

I would like to start by giving you a quick overview of the Canadian system of government and our system of justice. Canada, with its population of 34 million people, is comprised of 10 provinces and 3 northern territories. Prince Edward Island, where I come from, is a little island off the east coast which has beautiful warm summers and cold snowy winters. It is the smallest province, and has only 140,000 people. The largest province has 11, 500,000 people. The territories are vast geographically, but have smaller populations than PEI, so they remain under more federal control.

Each province or territory has its own government with its own areas of jurisdiction. Of course we also have our federal government, the Government of Canada, with its own jurisdiction. Like other democracies, we have 3 branches of government: the legislative branch, the executive branch, and the judicial branch.

Our entire court system, like that elsewhere, is based upon, and survives, because of respect for the Rule of Law. Without that, we would not have what we have. In Canada, we are blessed with a high standard of living. We have a very law-abiding population. Our democratic institutions are respected. Our judiciary is respected. You will see the impact of that when I speak of the number of cases heard each year at each level of court.

In each province there are 3 levels of the judiciary. First, there is a provincial court which handles the most common criminal matters. In some provinces these courts also have some limited family or civil jurisdiction. Judges on these courts are appointed by the provincial government.

Then we have the superior court in each province. Depending on the province, the superior court is referred to as the Supreme Court, or the Court of Queen's Bench, or simply, the Superior Court. This is the trial court or the court of first instance for all matters except those limited areas covered by the provincial courts. For example in my province, PEI, the Supreme Court has jurisdiction over all of the more serious criminal matters including any jury trials, all civil matters, commercial, property, family, estates, administrative matters, etc. , together with appeals from summary conviction matters from the Provincial Court.

As the final stage in each province, we have a court of appeal which, sitting in panels of 3, hears appeals of all decisions of the superior court for that province. Judges of both the superior court and the court of appeal of each province are appointed by the Federal Minister of Justice or by the Prime Minister of Canada.

And over all of that, we have the Supreme Court of Canada, with 9 judges who sit in Ottawa, our national capital, and hear appeals concerning all areas of the law from all provinces and territories. Judges of this court are appointed by the Prime Minister.

The most significant and treasured feature of our system is the complete independence and impartiality of our judiciary once appointed. (And I don't mean to say we are alone in this - certainly Great Britain, Australia, NZ, etc operate under the same principles and rather than demonstrate my ignorance of the status quo anywhere else, I am not going to name any other countries).

We are appointed to age 75 although we can choose to retire after age 65.

Once we are appointed we can have no further political involvement or interest - notwithstanding that many of us - as lawyers tend to be - were actively or heavily involved in political activities prior to being appointed. This is no "nudge, nudge-wink,

wink” kind of prohibition. We must remain, and be seen to remain independent and impartial, and completely removed from any public issue or political fray. We have an independent commission that recommends judges salaries in order to avoid anything such as negotiations between judges and government that might be seen to influence decisions, and court administration budgets are becoming increasingly independent and free from any government control. The concept of electing judges, or even more-so, re-electing them, as is done in some places, is completely foreign to the Canadian system of justice.

In terms of volumes of cases heard (or at least, processed) the provincial courts have by far the greatest number. Every common assault and minor criminal offence goes to the provincial court. In my province, it is rare for the Provincial Court to issue written decisions. Most are short processes resulting in an oral decision from the bench. In other provinces where provincial courts have broader jurisdictions, they do issue a large number of written decisions, but most are fact based and are not released for publication.

Just as a rough guide in terms of the number of cases heard each year at each level, (and I speak of the larger provinces because PEI’s population is so small), the numbers breakdown something like this:

Provincial Courts - 10,000’s

Superior Courts - 1000’s

Courts of Appeal - 100’s

Supreme Court of Canada - Less than 100 (60 last year)

When litigants receive a decision from an independent and impartial court which they respect, they don't usually appeal. Of course there are legitimate differences of opinion on questions of law – and we do have appeals – but it is certainly not the norm.

At the superior court level, or trial level, we do have a number of shorter processes – motions, lasting 30- 60 minutes, for which we usually give oral decisions, but the majority of our work involves trials that last a few days to a few weeks for which we issue written decisions that average 15 pages, but range from 2 pages to 200 pages.

Most court of appeal decisions are written, as are essentially all the decisions of the Supreme Court of Canada (SCC).

So, what happens to all these written decisions from these courts after they are issued? And why do we care?

That is where JTAC comes into the picture. The Judges Technology Advisory Committee (JTAC) is a committee created by the Canadian Judicial Council, (CJC), which is a Council comprised of all of the Chief Justices of all of the courts across the country and which is chaired by the Chief Justice of the Supreme Court of Canada. JTAC's mandate is to:

“ provide advice and make recommendations to the Council on matters relating to the effective use of technology by the courts, consistent with the Council's overall mandate to promote uniformity and efficiency and improve the quality of judicial service in courts across the country. “

There are 3 subcommittees of JTAC, namely:

- 1) Security,
- 2) Electronic Evidence, and
- 3) Open Courts and Privacy.

Currently, I am the Chair of the Open Courts and Privacy subcommittee, and Daniel Poulin, whom many of you know, is a very highly valued and most respected member of this committee. This subcommittee is responsible for finding the best uses of technology to help provide for openness and access to decisions from the courts, while at the same time protecting the unnecessary disclosure of personal or private information of the parties before the courts. Openness is a fundamental principle and is the first principle that is respected. In an open system, protection of personal information is not always possible but, to the extent it is, we make every effort to protect it.

Several policies that significantly affect and facilitate free access to court decisions have been developed and updated over the last several years and are contained in a protocol on The Preparation, Citation and Distribution of Canadian Decisions which was revised and consolidated in May, 2009. This Protocol, which has the imprimatur of the Canadian Judicial Council, is now in effect and guides all judges in Canada on the practices surrounding the issuance of their judgments.

The internet arrived in earnest 15 years ago. Until that time, decisions were available only either directly from the court file, if you could get access, or, if they were published, through various report series to which you had to subscribe. With the advent of the internet, and more generally the new electronic media, it became possible for decisions to be accessed electronically from commercial databases, or from free access websites.

There were certain issues that arose that reflected the need for precise citation of electronic documents that differed from those used in traditional publishing methods. For example, page

numbering gave way to paragraph numbering. This type of change was researched, discussed, approved and promoted by JTAC. When it was adopted by the Canadian Judicial Council, along with various other changes, it was implemented across the country. Changes such as this addressed the technical or practical aspects of accessing information on the net, but larger questions remained regarding certain impediments to free access to court decisions. These issues have now been addressed in the latest Protocol.

One of the most significant accomplishments of JTAC has been to have every court across the country implement the use of neutral citations for their decisions. At the risk of being too elementary, I can explain that before neutral citations, when a decision was issued, it was assigned the court docket number or document registry number, and the date of issue. It was certainly not a very user-friendly way of identifying a decision which someone uninvolved in the case might like to discover or retrieve at a later date.

Publishing companies would obtain a copy of the decision and might decide to report on it in a report series. It was a business decision on their part. Of course it was necessary to subscribe to a publication in order to search the cases in that report series. Publishing companies perform a valuable service and I take nothing away from them at all. But now, instead of finding a Prince Edward Island Supreme Court decision in the case of, let's say, A. v. B. at [2009] 16 D.L.R. (3d) 423, (PESC), or at page 423 of the 16th volume of the 3rd series of the Dominion Law Reports for which you must pay a subscription fee, you can find it at A. v. B. (2009) PESC 34, free of charge on the courts website, or more likely, through CanLII's free website.

The citation refers to the year of the decision, the court from which it came, and the sequential decision number from the court for that year. By using the neutral citation, the publication and distribution of court decisions has been liberated both from its traditional paper support and from its specific reference to a commercial product. Neutral citations enhance the value of court websites and other free access sites such as CanLII, as decisions found in those places now have a citation that can be used when referring to them. Neutral citations are also available from the moment the decision is released since it is attached to the decision by the court itself. Finally, the neutral citation belongs to the courts and, in that way, the public nature of Canadian case law is reinforced. The “product” of publicly funded courts is now available to the public without charge. Publishing companies continue to provide a valuable service in compiling various report series, but access is no longer limited to commercial sources.

JTAC also developed a Uniform Practice Direction to be issued under the Rules of each court requiring the legal profession to use the neutral citation when referring to cases, and directing that if they use parallel citations from reporter series or electronic databases, the neutral citation be listed first.

Another issue raised in connection with the Protocol is the question of whether a decision is distributed at all, and the process for distribution. As it stands, there is nothing requiring the public release of a judgment. It is in the judge’s discretion whether a decision is given orally or in writing. Certainly it is the case for routine decisions on motions that they are usually given orally from the bench. I don’t see that changing. And of course an oral decision can be transcribed by one of the parties or by the court if there is a request, but the formalities of issuing a decision are not the same when the decision is given orally. However, what about a decision of more significance? Should there be a policy in each court as to which decisions are “published” and which are

not? What about decisions involving personal information such as in family law and child protection matters? What about corrections to distributed decisions? And what about publication bans imposed on certain aspects of a decision? How are they released?

With the Protocol, and a companion document called "The Use of Personal Information in Judgments", these questions are addressed. The policies call for a central distribution desk for each court to allow for the orderly assignment of sequential numbers and posting on the court's website and distribution to publishers. Each court is to follow its policy on the distribution of decisions. If all agree in a court that there is no value in distributing routine, clearly non-precedent setting decisions, then that is fine. For example, if I grant a 10 day extension for someone to file a document because they were seriously injured in a car accident, that decision doesn't need to be placed on the web. The key is to have the judges address the issue and develop a policy that clearly respects the principles of openness and access while recognizing certain practical factors that permit non-publication without violating the principles involved. Of course consideration has to be given as well to the sheer volume of decisions that are produced when a search is performed, and how, practically, to separate the significant from the insignificant.

I have stated that openness is the key principle and the protection of personal information follows to the extent possible. That is true. However if one is conscious of protecting that information as the decision is being written, a remarkably high percentage of that information can be avoided. Ten years ago it would not be unusual in Canada to see a family law decision start of as follows:

"This case between James Gray and Donna Gray of 323 Summer Street, Newtown, Ontario, involves a custody dispute over their 2 children aged 8 and 10. Their son, Thomas Donald Gray, was born on April 23rd, 1995 and their daughter, Jill Marie Gray, was

born October 18th, 1997. They both attend Spring Street School, in grades 5 and 3 respectively.”

Now that same decision would likely read as follows:

“This case between JG (the “father”) and DG (the “mother”) involves a custody dispute over their 2 children, a boy aged 8 and a girl aged 10, both of whom attend a local elementary school.”

All of the necessary information is there, but the privacy of the litigants has been respected. The depersonalization, or what is sometimes called the anonymization of judgments can be performed in a manner that does not render the decision unreadable and that preserves all of the information necessary to form the basis for a decision. Of course, if it is necessary to include any private information to foster a better understanding of the decision that has been reached, it should be included.

One has to ask how often it really is necessary to include the day and month of someone’s birth, or social insurance numbers, or credit card and bank account information. The protocol on Use of Personal Information in Judgments discusses how to avoid using personal information when it is not necessary. Careful preparation of decisions can spare a lot of needless embarrassment, or even harm in some cases.

Another factor that affects the ease with which one can access a decision of the courts is the name assigned to a case. For example, if someone wanted to sue the city in which they live because a sewer access cover was left off and they fell in the open hole, there are several ways in which the lawsuit could be styled. Let’s say it was in my home town. They could sue the Director of Water and Sewer Services for Charlottetown, or the Public Works Department, City of Charlottetown, or they might sue the Corporation of the City of Charlottetown, or maybe even just Charlottetown, a body corporate. There are other options as

well. To avoid confusion and promote consistency, the Canadian Citation Committee developed a detailed Case Naming Guideline that provides for the naming of everything from volunteer boards to aboriginal bands to ships in a predictable, uniform and more searchable manner.

There are many other issues that could be addressed regarding the publication of judgments. I would like to mention just 3:

- Any relevant Publication Ban with respect to a decision has to be respected and should be noted on the face of the judgment to assist in avoiding non-compliance by others.
- Decisions should be saved “Without Metadata” in WordPerfect or using “Document Inspector” in MS Word to avoid having previous drafts and deleted comments resurface to haunt the author.
- Any “erratum” or correction to a decision should be issued under the original neutral citation, noting what has changed in the decision.

Certainly there are other elements about access to decisions that can be addressed and I am sure others will do so in a better manner than I could do.

In closing, the Canadian judiciary has been proactive in addressing issues relating to openness and free access for everyone to all judicial decisions across the country. Why do we care? We care because respect for the Rule of Law is promoted and enhanced by transparency and universal access. Our Protocols on the Preparation, Citation, and Distribution of Decisions, and on the Use of Personal Information in Judgments together with our Case Naming Guidelines , reflect a desire to

protect, preserve and enhance what I believe is a wonderful system of justice and one of which I am very proud.

I hope the documents to which I have referred may be of some assistance to you, and I would be happy to answer any questions you may have now or as I see you throughout the conference. Thank you for your kind attention.