize retrospective bills and *Gazettes* – see Ted Tjaden, *supra* note 5 at 60. In addition, the Law Library Microform Consortium – or LLMC – has digitized Ontario statutes to the turn of the century as part of their British North America historical database, but access is by subscription; the site is not freely available.

<sup>71</sup> *Supra* note 2 at 738-39.

- **Poor indexing of online case law by the courts:** Where courts do make their recent decisions available online on their court websites or on CanLII, there is little or no indexing done of the decisions by topic. This forces the user to either search by keyword or to browse by case name or date. Compared to using print indexes like the *Canadian Abridgment*, this is not always a satisfactory situation since it makes it extremely difficult to find prior cases on similar facts or issues.
- **Lack of depth of online case law:** Although the move by Canadian courts to put their judgments online for free is laudatory (and likewise the development of free online case law databases by CanLII), free online case law in Canada is in almost all situations only for very recent decisions. There is no “archive” or historical collection of Canadian case law freely available online provided by the government or available through CanLII. For a legal system that relies on past precedents, the result is that a researcher cannot rely solely on the free online versions of cases but must resort to print copies in law libraries or access the commercial online databases which tend to have better archives of older cases. The situation in the United States, also lamented for the lack of free archival case law, in fact is much better than the situation in Canada, but even in the United States, the lack of older case law freely online is a problem:

Many [U.S.] court Web sites provide access to current case law, but sites generally go back only a few years and documents may require downloading onto a hard drive or a disk, something not always possible on public library Internet terminals. I surveyed each state’s case law Web site via FindLaw and found that most state databases don’t include opinions prior to 1995. The oldest database is Oklahoma, with cases from 1919 on. California starts in 1934, and Hawaii in 1989. Six states include opinions from 1990 to 1994. A seventh state, Ohio, has opinions from 1990 on for the Eighth District Court of Appeals, but most Ohio appellate courts start in 1997. The Ohio Supreme Court site directs users

to the FindLaw Web site for older cases, as the court only archives current cases. Although the FindLaw site archives Ohio Supreme Court material back to 1997, for appellate court cases it links to the official appellate court Web site.<sup>72</sup>

- **Secondary resources aimed at primarily lawyers not consumers:** In part because the Canadian market is so small, there is very little return for Canadian legal publishers to sell law-related textbooks to the general consumer market. As such, their sales of print legal materials (such as books, journals and encyclopedias) are primarily to practicing lawyers and law libraries. The result of this is that books and other materials that do get published on legal topics tend to be geared in terms of style and comprehension levels towards the professional market and not the average citizen.
- **Legal materials are expensive:** There are more than twice as many lawyers in California than all of Canada.<sup>73</sup> This results in a very small market in Canada with relatively specialized demand for materials that tend to be high-priced (since in Canada the “profitability of legal materials is not derived from a high volume of sales or low prices”<sup>74</sup>):

More importantly, for the investors in law publishing, is the known fact that professionals are willing to pay high prices for the necessary tools of their trade. As far back as 1956, a Canadian Bar Association Committee on Legal Research reported that the market for legal materials was willing to tolerate high prices; lowering prices would have no effect on sales. Quality and utility were of uppermost importance.<sup>75</sup>

<sup>72</sup> Barr, *supra*, Chapter 2, note 5 at 68.

<sup>73</sup> There are approximately 83,000 lawyers in Canada (Federation of Law Societies of Canada Homepage <<http://www.flsc.ca>>); California, on the other hand, had 190,000 members as of January 2003 (“State Bar of California: What Does it Do? How Does it Work?” Available online: <<http://www.calbar.ca.gov/calbar/pdfs/whowhat1.pdf>>).

<sup>74</sup> Lisa Moran, “The Legal Publishing Industry in Canada, 2000: Challenges and Opportunities” (2000) 25 Can. L. Libraries 152 at 157.

<sup>75</sup> *Ibid.* at 154.

Realistically, the average person needing to research a legal problem will not be able to buy his or her own research materials and will need to use a law library. Depending on location, a law library with print materials may not be easily available and may have restrictions on access, aside from the problem of actually being able to use and understand the materials once in the library. The cost of some important reference tools – such as the *Canadian Abridgment*, the best case law finding tool – is even expensive for all but specialized law libraries to purchase and keep updated through supplements.

- **Secondary resources limited by professional market demand:** Because the market for legal publications in Canada is so small and because the main market for legal publishers are practicing lawyers, this results in there being fewer secondary resources (such as books) in areas or on topics where there may be less market demand by lawyers, such as in areas of consumer law.<sup>76</sup> One consequence of this is that the content of books will be on topics of interest to practicing lawyers, topics which may not coincide with the needs of the average consumer. There are, for example, annotated *Personal Property Security Act* publications but no annotated *Consumer Protection Act* publications:

Commercial publishers do not, however, necessarily give the legal system what it “needs” in terms of publications. Rather, publishers are focused on what they believe the market will buy. The audience to which a publication is directed influences a number of factors including: the form of publication, quality of print, type of binding, length of the book, etc. Further, legal publication is complicated through being divided by jurisdiction into larger markets for federal legal materials and the larger

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<sup>76</sup> *Supra* note 2 at 736.

provinces' materials, on the one hand, and small markets for the less populated provinces, on the other hand.<sup>77</sup>

In addition, although Irwin Law and Self-Counsel Press fill some of the market for self-help guides, the larger legal publishers have relatively few of their monographs aimed at general consumers.

- **Regionalization/Divided markets:** Because the majority of Canadian lawyers practice in Ontario and British Columbia<sup>78</sup> and because Toronto and Vancouver are two major financial centres in the country, secondary resources involving issues of provincial law tend to focus on the law and legal developments for Ontario or British Columbia (and Alberta, to a lesser extent). This results in there being less incentive for publishers to publish materials for small populations, such as Prince Edward Island or Saskatchewan, for example. Regionalization also negatively impacts less-populated areas, which tend to have smaller courthouse libraries or other facilities with law-related information:

A final weakness is in the county court libraries in small centres. In large urban areas small firms can fall back on the law society or law school library. Their confrères in the small centres, however, complained of being at a disadvantage. Often it was pointed out that the library is incomplete and the library staff lacking in both quantity and quality.<sup>79</sup>

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<sup>77</sup> *Ibid.* at 740.

<sup>78</sup> There were 10,799 members of the Law Society of British Columbia as of March 31, 2005 (Law Society of British Columbia, "About the Law Society – Overview," Available online: <[http://www.lawsociety.bc.ca/about\\_law\\_society/body\\_about\\_statistics.html](http://www.lawsociety.bc.ca/about_law_society/body_about_statistics.html)>) and 34,600 members in the Law Society of Upper Canada as of December 31, 2003 (Law Society of Upper Canada, "2003 Performance Highlights," Available online: <[http://www.lsuc.on.ca/news/pdf/arep\\_full03.pdf](http://www.lsuc.on.ca/news/pdf/arep_full03.pdf)>) for a total of 45,399 lawyers of approximately 83,000 lawyers overall in Canada, *supra* note 74.

<sup>79</sup> Department of Justice Canada, *Operation Compulx: Information Needs of the Practicing Lawyer* (Ottawa: Department of Justice, 1972) at 13.

- **Expensive products:** Also because of the small market in Canada for legal publications, and because the market is aimed at professionals, legal publications are not as price-sensitive as they might otherwise be; this has resulted in legal publications being very expensive and out of the reach of many persons:

It is gospel in the law library community that the consolidation of legal publishing into two or three conglomerates has increased the costs of acquisition beyond what is reasonable and, certainly, beyond what the economy had experienced. The publishers, of course, respond that the users, including libraries, are getting much more “added value” than more than justifies cost increases. It seems likely that they are both right from time to time and work to work. It is likely that cost escalation will continue. These conglomerates have paid and will continue to pay high prices for acquisitions as they seek economies of scale and market share. Academic law librarians must remember that practicing lawyers are the market. They are notoriously unconcerned with the cost of their research tools. Publishers say that they provide “need to know” information. If you drive a cab, you must buy gas. If you want to practice law, you must have up-to-date, reliable information. No one has accused the publishers of failing to provide that. As long as they do, they can charge what the “practicing lawyer” market will pay. And that market will set the pricing.<sup>80</sup>

- **Low return on investment affects publications:** It is also reasonable to assume that the relatively small market for legal publications in Canada means that certain materials are not going to get published or frequently updated due to the cost of publication and the low return on investment. One example of this appears to be the failure by Carswell to continue updating critically important titles within its *Canadian Encyclopedic Digest*. For example, the following relatively key titles were last updated 6 or more years ago (with the date of last-update as of May 2005 show in parentheses after the title):

Constitutional law (Last updated: 1986)  
 Criminal Offences (Last updated: 1999)  
 Human Rights (Last updated: 1996)

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<sup>80</sup> *Supra* note 57 at 143.

Bankruptcy (Last updated: 1998)

It is a serious problem that such an important topic as constitutional law is close to twenty years out-of-date given the enactment of the *Charter* in 1982 and the lack of current commentary in the encyclopedia on this topic.<sup>81</sup>

- **Increase of electronic materials creates a digital divide:** As mentioned, private publishers are increasingly taking advantage of online technologies to publish law-related material online. However, as also mentioned, these commercial databases are not freely available and it is likely difficult for most members of the public to use these databases:

Print materials continue to be a necessity where public access is the responsibility of the library. Online services may be reserved for professionals or students, but print resources can provide access to the law for the general public. Libraries are supposed to support a democratic society by providing free access to information. Greater reliance on computers, at the expense of print, will exacerbate inequalities of access, which will also affect the quality of performance of small law firms with limited financial means.<sup>82</sup>

Even law libraries may have difficulty in licensing these databases for use by any

“walk in” patron:

Although many courts now publish case law on the Internet for free, thousands of older cases are not available to those who cannot pay. Hundreds of public libraries across the country provide online access to their patrons in an attempt to bridge the digital divide, covering all areas of information need. Yet often these public libraries are not allowed to offer access – free or fee – to legal subscription databases maintained by

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<sup>81</sup> It could be argued that the information in these out-of-date titles within the *Canadian Encyclopedic Digest* can be found in other publications. Carswell, for example, publishes a current loose-leaf monograph by Professor Hogg entitled *Constitutional Law of Canada*, regarded by many as one of the best books on this topic. However, to the extent that the *Canadian Encyclopedic Digest* purports to be a “complete statement of the law” that is “updated annually or as necessary with new case law or legislative developments delivered by means of its supplement” (the product description on the Carswell website at <http://www.carswell.com>), something is not right.

<sup>82</sup> *Supra* note 74 at 156.

the two largest legal vendors in the U.S. And those same vendors also constitute the largest publishers of legal materials in print. Amidst a growing wealth of free, reliable information on the Internet, there is a poverty of access to the decisions and opinions of the courts that protect our liberties.<sup>83</sup>

As such, “digital drift” poses potential barriers to certain types of law-related information, a topic discussed in more detail in Chapter 5.

In response to the position of West that it at one point owned its citations and page numbering in its cases, the American Association of Law Libraries lobbied the U.S. government for policy changes, expressing its concern over monopolization of law-related information:

[I]t is a fundamental part of our belief that no one should own the law, either outright or in practical effect. Regrettably, the assertion of ownership of some parts of the published case law together with the requirements of courts and others to cite to certain privately published versions of the case law, have, in practical effect, given one publisher substantial control over the legal information market.<sup>84</sup>

In response, the U.S. government noted its concern over the impact of possible monopolization of law-related information and that it would evaluate the possibility of a public-domain database for law-related information:

The Justice Department today said it would explore ways to improve public access to federal court opinions, especially by computer, to make legal research more affordable for scholars, public interest groups and users of electronic information. Currently, most electronic research is done by leasing access to privately owned systems, such as WESTLAW and LEXIS, that electronically search through data bases of federal cases and other materials.

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<sup>83</sup> Barr, *supra*, Chapter 2, note 5 at 67.

<sup>84</sup> American Association of Law Libraries on DOJ Legal Procurement, Letter from Robert Oakley for the AALL to Attorney General Reno, Available online: <<http://lists.essential.org/1995/info-policy-notes/msg00087.html>>, cited by Dethman, *supra* note 57 at 134-35.

Attorney General Janet Reno said that the Department had received considerable correspondence from members of the legal community concerned about the high cost of electronic access to judicial opinions and the present proprietary system most often used to cite federal cases. Reno said the Department is evaluating various existing non-proprietary methods of citing cases to develop a unified, comprehensive approach acceptable to federal and state courts, attorneys and legal researchers. The Department is also exploring the possibility of a public-domain data base of federal and state judicial opinions.<sup>85</sup>

It does not appear that anything concrete arose from this government press release that proposed a public domain database of federal and state court decisions.

Dethman points out that the government subsequently approved the takeover of West (and Westlaw) by The Thomson Corporation (despite its initial concerns about monopoly control), and that the approval was granted on the promise by West to make its claim of a proprietary interest in its page numbering available to others by license (which was likely inevitable in any event – proven to be so in later court decisions discussed in the next chapter).<sup>86</sup>

- **Risks of monopolization affecting cost and ownership of information:** An obvious concern is that the consolidation within the legal publishing industry may reduce competition and thereby raise the cost of legal materials and negatively impact access to that information:

Much of the concern in the law library community regarding the consolidation in the legal publishing business centers on two issues. One is fairly obvious and immediate: cost. The other may have even more importance on the level of public policy: sovereignty and the public's access to the law under which it lives.<sup>87</sup>

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<sup>85</sup> Department of Justice, Press Release (2 September 1994). Available online: <[http://www.usdoj.gov/opa/pr/Pre\\_96/September94/501.txt.html](http://www.usdoj.gov/opa/pr/Pre_96/September94/501.txt.html)>, partially cited by Dethman, *supra* note 57 at 134.

<sup>86</sup> Dethman, *supra* note 57 at 135.

<sup>87</sup> *Ibid.* at 143.

In addition to concerns over rising costs, Dethman in the passage above raises a concern about sovereignty – the article was written shortly after the September 11, 2001 terrorist attacks in New York – at a time when issues of sovereignty were perhaps more pressing with some Americans being concerned that West and Westlaw were now owned by Thomson, a “Canadian” company. Although sovereignty is likely not too pressing a concern in Canada (due to restrictions on foreign ownership of publishing companies), the prospect of private control of public information is perhaps more of an issue, a topic discussed in Chapter 5.

## **Conclusions**

Throughout the history of Canadian legal publishing, a number of similar themes appear – that the market for law-related publications in Canada is comparatively small and regionalized; that most law-related publications are geared towards practicing lawyers and not the general public; and that law-related publications in Canada tend to be quite expensive. Academic and courthouse law libraries are an excellent repository of law-related publications but they may not always be geographically convenient for everyone, and some persons may feel intimidated to use them or may likely in fact have difficulty in using the materials without adequate training.

In the last twenty years or so, there has been an increasing move by the commercial legal publishers and by governments and others to publish law-related information online. As will be discussed further in Chapter 5, the “digital drift”, that is, the move by commercial publishers to publish materials on online databases controlled

by subscriptions and passwords, means that, practically speaking, only lawyers with clients who can afford the online search costs will be able to take advantage of the valued-added features on these online products. The move by the Canadian Legal Information Institute (CanLII) to publish recent Canadian case law and legislation online for free is laudable but represents only a relatively small portion of law-related information with there being little or no historical legislation or case law being freely available online. Since some of these consequences negatively impact access to law-related information, steps can and should be taken to better utilize the Internet to improve access, steps that will be discussed further in Chapter 6 and the final conclusions to this thesis.

Although the focus of this chapter was on the private legal publishing field because of their impact on the industry and access to law-related information, governments also have a significant impact on access. In the next chapter, I review the concept of Crown copyright law as a factor that has retarded access to law-related information.