ACCESS TO LAW-RELATED INFORMATION IN CANADA

IN THE DIGITAL AGE

by

Theodore John Tjaden

A thesis submitted in conformity with the requirements
for the degree of Master's of Law
Faculty of Law
University of Toronto

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LL.M. 2005
Theodore John Tjaden
Faculty of Law, University of Toronto

Abstract

Access to law-related information in Canada is – and should be – a fundamental right. This access is crucial in a democracy such as Canada that follows the rule of law since access to legislation, case law and other government information that is law-related is essential for an informed citizenry. However, a number of factors negatively impact this access, including the complexity of the Canadian legal system, the small size of the Canadian legal publishing industry, Crown copyright, contradictory government information policies, and a shrinking public domain through the digitization of information and other roadblocks on the Internet. The stakeholders involved – the government, private publishers, lawyers, law schools, and other public interest groups – have important roles to play in improving access, particularly through the use of Internet technologies. Recommendations are therefore included regarding specific steps that can be taken to improve access to law-related information in Canada in the digital age.

Acknowledgements

I wish to acknowledge the continual support of my wife Reiko and daughter Hannah in their encouragement and support that allowed me to work on my Master's of Law thesis. I could not have done it without them.

I also wish to acknowledge the kind comments and support I received from Professor Lisa Austin who supervised this thesis. Her knowledge and insights on information law are only exceeded by the kindness and patience she showed me in her supervision.

Thanks also goes to the staff of the Bora Laskin Law Library but particularly to John Papadopoulos for his comments, feedback and insights into the world of legal literature and also to Esmé Saulig and Sufei Xu for the continual support and assistance.

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Introduction

The ability for all persons to access and contribute information, ideas and knowledge is essential in an inclusive information society.[1] This declaration of the World Summit on the Information Society – an obvious truism for most people – is far from being fully realized in many countries, however, due to any number of technological, societal, legal or cultural barriers that contribute to the so-called "digital divide."[2] Information literacy will therefore be the goal and the challenge for those persons wishing to compete and flourish in modern society. And the "information society" as a concept is far-reaching, one that affects not only our industries and economic well-being but also permeates all aspects of life, including our legal system and legal publishing. Increasingly, law-related information is being digitized and made available online. As such, in a society governed by laws, access to *law-related information* is an equally essential component of access to information. Such access has many components, including the notion that courts should be open and accessible to all people, that

[1] World Summit on the Information Society, "Declaration of Principles – Building the Information Society: A Global Challenge in the New Millenium" (12 December 2003) ¶ 24. Available online: <*http://www.itu.int/wsis/docs/geneva/official/dop.html*>.

[2] See, for example, Julie Hersberger, "Are the Economically Poor Information Poor? Does the Digital Divide Affect the Homeless and Access to Information?" (2003) Can. J. of Info. & Libr. Science 45; Susanna Frederick Fischer, "The Global Digital Divide: Focusing on Children" (2002) 24 Hastings Comm. & Ent. L.J. 477; Mark Lloyd, "The Digital Divide and Equal Access to Justice" (2002) 24 Hastings Comm. & Ent. L.J. 505; Catherine Russell, "Access to Technology for the Disabled: The Forgotten Legacy of Innovation?" (2003) 12 I. & Comm. T.L. 237. Issues raised by the digital divide are discussed in more detail in Chapter 5.

legislation should be published and clearly prescribed, and that access to government information be as inexpensive and accessible as is possible. Citizens need to know their legal rights and obligations; journalists need access to the courts and government information in order to be an effective "check" on public institutions; and researchers rely on a variety of government and law-related information to support their research. But the law is complex and law-related information difficult to understand, even for lawyers. This has been the situation for some time in Canada. Thirty years ago – in what was largely a "print-based" environment –Friedland concluded in a study that access to the law in Canada was poor, and even where persons could find law-related information, they often did not understand it or did not interpret it correctly.[3]

Since Canada is a country that follows the rule of law, Friedland's conclusions – that the average person has some difficulty in accessing and understanding the law – are problematic. Taken to its extreme, the lack of access to law-related information results, among other things, in the potential abridgment of legal rights and a difficulty in holding public officials accountable. This worst-case scenario evokes the images of the nightmarish experiences suffered by Joseph K., the central character in Kafka's *The Trial*. In that story, K. is unable to find out the details of the crime for which he is put on trial: "Who's accusing me? What authorities are in charge of the proceedings?"[4] When K. later asks to see the law books sitting on the magistrate's table, he is rebuffed:

> "Can I look at the books" K. asked . . . .

[3] Martin L. Friedland, with Peter E. S. Jewett and Linda J. Jewett, *Access to the Law: A Study Conducted for the Law Reform Commission of Canada* (Toronto: Carswell-Methuen, 1975) at 1 [the "Friedland study"]. This study is discussed in detail in Chapter 6.
[4] Franz Kafka, *The Trial*, trans. by Breon Mitchell (New York: Schocken Books, 1998) at 14.

> "No," said the woman and shut the door again, "that's not allowed. Those books belong to the examining magistrate."
>
> "Oh, I see," said K. and nodded, "they're probably law books, and it's in the nature of this judicial system that one is condemned not only in innocence but also in ignorance."[5]

Later, when K. asks if there have been any actual acquittals by the court, he is told by a painter that in fact the decisions of the court are not published:

> "Such acquittals are said to have occurred, of course," said the painter. "But that's extremely difficult to determine. The final verdicts of the court are not published, and not even the judges have access to them . . . ."[6]

Shortly before he is to be put to death for his unknown crime, K. is told by a priest a parable of a man seeking to gain admittance to the Law. In the parable, access to the Law is via a door that is guarded by a doorkeeper:

> Before the Law stands a doorkeeper. A man from the country comes to this doorkeeper and requests admittance to the Law. But the doorkeeper says that he can't grant him admittance now. The man thinks it over and then asks if he'll be allowed to enter later. "It's possible," says the doorkeeper, "but not now."[7]

The man in the parable thinks that the Law should be accessible to everyone and at all times but decides that he better wait until he gets permission to enter. The man dies waiting. But K. fails to understand the meaning of the parable. The priest points out there are many interpretations to the story: was the man asking the right questions to gain admittance? Was the doorkeeper answering the questions honestly? Did the man even understand how to gain admittance?

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[5] *Ibid.* at 55.
[6] *Ibid*. at 154.
[7] *Ibid.* at 215.

Although the situation in Canada has not deteriorated to this level, the story highlights the dangers of a system that does not provide access to the law. It is this narrower but important aspect of access to information – access to *law-related information* and legal information literacy – that I wish to explore in this thesis. Much has changed in Canadian society in the last thirty years since the Friedland study with the introduction of new technologies such as the Internet. Clearly, the legal system is drastically changing as a result of new technologies, moving away from a traditional print-based environment to an online environment:

> And where is law going? To a place where information is increasingly on screen instead of on paper. To a place where there are new opportunities for interacting with the law and where there are also significant challenges to the legal profession and to traditional legal practices and concepts. To an unfamiliar and rapidly changing information environment, an environment where the value of information increases more when it moves than when it is put away for safekeeping and is guarded. To a world of flexible spaces, of new relationships, and of greater possibilities for individual and group communication.[8]

Have these new technologies "opened the door" to provide improved access to law-related information in Canada? Have new technologies improved comprehension of law-related information? And what roles do the various public and private "gatekeepers" to legal information in Canada – the government, private publishers, lawyers – play in providing access to law-related information? These are important questions if access to law-related information is to be taken seriously. Unfortunately, the answers to these questions are not simple and first require an analysis of overlapping political, social and economic factors that I address in the pages that follow. My goal, in part, is to re-address the issues raised by Professor Friedland thirty years ago in his *Access to the Law* study to

[8] M. Ethan Katsh, *Law in a Digital World* (New York: Oxford University Press, 1995) at 4.

see what, if any, impact the Internet and other advances have had on access to law-related information.

Chapter 1 of this book will argue that access to law-related information in Canada is a fundamental right of every person, embodied in the fundamental legal rights enshrined in the *Canadian Charter of Rights and Freedoms*.[9] This first chapter will also explore the philosophical underpinning of the right to receive information and how it is manifested in different jurisdictions. An argument will be put forward – and expanded on throughout the book – that, despite the importance of the right to access law-related information, this right is not effectively realized by many Canadians.

Traditionally, however, access to law-related information in Canada meant access to print-based materials that were not always very well-organized, were expensive and subject to publication delays. Combine this with a mixed legal system in Canada (common law and civil law), bilingual legislation at the federal and some provincial levels, and the inherently confusing nature of the common law judicial system, you end up with a legal system with many complexities that also hinder access to law-related information, a topic that will be analyzed in Chapter 2.

Chapter 3 will examine the market in Canada for legal publishing. An argument will be made that the effect of a relatively small legal publishing industry in Canada is a diminished legal literature, which also negatively impacts access to law-related information. Moreover, there is a move by most private legal publishers from publishing

[9] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["*Charter*"].

their products in print to publishing their products online with access restricted by license agreement, password or fees. This phenomenon of "digital drift," which has the potential to drastically impact access to law-related information by the general public, will also be analyzed. Despite the existence of the private legal publishing industry in Canada and the limitations that industry faces due to the small size of the professional market for legal publications, an argument will be introduced here and expanded upon in Chapters 5 and 6 that Canadian governments have shirked their obligations to make primary sources of law more easily available and have instead left these obligations to private sector forces. As a result, it will be argued, access to law-related information is further hampered.

Compounding the problem of a complex legal system and challenges faced in the legal publishing industries in Canada is the role of Crown copyright. In Chapter 4, I will argue that Crown copyright in Canada has retarded access to and the availability of government information, including not only legislation and case law but other types of government information relevant to legal research. Comparisons will be made to the United States, where there is no Crown copyright, on the availability of government information and its impact on access to law-related information.

Chapter 5 will explore the trend towards a "shrinking information commons" and the phenomena of increasing private control of public goods. I will look at the role of the World Wide Web in providing public access to the law using free online resources and the impact of a "shrinking" information commons and the commercialization of the Internet. The commoditization of information generally and of law-related information specifically is a growing trend and risks hampering wide access to law-related

information by all sectors of society. Government information policies will also be examined.

The final area of focus – Chapter 6 – will be a brief review of the 1975 *Access to the Law* Friedland study, previously mentioned, by summarizing its research findings and addressing the impact of the Internet and other technologies thirty years after the study was conducted. Using Friedland's study criteria, I will argue that access to law-related information in Canada has definitely improved in certain areas since 1975 but that the ability of the average Canadian to fully comprehend and apply the law-related information they have found remains problematic. Included will be a look to the future to examine the role to be played by various stakeholders, including governments, private publishers, public interest groups and lawyers, regarding access to law-related information. I will recommend a number of steps that stakeholders should take in order to improve access to law-related information in Canada in the digital age. Despite the concerns raised regarding the difficulty for the average person to access law-related information, the future does bring some hope. More specifically, I will be examining the role of technology in improving access to law-related information in Canada.