A Legal Analysis of the Access to Court Record Policies of the Provincial and Territorial Courts of the Common Law Jurisdiction of Canada and Public Accessibility

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws

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Abstract

The Supreme Court of Canada has recognized the importance of court openness to public confidence in the transparency and integrity of the administration of justice. These principles are promoted when the public and media have access to court proceedings, which also includes access to court records. Canada’s highest court has also recognized the importance of the Charter right of expression and the media’s essential role in disseminating information about the courts to the public, which means accessibility to the courts and records. However, there is inconsistency within the access to court record policies of the provincial and territorial courts of the common law jurisdiction of Canada. While some policies may recognize the importance of court openness and public accessibility, they may not contain provisions that meaningfully adopt these principles. Moreover, there is much debate and hesitation when it comes to digitization of court records and public accessibility.
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All errors are my own.
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Introduction

Most attention of a court case is placed on what happens while court is in session: the conflict at issue, legal counsel, what the jury is like, if opted, and the temperature of the public galley, if open. For most interested people, there is a reliance on the media and press to deliver the news about a court case. This can include all the details that one would not be privy to had they attended while court was in session. This can include information about the arguments, the dynamic between the parties, and the atmosphere of the court proceeding. One seemingly ordinary and negligible element of a court case is the physical court record and the documents filed within. Much like how one would typically breeze through a doorway to enter a room without giving a second (or first) thought to the bolts holding up the door frame, so, too, are court records in how they are overlooked, yet serve a fundamental purpose in the justice system. Court records, like the connectors that hold up entry and enable access, are absolutely essential to ensure public access to the court system. Further, public accessibility to the court system is essential to the principle of open court, which thereby fosters public confidence in the court system and places a check on the proper administration of justice.

Another anchor in this fundamental structure is how public accessibility to the justice system and to court records is essential to the Charter rights of freedom of expression and freedom of the press. These elements are inextricably linked in promoting transparency and integrity of the court system. The public and members of the media are not only permitted to attend court proceedings, but also to review court records. Having public access to court records is a fundamental element in ensuring that the press provides the wider public with accurate information about court proceedings. Irrespective of this right, not all access to court records is made equal.

This thesis will highlight the inconsistencies between access to court record policies of the courts of the provincial and territorial common law jurisdictions and how some of these policies contain provisions that focus on implementing limitations and barriers against public accessibility to court records. It will be argued that these policies should be based on the principle of openness, rather than taking a protective stance in redacting information that
should otherwise be publicly accessible, which effectively chooses the safeguarding of the privacy of litigants over promoting openness and public accessibility – principles that are upheld and encouraged by the Supreme Court of Canada. Furthermore, these principles are aligned with the Supreme Court’s position on the importance of the Charter right of freedom of expression and freedom of the press. In order for the media and the press, along with other interested members of the public to gain access to the judicial system, this must include having access to court records. It is the media and press’s duty to inform the public about the courts and important cases that most citizens would not be apprised of had it not been for the fundamentally important role of the media in the dissemination of information. By fulfilling this key function, the media keeps the judiciary in check and increases transparency of the courts, thereby fostering great public confidence in the integrity of the judicial system.

There are a number of levels of courts of the common law jurisdictions of the provinces and territories of Canada that provide access to court record policies of varying substance and length. Some of these policies fully embrace the principle of open court and recognize the importance of the public having access to court records and files while trying to balance the competing concern of the privacy of litigants and other parties involved in court proceedings. Other policies are less committed to ensuring public accessibility. These policies may contain provisions that acknowledge the principles of court openness and public accessibility, but they do not substantively and practically incorporate these elements within its provisions. Then there are other policies that incorporate barriers or limitations against public accessibility, effectively giving priority to the privacy of litigants at the expense of the public and media having access to court record information; which has the overall effect of taking away from the exercise of freedom of expression by the press and the open court principle, thereby jeopardizing the fair administration of justice and public confidence within the judiciary.

The Canadian common law provinces of Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island, Ontario, and Saskatchewan all have access to court record policies in some form that are accessible to the public. New Brunswick, Yukon, and Newfoundland and Labrador have yet to create and publicly post any access to court record policy or reference.
Canada’s youngest territory, Nunavut, is an interesting case. Nunavut does have an access to court record policy that has, interestingly, undergone a number of edits and changes in recent years. Earlier versions were indicative of a policy rife with barriers and limitations against public accessibility to court records. A more recent version of the policy has been created, which offers some gradual progress in recognition of the importance of public accessibility.

Over the next three chapters, an analysis into the access to court record policies of the courts of the territorial and provincial common law jurisdictions of Canada will be presented, along with recommendations for the best policies and practices. The first chapter begins with an informative overview of the case law related to the principle of open court, the ties with the Charter values of free expression and freedom of the press, the importance of the right of accessibility by the public and the media, and the formation and establishment of the important Supreme Court of Canada principle of the Dagenais/Mentuck test. The second chapter outlines the limitations and barriers against public accessibility implemented within access to court record policies, with specific focus on the policy of Nunavut and its provisions that minimize public accessibility. The third chapter of this thesis highlights some aspects of access to court record policies that promote public accessibility to court records and documents, while also providing recommendations on best practices for policies. The third chapter also provides some background and a brief analysis of the digitization of court records and digital access.

More specifically in the first chapter, a survey of the Supreme Court of Canada case law that recognizes the importance of open court and its connection with the freedom of expression and press freedom is presented. Focus then shifts to the essential role of the media in carrying out these principles with respect to access to court records. The media and press exercising their essential function in providing information to the greater public is carried out in having the necessary access to court records in order to decipher complicated legal arguments and evidence presented before the court. This right of public access and review of court records has been recognized by the Supreme Court of Canada. However, the first chapter also highlights the importance of the competing tension against public accessibility to court records, which is that of protecting the privacy of litigants and others who are involved in a
court file. The Supreme Court has advised in taking a contextual approach in balancing between these the competing values of public accessibility and privacy. This positioning is further supported by the key legal framework established by the Supreme Court, known as the \textit{Dagenais/Mentuck} test. This legal standard should be referenced in determining whether any limitation against the exercise of freedom of expression is warranted. As well, this important element ties into access to court records in determining whether an imposition or limitation implemented against public accessibility is permitted under law.

The first chapter includes a comprehensive analysis of the development by the Supreme Court of Canada of the \textit{Dagenais/Mentuck} test in the Vickery decision, as well as its namesake decisions in the \textit{Dagenais} and \textit{Mentuck} cases. While the majority of the Court in the Vickery held that the accused’s right to privacy bore greater weight than enabling news media to access exhibit videotape footage, the minority decision provided enlightened perspective that was later reflected in the development of the \textit{Dagenais/Mentuck} test. The first chapter closes with an in-depth examination of the \textit{Dagenais/Mentuck} test, which is one of the most important legal developments with regard to the recognition of freedom of expression and its place in democratic Canadian society.

The second chapter of this thesis focuses on the limits and barriers that take away from public accessibility to the courts and court records and the minimization of the importance of freedom of the press. It picks up where the previous chapter ends with respect to the progression in case law with the Supreme Court embracing and extolling the importance of the principle of open court, the role of freedom of expression and of the press in promoting public confidence in the judicial system and the development of the \textit{Dagenais/Mentuck} test. This chapter delves into the case law of the \textit{Vickery} and \textit{Dufour} decisions that show a different side of the Supreme Court of Canada in protecting and upholding the value of privacy over freedom of expression, before presenting the examples of the limitations and barriers against public accessibility found throughout the access to court record policies of the Nunavut Court of Justice, and other jurisdictions.
This thesis also highlights the interesting turn in jurisprudence with the *Vickery* and *Dufour* decisions that most media lawyers in Canada want to forget. Specifically, at the time of the release of the *Vickery* decision, the constitutional climate was in favour of protecting freedom of expression and rights of the press. For a number of years, media lawyers and proponents in favour of public accessibility enjoyed a relatively golden time, reducing *Vickery* to a blip in the legal landscape that seemed to favour their shared views instead of *Vickery*’s in upholding the privacy rights of an accused. Nevertheless, there seemed to be a shift in focus of findings that followed in the direction set by *Vickery* with the Supreme Court releasing their decision in *Dufour* ten years later. In these two particular cases, the Supreme Court placed greater weight on the protection of social values, particularly of vulnerable individuals, over court openess and public accessibility.

After a survey of the evolution in Supreme Court case law with respect to its contextual analysis and resulting position of protecting privacy over openness, the second chapter provides background into the access to court record policies of the courts of the provincial and territorial common law jurisdictions in Canada with specific regard to those limitations against public accessibility that safeguard and protect the value of privacy of litigants and others involved in the court process. However, before this analysis, the Canadian Judicial Council ("CJC") and its actions in the formulating of a sub-committee known as the Judges Technology and Advisory Committee ("JTAC") are introduced. Over the last few years, the CJC and the JTAC have prepared reports dealing with model policy provisions on how to organize and manage access to court records in Canada. Interestingly, the Nunavut Court of Justice’s access to court record policy mirrors some elements and structure from the Canadian Judicial Council committee’s suggestions. However, in doing so, the court record policy of Nunavut also takes a position reminiscent of the Court’s findings in *Vickery* and *Dufour*.

Chapter two also provides an in-depth analysis of the access to court record policy of the Nunavut Court of Justice and its tendencies to implement barriers or limitations against public accessibility. In conjunction with this analysis, this chapter also reviews the provisions of other access to court record policies of common law Canada that include similar
provisions that impede public accessibility to court records. Moreover, in this review, this thesis applies three principles to act as references in measuring these policy provisions, which include: (1) openness, (2) accessibility, and (3) how the policy does or does not incorporate the *Dagenais/Mentuck* test and its elements.

While the Nunavut Court of Justice’s access to court record policy provides immediate and express reference to the tenets of Jeremy Bentham and the principle of open court, the policy, as per its earlier version from 2013 and its later version revised in 2015, which is currently applicable today, is rife with several mechanisms and modes of operation that minimize and limit public accessibility to court records. For instance, the policy in Nunavut creates barriers against access by restricting when a member of the public can actually access a court file in an ongoing criminal case. The policy also allocates significant power to the administrative staff member known as the Court Records Officer to redact and remove information from a court record before that file is made available to the public.

Another barrier against public accessibility are the search fees associated with court record access requests. Some common law jurisdictions in Canada implement relatively minimal search fees that reasonably increase in amount depending on how long a court record has been on file. Others implement search fees that significantly increase in amount without any real explanation as to the reasoning behind the price hike. The remaining jurisdictions that make no specific reference to dollar amount of their search or access fees, causing a greater lack of clarity and assistance to the public in how to fully navigate the process and procedure of access to court records.

A critical aspect of public accessibility to court records includes the right to make copies and publish that information to the wider public. The next portion of chapter two provides references to case law from courts that support the conclusion that the media has the right to gather information from the courts and also has the right to publish or broadcast that information. In contrast to that is the access policy of Nunavut, which includes reference against dissemination of information to the public, and in particular over social media. This is
yet another example of the policy’s restrictive positioning against public accessibility to court records.

The last part of the second chapter ends with a closer analysis of the Nunavut access to court record policy and how the earlier version of this policy did not incorporate any elements from the Dagenais/Mentuck test. However, it is noted that in the updated 2015 version of the policy, there was some movement towards recognition of the Dagenais/Mentuck test elements – a relative coup in relation to the policy’s recalcitrant position against assisting the public in their right to access court records. This improvement is marred by the extension of powers to unilaterally redact information as delegated to the registry’s Court Records Officer. This chapter closes with a summary of the case law and the provisions of the access to court record policies, in particular that of the Nunavut Court of Justice, that run against the principles of open court, public accessibility and values as established pursuant to the Dagenais/Mentuck test.

The third and final chapter of this thesis continues with the principles of openness, accessibility and the meaningful reflection and integration of the Dagenais/Mentuck test, but this time in relation to those provisions within the access to court record policies of the common law jurisdictions in Canada that foster and promote public accessibility to court records. In addition to this survey, chapter three also provides a section on the best practices and recommendations to be adopted and reflected in every access to court record policy of the courts of the territorial and provincial common law jurisdictions in Canada. Chapter three then closes with a brief look into the next advancement of court records, evolving from hard copy paper records that are physically stored to digital online records that are digitally stored and digitally accessible.

Irrespective of the numerous provisions within the Nunavut Court of Justice’s access to court record policy that demonstrate the jurisdiction’s predilection towards the implementation of limits on public accessibility to court records, this third chapter does bring forward a couple of examples of provisions from the policy of Nunavut that actually do promote public accessibility. It is also important to note that other provinces have established access to court
record policies that meaningfully integrate elements into their policies that promote openness, accessibility and adhere to the Dagenais/Mentuck test. Alberta and Ontario are two jurisdictions that offer policies that incorporate a contextualized balance, due to integration of the Dagenais/Mentuck test and its principles. It is also important to note that these two policies do not include provisions that create undue barriers against public accessibility based on fear of the protection of privacy.

Chapter three also provides a summary of best policies and practices that are recommended to be incorporated into every access to court record policy of the courts of the provincial and territorial common law jurisdictions across Canada. The challenge will be for the provincial and territorial courts of the common law jurisdictions in Canada to align and form publicly-available access to court record policies that promote public accessibility while still protecting the privacy of litigants as required and not in an overly-protective way. As recommended in this chapter, it is advised that those jurisdictions without a policy available for public reference do develop a policy in line with the other jurisdictions. Further, it is recommended that those jurisdictions with minimal and very general access to court record policies should expand their provisions to provide more informative reference to the public. It is necessary and highly recommended that these policies not only begin with a recognition and acknowledgement of the importance of the principle of open court, but that each policy meaningfully integrate elements to assist the public in accessing court records and not provide barriers or conditions that limit or make public accessibility difficult. Moreover, I support the position that all members of the public, irrespective of whether they are members of an established media organization or a solo citizen journalist, are considered and treated the same under an access to court record policy. No member of the public, irrespective of profession, should have special or increased rights of access over others.

A potentially conflicting recommendation that is raised in the third chapter is for some personal information of a highly sensitive nature to be pre-emptively redacted from a court record before it becomes available to the public. This information would include the kind of information that, arguably, does not have any direct bearing to the court proceeding or reason to be publicly accessible, such as a litigant’s social insurance number. It is not recommended
that this level of redaction fall in line with the Nunavut Court of Justice’s current policies and practice, but only insofar as the safety and privacy of a litigant or other individual connected to a court file are not compromised simply for the sake of offering absolutely every scrap of information to the public. As maintained by the Supreme Court, I argue that while the principle of open court is a fundamental and essential to the integrity of the judicial system in line with the promotion of freedom of expression and the press, it is important to also take a contextual approach so as to not cause undue harm to a litigant, since it is not necessary to have his or her or their highly personal information available to be accessed and disseminated publicly.

A final recommendation put forward in the third chapter is for the widespread coordination and organization of all access to court record policies across common law Canada to be established with regard to hard copy court records before the digital realm of court records is considered and established. I make the argument that it is necessary to finalize this important step before addressing what to do with digital access to digital court records. Interest in how to deal with the digital realm has disintegrated in Canada over the last few years. Most of the focus happened in the early 2000s and then quickly diminished. It is believed that there is cross-over between the two mediums that would not render the organization of uniform or similar access to hard copy court records to be an unnecessary or futile effort. In fact, it is further believed that establishing access policies in this regard would assist in how the common law provinces and territories should deal with the digitization of court records and electronic access.

There are plenty of arguments cautioning against the recklessness and possible abuse once court records are digitized and can therefore fall into the wrong hands, such as those who want to use information derived from court records for fraudulent purposes. And while there are always risks present, it is argued that any in-depth assessment by a reliable source of the state of affairs related to the digitization of court records has not been updated in some time. Moreover, advancements in technology happen at breakneck speed. There are filtering systems that will aid in dispelling the heightened fears of possible risks against privacy with respect to the digitization of court records and access.
However, there are other legal issues that might not be solved with technology. More specifically, concerns are raised with respect to the changing role of the court from keeper or custodian of hard copy court files to a publisher when digitally duplicating those files and making them publicly accessible. The risk lies in the possible change in role of the court from merely storing court records to uploading and reproducing court documents. There exist concerns in defamation and criminal law with respect to the changing role of the court and its purpose in light of the digitization of court records and making these digital files accessible to the public. These concerns have yet to be considered and resolved as Canada and its courts move forward into the digital age.

The third chapter closes with a brief survey of the developments of some jurisdictions in Canada to usher in the digitization and electronic access to the court system. While this thesis has not substantially considered the court policies of Quebec, Canada’s only civil law jurisdiction, chapter three still provides some highlights from Quebec’s decades-long investment into electronic accessibility and court information and documents. As well, the chapter also provides some brief perspective on how other common law jurisdictions are making their foray into offering information from a more digital friendly perspective.

This thesis does not provide an in-depth analysis into the background of privacy law or the current state of privacy in each common law jurisdiction. Nor does it provide a rundown on the latest technology that would aid in public accessibility of digital court records and files. Such advancements would likely ameliorate concerns like data mining and unintended reproduction and dissemination. As well, specific issues regarding public accessibility of court records of family court or civil courts are not raised and analyzed. In fact, most reference within this thesis about issues and features relate to the criminal court context. Nevertheless, this thesis provides a general summary of the major issues of public accessibility to court records and delves into the subject matter with specific references from the policies of access to court record policies of the provincial and territorial courts of the common law jurisdiction of Canada.
While the focus of this thesis may not draw out immediate excitement from the general public, this is subject matter that has some effect on us. There are inconsistencies between the access to court record policies of the provincial and territorial courts of the common law jurisdiction in Canada, resulting in the public of some provinces or territories having better public accessibility to court files, or, vice versa, litigants and other parties enjoying greater privacy rights when involved in court proceedings. The latter results in a restraint, whether intentional or not, on the level of information that can be disseminated by the media to the public, thereby constraining Charter rights of free expression and of the press, which negates further from public confidence in the judicial system. This thesis endeavors to shed light on these irregularities between policies and advocate for a uniformity of principles that better promote public accessibility while also implementing some necessary safeguards to ensure a contextual balancing with privacy, that will be aligned and meaningfully integrate the *Dagenais/Mentuck* test. A measure of the legal landscape is raised, along with plenty of other issues for further contemplation.
Chapter 1  
Case Law and Jurisprudence

Before delving into the management and organization of access to court records and documents of the courts of the common law provincial and territorial jurisdictions across Canada, it is necessary to consider the principle of court openness and its essential connections with the Charter rights of freedom of expression and freedom of the press. This chapter will provide an overview of the case law related to the principle of open court and its fundamental importance in fostering public confidence in the judiciary and the proper administration of justice. This will be followed by a survey of the importance of the Charter rights of freedom of expression and freedom of the press, as well as the essential role of the media and its symbiotic relationship with the principle of open court in an effort to properly and fully inform the public of the inner workings of the judiciary and judicial matters. Reference to foundational case law outlining the importance of the media and freedom of the press will be covered in conjunction with an analysis of competing values, with specific reference to the value of privacy that would seem to be at odds with court openness, transparency and public accessibility. It will be presented that what appears to be the competing values of court openness and privacy actually do share the same intent in promoting and safeguarding the proper administration of justice. Chief Justice McLachlin of the Supreme Court of Canada has written on the importance of a contextual approach in analyzing tensions between values, which this thesis highlights in connection with the Supreme Court of Canada-created legal test known as the Dagenais/Mentuck test. The latter part of this first chapter will provide a survey of the case law behind the formation of the Dagenais/Mentuck test, an essential legal principle created to ensure that any limitation on the Charter rights of freedom of expression and freedom of the press is weighed and considered.

1 The Importance of the Principle of Open Court

The Supreme Court of Canada has referred to the importance of court openness in a number of its seminal cases spanning the last thirty years. One foundational case is Canadian
In this case the Court described the open court principle as “one of the hallmarks of a democratic society, fostering public confidence in the integrity of the court system and understanding of the administration of justice.” The Court went on to delineate the importance of the principle of open court and its significant constitutional connection:

This principle is inextricably tied to the rights guaranteed by s.2(b) of the Charter. The freedom to express ideas and opinions about the operation of the courts and the right of members of the public to obtain information about them are clearly within the ambit of s.2(b) of the Charter.

However, before this thesis delves deeper in exploring the ties between court openness to freedom of expression, it is important to trace back the purpose behind the principle of open court and the recognition and importance of this principle by Canada’s top court.

The roots of the principle of open court run deep. According to the Supreme Court of Canada in Edmonton Journal v. Alberta (Attorney General), Justice Cory writes: “The importance of the concept that justice be done openly has been known to our law for centuries.” Another oft-quoted turn of phrase comes from Jeremy Bentham in presenting the deep historical roots of the principle of open court. Bentham wrote the following passage over a century ago outlining the importance of court openness, which was referenced by the Supreme Court in the 1982 case of MacIntyre v. Nova Scotia (Attorney General):

‘In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. It is the keenest spur to exertion and the surest of all guards against

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2 Ibid at 482.
3 Ibid.
improbity. It keeps the judge himself while trying under trial."\(^5\)

There are more instances of the Supreme Court of Canada extolling the virtue and importance of the principle of open court. One recent example comes from its 2005 decision in *Toronto Star Newspapers Ltd. v. Ontario*. The Court stated that "[i]n any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy."\(^6\) The Court has recognized that the basic element of keeping the doors to the court open to public monitoring creates a powerful and essential force in deterring secrecy and holds the judiciary accountable.

Another example worth highlighting is the Supreme Court of Canada recognizing that court openness should be the default position. The Court stated that "[i]t is now well established…that covertness is the exception and openness the rule."\(^7\) And with that comes "[p]ublic confidence in the integrity of the court system and understanding of the administration of justice."\(^8\) The symbiotic relationship between the principle of open court fostering public confidence and integrity of the judiciary lie at the very heart of a healthy and functioning judicial system.

Chief Justice Beverley McLachlin, then Supreme Court Justice, has called “the preservation of public confidence in the administration of justice” the “single unifying purpose” of the open court principle.\(^9\) McLachlin has viewed the open court principle as serving “to maintain the authority of the courts and the rule of law in civil society.” McLachlin writes: “[s]ince openness permits the community to see that justice is done, it has a therapeutic function."\(^10\) These are but a few of the examples of the Supreme Court of Canada’s positioning on the importance of the principle of open court, confirming that court openness is essential in

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5. *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175 at 183 [*MacIntyre*].
7. *AG (Nova Scotia) v MacIntyre*, supra note 5 at 185.
8. *Ibid*.
promoting greater transparency into the inner workings of our most revered judicial institutions.

2 The Common Law Right of Open Court and the Connection to Freedom of Expression and Freedom of the Press

Court can be a complicated place. There are various factors that make the ease of public accessibility to the judicial system seem questionable. Factors such as the grandiosity of the court and judiciary, the complexities of legal issues, the unwavering interests of various stakeholders, and the allocation of generous resources are but a few elements that can make the judicial system seem like a daunting forum to some. However as outlined above, the roots of the principle of an open court run deeply and the presumption of court openness inspires and feeds public confidence in the administration of justice.

As highlighted, Chief Justice McLachlin believes the public has the opportunity to “see that justice is being done”.11 This is achieved through court openness. McLachlin raises the issue of open justice being “therapeutic justice” because it is

...a process fundamental to civil society. The citizen who is wronged seeks reparation through the justice system. It is essential that the system be open if the process is to function. The wronged person seeks not only private reparation, but public vindication. The judgment proclaims to the community the rightness – or perhaps the error – of the claimant’s pretension. Disputes must be resolved and people must move on. All this is best done if the system of justice operates openly and transparently.12

Having this opportunity of “seeing” justice served in relation to the open court principle comes in two forms. The first of which can best be summed up again by Chief Justice

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11 Ibid.
12 Ibid at 6.
McLachlin in her writings when she stated that “[o]penness [is] signified [when] the public and the press have free access to the courts of justice and are entitled to attend and observe any hearing.”\(^1\) Not only are the front doors to the courthouse are open, but the doors to each courtroom are accessible to the public and the press to attend proceedings while in session, ensuring that justice is served and confidence in the system flourishes.

The Supreme Court in *Canadian Broadcasting Corp. v. Canada (Attorney General)* has acknowledged the importance of the open court principle in relation to freedom of expression, freedom of the press and the proper administration of justice in the following:

> The right to freedom of expression is just as fundamental in our society as the open court principle. It fosters democratic discourse, truth finding and self-fulfillment. Freedom of the press has always been an embodiment of freedom of expression. It is also the main vehicle for informing the public about court proceedings. In this sense, freedom of the press is essential to the open court principle. Nevertheless, it is sometimes necessary to harmonize the exercise of freedom of the press with the open court principle to ensure that the administration of justice is fair.\(^1\)

It is apparent that the Supreme Court of Canada has recognized the essential connections between freedom of the press, the open court principle and the proper administration of justice. In order for the administration of justice to be “fair”, the public and the press must have access to an open court in order to seek the truth and promote democratic dialogue. Having the ability to do so enables the media to disseminate essential information to the public about judicial matters and process. The public is then informed and enlightened. An open court means the media has served its essential purpose in exercising its rights in gathering and disseminating information on behalf of and for the public.

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\(^1\) *Ibid* at 1.

\(^1\) *Canadian Broadcasting Corp. v. Canada (Attorney General)* 2011 SCC 2 at para 2.
Public accessibility to the courts has long been viewed as a common law right for the public and the press to attend criminal and civil proceedings.\textsuperscript{15} As mentioned, some may view the judicial system as complicated. Nevertheless, Chief Justice McLachlin believes that the courts can offer a “therapeutic” function when they are publicly accessible and open. The public and press are able to witness, document and share what happens behind courtroom doors, which then makes transparency possible. When the public and the media are permitted to attend proceedings, they are able to exercise their common law rights to participate and serve their purpose to the public.

A second way to “see” justice being served is in relation to the open court principle enabling the public and the press to have the ability to retrieve and review court files and records. This is a logical extension of accessibility. In order for the public and the press to fully understand the matters being presented before a court, it is a reasonable and expected progression for the public to then have access to documentation within the court record that outlines the complexities of the issues and arguments. Lawyers before a judge may not present full arguments and any nuances may be lost when arguments are truncated and time is of the essence. Court records provide a useful and meaningful reference to enable the public to review materials and be fully aware of the issues before the court. However, before we delve further into this topic of public access to court records, it is worthwhile to explore the fundamental role of the press and media with respect to open court and the Charter rights they uphold.

3 The Essential Role of the Media and the Charter Right of Freedom of the Press

While championing the principle of open court principle and its connection to the Charter rights of freedom of expression and freedom of the press, the Court has also highlighted the practical realities of who would actually be the ones to exercise the rights of accessibility to

\textsuperscript{15} Scott v. Scott [1913] A.C. 417 (H.L.), per Viscount Haldane L.C. at 438 as quoted in Vancouver Sun (Re), 2004 SCR 43 at para 24 [Vancouver Sun].
the courts and court records. The Court has recognized that this duty would be bestowed upon the press, or more inclusively and presently described as the media, seeing as how informational sources have grown and evolved from just a newspaper and the radio to television and the internet. The Court recognized that the everyday duties and obligations of most people would prohibit members of the public to regularly attend court proceedings and examine court records during a courthouse’s regular hours of operation. In *Ford v. Quebec (Attorney General)*, the Court deemed that the media play a “fundamentally important role” since

[i]t is exceedingly difficult for many, if not most people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court.16

As established, the open court principle promotes public confidence in the integrity of the court system and aids in the proper administration of justice. However, without the role of the press and its access to open court, the press would not have the ability to disseminate valuable information to the public – likely resulting in a loss in confidence in the judicial system. Arguably, without the dissemination of information about court proceedings from a trustworthy news source, confidence in the integrity of the judicial system is not sustainable. Plainly on a practical level, the public is reliant on the media and press to deliver information about court proceedings to the public. People are simply busy with their own occupational responsibilities, familial commitments, or personal duties.

In the case of *Edmonton Journal v. Alberta (Attorney General)*, the Supreme Court highlighted the importance of the role of the press in informing the public and promoting confidence in the system:

The press must thus be free to comment and report upon court proceedings to ensure that the courts are in fact seen by all to operate

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openly in the penetrating light of public scrutiny. It is only through the press that most individuals can really learn of what is occurring in the courts. The members of the public, as “listeners” and “readers,” have a right to receive information pertaining to public institutions, in particular the courts.¹⁷

Without a free press and media there would be a great lapse in the system of checks and balances on government and other key players of influence. Moreover, with the proliferation of the use of digital technology in recent years, along with the rise in the use of social media, as well as improvements in the speed within which information is disseminated and consumed, nary goes by a moment that is not already documented somewhere. Barriers have been broken with regard to the establishment of journalism and the press. Everyday citizens with a voice and the willingness to gather and share information are now in lock step, and sometimes ahead of established news organizations that have traditionally been charged with the responsibility of informing the public. It seems now more than ever section 2(b) of the Charter supporting freedom of expression and freedom of the press is relied upon and championed through the increased offering and availability of information and news, some of which is extraneous, other parts essential, all of which are disseminated publicly.

In numerous decisions, the Supreme Court of Canada has highlighted the critical importance of freedom of expression to democracy, which includes freedom of the press. Section 2(b) of the Canadian Charter of Rights and Freedoms declares that everyone has the fundamental freedom of “thought, belief, opinion and expression, including freedom of the press and other media of communication.”¹⁸ These values are critical to the good health of a functioning and thriving judicial system and are tied to the principle of open court.

Numerous Canadian courts, including our country’s highest level of court, have recognized the open court principle as a fundamental aspect of the Charter guarantees of freedom of

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¹⁷ Supra note 4.
expression and freedom of the press. Citing the *Vancouver Sun*\(^{19}\) decision, Fish J. in *Toronto Star Newspapers Ltd. v. Ontario* reiterated that “the open court principle…is inextricably linked to the freedom of expression protected by s.2(b) of the Charter and advances the core values therein.”\(^{20}\) The Supreme Court has also stated that the principle of open court has “taken on added force as ‘one of the hallmarks of a democratic society’ that deserves constitutional protection.”\(^{21}\)

Justice Iacobucci and Justice Arbour in the *Vancouver Sun* decision referenced previous Supreme Court decisions in an effort to highlight the important connections between the open court principle, the role of the press and media, and the right of the public to receive information brought forward during court proceedings:

> The freedom of the press to report on judicial proceedings is a core value [of the open court principle]. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression.\(^{22}\)

> The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions.\(^{23}\)

Iacobucci and Arbour then closed with the following cautionary conclusion, deducing that “[c]onsequently, the open court principle, to put it mildly, is not to be lightly interfered with.”\(^{24}\)

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\(^{19}\) *Vancouver Sun (Re)*, 2004 SCR 43 [*Vancouver Sun*].


\(^{21}\) *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, supra note 1 at para 22 in *R v Canadian Broadcasting Corporation* 2010 ONCA 726 at para 23 [*Ashley Smith*].

\(^{22}\) *Ford*, supra note 16; *Edmonton Journal*, supra note 4 at 1339-40 in *Vancouver Sun*, supra note 19 at para 26.


4 Right of Access to Court Records and Documents

As previously mentioned in the section above, the second way to “see” justice be served in relation to the open court principle is having and exercising the right of access and inspection of court records and documents. While it is inherent within the open court principle that the doors of the courthouse to be open for the press and the public to enter and attend proceedings, so too is it inherent within the principle that the press and public have access to court files and records as another way to promote transparency and accessibility. Not only does there exist the common law principle of open justice that has been recognized for centuries as previously highlighted, but it is also important to note that the principle extends to the press and the public possessing the “common law right “to inspect and copy public records and documents, including judicial records and documents”\(^\text{25}\). This right has roots in American jurisprudence and has been subsequently adopted by the Canadian judiciary pursuant to the Supreme Court of Canada decision in the \textit{AG (Nova Scotia) v. MacIntyre}.\(^\text{26}\)

Canadian law professor, David Lepofsky, has noted that in the MacIntyre decision, the Supreme Court of Canada recognized the existence of the common law right to inspect court records.\(^\text{27}\) In MacIntyre, CBC investigative reporter, Linden MacIntyre, was denied access to search warrants and supporting information while researching a case about political patronage. Justice Dickson, for the Court, ruled that the right of access to executed search warrants and accompanying information vests in interested persons, including the target of the search.\(^\text{28}\)

Having access to court records and documents is another practical consideration that falls in line with the Supreme Court of Canada-supported approach of journalists and the press keeping the public informed of what happens in the courtroom when everyday citizens are unavailable to attend court proceedings themselves when in session. The Supreme Court has


\(^{26}\text{MacIntyre, supra note 5}\)

\(^{27}\text{M. David Lepofsky, Open Justice (Toronto: Butterworth & Co. (Canada) Ltd, 1985) at 25 [Lepofsky, Open Justice].}\)

\(^{28}\text{Ibid.}\)
recognized that it is “equally important for the press to be able to report upon and for the
citizen to receive information pertaining to court documents.” In an effort to provide the
most accurate account of what happened during court proceedings, it is an imperative and
logical extension that the public and the press would have access to court records. As
illustrated, it is the media’s role to provide practical substance to the principle of open court.

Having access to court files and documents enables the press and media the ability to
effectively fulfill their roles as providing the public with up-to-date and accurate information
about court proceedings. There are a couple of practical and contextual considerations for the
necessity of the media and the public having access to court records and files. Firstly, there is
the practical reality of procedure within a courtroom that results in lawyers presenting
efficient and summary versions of arguments that are more robustly presented and elaborated
upon in their submitted pleadings, which become part of the court file. Secondly, court
proceedings can be complicated and confusing for some who may not have access to
resources that aid in explaining and demystifying court procedure and legal concepts. Unless
those sitting and observing while court is in session are well versed in legal process and
concepts, and furthermore, that these court spectators have the ability to take notes in real
time as the words are articulated aloud by counsel and the judge, then the gathering,
processing and relaying of the intricacies of a court proceeding would be a challenge to most
others. Having the right to access a court file to review the documents contained within in a
thorough and careful manner, including pleadings and transcripts, enables a journalist to
meaningfully reference documents and fully present the details of complicated legal matters
to the public. Having this access thereby results in that journalist providing a more accurate
account of the proceeding to the public than had they not had access to the court file.

From a journalist’s perspective, undisturbed and expansive access of court records and files
would be the most conducive in newsgathering and understanding as much accurate
information as possible. The idea of wide access to court files has interestingly been
contemplated by the Supreme Court in recognizing that

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29 Edmonton Journal, supra note 4 at para 11.
Once a trial begins, and except for the limited number of cases held in camera or subject to a publication ban, the media will have broad access to the court records, exhibits and documents filed by the parties, as well as to the court sittings. They have a firm guarantee of access, to protect the public’s right to information about the civil or criminal justice systems and freedom of the press and freedom of expression.30

Furthermore, Justice Sharpe of the Court of Appeal for Ontario acknowledged that while the Supreme Court of Canada has yet to rule directly on the point, “there are dicta in at least two Supreme Court decisions” that support the public’s right to make copies of court files.31 In referencing Named Person v. Vancouver Sun,32 Sharpe J.A. stated that the Supreme Court had

[r]eaffirmed the holding in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R.1326 at p.1338, that the right to access exhibits includes the right to make copies as “s.2(b) provides that the state must not interfere with an individuals’ ability to ‘inspect and copy public records and documents, including judicial records and documents’.”33

At issue in the 2010 case that Sharpe J.A. was presiding over, known simply as R. v. Canadian Broadcasting Corporation34 (“Ashley Smith” case), was the Canadian Broadcasting Corporation (hereinafter referred to as the “CBC”) seeking rights to access and to make copies of exhibits filed at a preliminary inquiry. While this case is a decision from the Ontario Court of Appeal, it is considered a seminal case from the perspective of media lawyers and others who advocate for the exercise of full rights pursuant to the principle of

30 Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc. 2001 SCC 51 at para 72.
31 Ashley Smith, supra note 21 at para. 32.
32 Vancouver Sun (Re), supra note 19.
33 Ashley Smith, supra note 21 at para 33.
34 Ibid.
open court. This particular judgment also touches on other legal aspects that this thesis will explore in further detail.

By way of background, at issue in this case was the CBC’s fight to gain access to the exhibits, which included video footage of the death of a young woman named, Ashley Smith. Ashley Smith was nineteen years old and was serving a six-year sentence at the Grand Valley Institution for Women in Kitchener, Ontario. She was found dead from self-strangulation with a strip of cloth while in custody under observation in an isolation cell on October 19th, 2007. Four correctional officers of Correctional Service Canada were charged with criminal negligence causing death, and a preliminary inquiry was held a year later. A statutory publication ban under section 539 of the Canadian Criminal Code\(^\text{35}\) was invoked, which prohibits the publishing of any evidence taken during a preliminary hearing. The exhibits called into evidence during the preliminary hearing included photographs, documents, and audio and video recordings with respect to how Ashley Smith was managed by Correctional Service Canada, with only a portion of the video recordings of Ashley Smith’s death being played in open court. All four of the accused were Correctional Service Canada employees, and they were discharged and formally disciplined in accordance with union grievances.

Seven months after the end of the preliminary inquiry, the CBC applied to the Ontario Court of Justice to gain access to the exhibits, which including gaining access to the videotape footage of Ashley Smith’s death. The CBC wanted to make copies of the videotape footage to feature in their television documentary on the life and struggle of Ashley Smith for the CBC investigative program, the fifth estate. In determining whether the CBC could be granted access, the application judge decided to enable CBC to have access to the videotape footage with several conditions, which included a prohibition against the CBC from making copies of the exhibits.

Upon appeal of the decision, Sharpe JA for the Ontario Court of Appeal had ruled in favour of the CBC’s application. Sharpe JA agreed with the CBC with regard to the public

\(^{35}\) Criminal Code, RSC 1985, c. C-46.
broadcaster’s right to make copies of the videotape footage in their entirety, and not simply just of the footage that had been aired in open court. Sharpe JA stated that

...[w]hen an exhibit is introduced as evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes a part of the record in the case.36

In the decision, Sharpe JA had highlighted the connection between the open court principle, section 2(b) of the Charter, and the importance of the media in providing the public with information about court proceedings. Sharpe JA stated that

[the open court principle and the rights conferred by s.2(b) of the Charter embrace not only the media’s right to public or broadcast information about court proceedings, but also the media’s right to gather that information, and the rights of listeners to receive that information.

In keeping with the importance of the media disseminating information to the public, Sharpe JA had also undergone an analysis and application of a legal test established by the Supreme Court of Canada in determining whether a limitation upon the Charter rights of freedom of expression and freedom of the press is warranted. This legal test, known as the “Dagenais/Mentuck test” is named after the following two Supreme Court of Canada cases: Dagenais v. Canadian Broadcasting Corp. and R. v. Mentuck. More specifically, the Dagenais/Mentuck test is a legal analytic framework established and used as a measure to determine whether a limitation against freedom of expression and freedom of the press in relation to legal proceedings is justifiable and necessary for the proper administration of justice. However, before further exploring this legal doctrine, it is necessary to first consider the constitutional tension between the principle of open court and freedom of the press versus the right of privacy in the context of access to court records.

36 Ashley Smith, supra note 21 at para 43.
5 The Tension between Privacy and Public Access to Court Records

In keeping with the principle of open court and the importance of transparency and public confidence in the integrity of the judicial system and the proper administration of justice, the starting point in Canada, as it is in the United States, is full access to court records. But what if you are a litigant involved in one of those court files and public access to the contents of the file raises concerns from a privacy perspective? As the Supreme Court stated in *Vickery v. Nova Scotia Supreme Court (Prothonotary)* that privacy

…inheres to the basic dignity of the individual. This right is of intrinsic importance to the fulfilment of each person, both individually and as a member of society. Without privacy it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought.

In this regard, the interest of privacy, among other interests, is at odds with the principle of open court and full access to court records. As a litigant in the court system, there could be concerns that personal information or other details contained within a court file could create discomfort or risk to the well-being of a litigant at the prospect of the public and media discovering personal details.

For proponents in favour of protecting privacy at the expense of other rights, including public accessibility to court records and documents, there are several risks and fears based on the belief that those wishing to publicly access court records to uncover specific detailed information do so with the intent of causing harm. There is an increase of vulnerability from the perspective of a litigant when his/her/their information related to a court file is included

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39 Another competing interest would be fair and impartial trial rights and the dissemination of accurate public information. However, discussion of these competing rights to the principle of open court and full access to court records is beyond the purview of this immediate research.
in a publicly accessible court file. There is the possibility of identity theft or using the information gleaned from court records to track down litigants to certain geographic addresses and locations.\textsuperscript{40} There is also the fear of sustaining psychological or reputational damage through the dissemination of information from a court file if details are highlighted in news reports or through other methods of sharing information.

Proponents of safeguarding privacy at the expense of public access to court information and records have argued that those who advocate otherwise, more specifically that broad public access means better transparency, have forgotten other elements essential to ensuring the proper administration of justice. More specifically, it has been argued that the “broad assumption of ‘transparency’ can best be achieved through unfettered access to [c]ourt [r]ecords” is a “mindset” that has “unfortunately skewed the debate”.\textsuperscript{41} Some believe that in doing so, the debate has been skewed away from “equally important values that underpin the justice system,” which can include “fairness” and “human dignity.”\textsuperscript{42} Author Jo Sherman, in her report on court information frameworks in a digital environment prepared for the Canadian Judicial Council in 2011, has advocated that public confidence would be strengthened, not through increased transparency to the courts, but the reverse:

\begin{quote}
It could be argued, for example, that protection of privacy and respect for civil liberty must be given equal weighting by the courts because there are essential principles of a democratic society. An infringement of privacy will often amount to an infringement of liberty. Attention to fundamental human rights including a right to privacy, may strengthen public confidence in a court’s ability to handle sensitive information appropriately.\textsuperscript{43}
\end{quote}


\textsuperscript{41} Ibid.

\textsuperscript{42} Ibid.

\textsuperscript{43} Ibid.
Sherman’s perspective in support of privacy concerns may have the effect of promoting public confidence, however it does run counter to the principle of broad access to court records and the principle of open court. Nevertheless, it is worthwhile to consider Sherman’s views in connection with the arguments and conclusions brought forward by Chief Justice McLachlin.

In her writings, Chief Justice McLachlin has called for a “contextual” approach as the “better approach today” in acknowledging that the open court principle may conflict with other values, such as privacy. Sagely, McLachlin advocates that “[i]t is not a matter of all or nothing, one or the other”, but rather “a matter of finding the right equilibrium, or balance”, which can be achieved on “a contextual case-by-case basis.” However, unlike Sherman, Chief Justice McLachlin has advocated for a balancing between values, instead of a hierarchical approach as suggested by Sherman, which places a premium of one value over another – specifically the protection of privacy at the expense of the open court principle and public accessibility.

Interestingly, in spite of this seemingly either-or situation, McLachlin has further identified that ultimately the proponents from both ends of the spectrum are not so far apart. McLachlin writes: “In reality, the conflicting interests are not so diametrically opposed as we might think.” If the end goals across the spectrum are to increase confidence in the judicial system and to maintain integrity and the proper administration of justice, McLachlin points out that “[p]rotecting the privacy of the victims is important to a good justice system.” Furthermore and perhaps most importantly, this line of argument also falls in line with the legal framework established by the Supreme Court of Canada in balancing those values that compete with broad access to court documents and the open court principle, known as the Dagenais/Mentuck test.

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45 Ibid.
46 Ibid.
6 The *Dagenais/Mentuck* Test and its path of formulation in the *Vickery* Decision

As mentioned, the *Dagenais/Mentuck* test was established in two cases in the mid and late 1990s by the Supreme Court of Canada. The legal test was formulated to ensure that any limitation upon freedom of expression and freedom of the press would be necessary and justified to ensure the proper administration of justice. While the Supreme Court cases of *Dagenais* and *Mentuck* in creating this legal threshold are a bright line in the hearts and minds of media law proponents advocating for broad public accessibility and court transparency as aided by the press and media, the roots of what is now the established *Dagenais/Mentuck* test did not begin on such a note.

The origins of the *Dagenais/Mentuck* test stem back to the 1991 Supreme Court of Canada case known as *Vickery v. Nova Scotia Supreme Court (Prothonotary)*\(^{47}\) (hereinafter referred to as “*Vickery*”). To lawyers who represent the interests of the media, journalists and other interested parties who advocate for maximum openness and access to the courts and court records, *Vickery* is a blight on the otherwise strong jurisprudential landscape in favour of freedom of expression, freedom of the press and the open court principle established by the Supreme Court of Canada.\(^{48}\) However, it is from *Vickery*, that creates fertile ground for the development of the principles of the *Dagenais/Mentuck* test and considerations in favour of balancing privacy, a value which is a fundamental right and interest.

The *Vickery* decision was written by Justice William Stevenson for the majority of the Court. Stevenson J.’s decision rested heavily on the importance of the right of privacy in limiting media access to videotape exhibits in a criminal trial. In his judgment, Stevenson J. prohibited access by the media to listen, view and copy audio and videotape footage of an accused who was convicted of second degree murder. On appeal of the trial, it was found that the audio and video evidence had been obtained involuntarily and in violation of the

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\(^{47}\) *Vickery*, supra note 38.

\(^{48}\) Notwithstanding the Supreme Court of Canada decision in *Canadian Broadcasting Corp. v. The Queen* 2011 SCC 2, known colloquially as the ‘*Dufour*’, which places favour upon “social values” of “vulnerable individuals” over openness. See page 66 of the decision. This decision will be further explored in Chapter 2 of this thesis.
accused’s right to counsel, which resulted in the exclusion of the evidence and the accused’s conviction being overturned. Claude Vickery, a veteran journalist with the CBC’s investigative documentary series, the fifth estate, requested a copy of the tapes, however his request was refused by the Prothonotary.

On behalf of six other justices, Stevenson J. had ruled that the accused’s privacy interests “outweigh[ed] the public right of access to exhibits that were judicially determined to be inadmissible against him” as a person acquitted of the charges for murder.49 He had viewed the release and publication of the tapes to be “fraught with the risk of unfairness” and cautioned against the courts becoming “unwitting parties” to the “harassment” of the accused by facilitating access to the tapes.50 Stevenson J. had definitively established that the “curtailment of public accessibility is justified where there is a need to protect the innocent.”51

In leading the majority, Stevenson J. had ruled that the court is the custodian of exhibits and that exhibits are not the property of the court, since they are frequently the property of non-parties. He reasoned that once exhibits have “served their purpose in the court process,” then…

…the argument based on unfettered access as part of the open process lying at the heart of the administration of justice loses some of its pre-eminence.52

Stevenson J. had concluded that contemporaneous scrutiny of the judicial process was no longer as important once the exhibits had been introduced during the trial. Furthermore, the Court believed that the open court principle had been sufficiently fulfilled by virtue of the exhibits being produced at trial and open to public scrutiny at that time.53 The Court placed a

49 Vickery, supra note 38 at 672.
50 Ibid.
51 Ibid.
52 Ibid at 682.
53 Ibid at 672.
greater premium on protecting the privacy rights of an accused, who was now seen as innocent in the eyes of the court. Further, it should be noted that both the majority and the dissent dismissed Vickery’s attempts at arguing that his section 2(b) Charter rights had been infringed due to the prohibition against access to the exhibits. These arguments were dismissed since the issue was not brought forth, nor considered, by the lower courts.

The dissenting judgment in *Vickery* was written by Justice Cory, on behalf of three justices, which included the only justice who continues to sit on the Court, Chief Justice Beverley McLachlin. Cory J. based his judgment on the practical virtues of the open court principle. Interestingly, Cory J.’s dissenting perspective in *Vickery* has since been followed by the courts, including the Supreme Court of Canada in the *Dagenais* case, as will further explored below.

In writing his decision, Cory J. had relied heavily on American jurisprudence and had provided counterpoints to Stevenson J.’s major points in favour of privacy and the minimization against access to the exhibits forming part of the court file. The dissent placed a higher premium on the role of the media in support and promotion of a well-functioning and healthy judicial system. In summing up the U.S. perspective, Cory J. wrote:

> All courts considered the media to be the representatives of the public with regard to judicial proceedings. The cases recognize the right and responsibility of the media to keep the public informed of the workings of the courts, particularly in the criminal context. The courts have acknowledged that the media play an essential role in furnishing the information proceedings can properly be based, and that in fulfilling this role the media make a substantial contribution to the democratic process of government. It is the media which makes the courts truly accessible and “public”. ⁵⁴

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⁵⁴ *Ibid* at 698.
However, it is interesting and important to note that Cory J. in representing the dissenting opinion, took a similar approach as Stevenson J., representing the majority decision, in balancing the issues of openness and judicial accountability, yet arrived at different conclusions.\textsuperscript{55} According to the Canadian Judicial Council’s subcommittee on technology, known as the Judges Technology and Advisory Committee (“JTAC”), the “descriptions by Cory J. as to the principles engaged in the appeal is consistent with the views of the majority”:

There are two principles of fundamental importance to our democratic society which must be weighed in the balance of this case. The first is the right to privacy which inheres in the basic dignity of the individual. This right is of intrinsic importance to the fulfilment of each person, both individually and as a member of this society. Without privacy, it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought.

The second principle is that courts must, in every phase and facet of their processes, be open to all to ensure that so far as is humanly possible, justice is done and seen by all to be done. If court proceedings, and particularly the criminal process, are to be accepted, they must be completely open so as to enable members of the public to assess both the procedure followed and the final result obtained. Without public acceptance, the criminal law is itself at risk. [emphasis added]\textsuperscript{56}


\textsuperscript{56} Vickery, supra note 38 at 687 in JTAC, “Open Courts, Electronic Access to Court Records and Privacy”, supra note 55 at 13.
Nevertheless, Cory J.’s references in coming to the minority’s very different conclusions relied upon other positioning by judicial authority from those sitting on the bench of Canada’s highest court.

Cory J. had also highlighted the pre-Charter findings in the *MacIntyre* case, quoting heavily from Dickson J., as he then was, in the conclusion that “[t]here can be no doubt that there exists in Canada a common law right of access to court documents.”57 Further, Cory J. raised the approach as referenced earlier by Chief Justice McLachlin in her writings about the “need” for “contextual balancing” when deciding whether to grant access in individual cases.58 Finally, in direct contrast to Stevenson J.’s findings, Cory J. included this additional quote from Dickson J.:

> It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.59

In addition to his findings and in direct opposition to most of Stevenson J.’s findings, Cory J. had proffered that merely allowing the public and press to view evidence from exhibits during trial was not a sufficient means of ensuring public scrutiny in support of the principle of open court. Cory J. recognized that the public has a “compelling interest” in the criminal trial process and that in earlier times, a “significant segment of the community” could attend hearings and pass on information to their friends and family, thereby making the process “in the truest sense of the term, open to the public.”60

57 *Ibid* at 701.
58 *Ibid*.
59 *Ibid* at 702.
60 *Ibid*. 
Cory J. had acknowledged that “times have changed”; and that space in courtrooms was limited; and that work and family obligations make attendance during a trial “impossible.”

With these modern changes had come the widespread acceptance that the media represents the public, with the media and press holding a “special place” as “proxies of the community” during the trial process. He had held that the public relies on the media for a “fair and accurate depiction of the proceedings” as the way to promote “the public right to comment on and criticise that process.” Cory J. had reasoned that

[...]his simply cannot be done without the degree of openness which would provide the media with full access to court documents, records and exhibits. The more barriers that are in place in the way of access, the more suspect the proceedings become and the greater will be the irrational criticism of the process. It is through the press that the vitally important concept of the open court is preserved.

Unlike Stevenson J. for the majority, Cory J. did not believe that the privacy rights of the accused should be upheld over and above access by the public and media to the proceeding and to exhibits within a court file. Cory J. had highlighted the importance of the principle of open court in connection with freedom of expression to the proper administration of justice. Cory J. included a quote from his majority judgment in the Edmonton Journal case, in which he wrote:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

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61 Ibid.
62 Ibid.
63 Ibid at 703.
It is only through the press that most individuals can really learn of what is transpiring in the courts. They as “listeners” or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court.\textsuperscript{64}

Unlike the case in \textit{Vickery}, the Supreme Court in the \textit{Edmonton Journal} case did consider the \textit{Charter} in its analysis. Cory J. in \textit{Vickery} had recognized that while his comments in the \textit{Edmonton Journal} case were made in the Charter context, unlike the present case, the distinction did not matter as much since he believed that “the rationale of the open court principle is important to the balancing exercise whether under the \textit{Charter} or…at common law.”\textsuperscript{65} This would also prove to be the case with respect to the positioning taken by Cory J. in the \textit{Dagenais} decision, which will be explored further in this chapter.

Cory J. had clearly advocated for the trial and appeal processes to be as “open as possible”.\textsuperscript{66} He had believed that the media “as the public’s representative” should have “access to all the exhibits which are a part of the appeal proceedings”, and which may “form the basis for the appellate decision.”\textsuperscript{67} Furthermore, Cory J. had firmly believed in the importance of the open court principle to ensure public confidence in the court, and that this openness was necessary “from the beginning of the process until the end of the final appeal.” He wrote

\begin{quote}
Of the three levels of government, it is the courts above all which must operate openly. While what is done in secret is forever suspect, what is done openly whether susceptible to praise or condemnation, is more likely to meet with acceptance.\textsuperscript{68}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{64} \textit{Edmonton Journal}, supra note 4 at 1339-1340 in \textit{Vickery}, supra note 38 at 703.
\item\textsuperscript{65} \textit{Vickery}, supra note 38 at 704.
\item\textsuperscript{66} \textit{Ibid}.
\item\textsuperscript{67} \textit{Ibid}.
\item\textsuperscript{68} \textit{Ibid}.
\end{enumerate}
\end{footnotesize}
7 The Dagenais/Mentuck Test

The principles established by the Supreme Court of Canada, known as the Dagenais/Mentuck test, cannot be underscored in their importance to journalists, media lawyers and other open court enthusiasts. Chief Justice McLachlin’s position on the importance of a “contextual” approach that sought to find the right equilibrium by balancing competing interests on a case-by-case basis as referenced earlier in this chapter are derived from the principles established in the Dagenais69 and Mentuck70 cases. The Dagenais/Mentuck test did this by creating a standard approach in balancing the various factors to determine whether the exercise of discretion to limit the Charter freedom of expression and freedom of the press was justifiable.

To proponents in favour of the principle of open court and accessibility, the Dagenais/Mentuck test had created a structural regime to deal with what can be perceived as the unpredictable and wayward impositions against freedom of expression and freedom of the press, which can come in the form of impromptu applications by counsel to ban certain information from public dissemination or seal a file from access. The Dagenais/Mentuck test has acted as a legal method to determine whether those proposed limitations are, in fact, impositions, or whether they are, instead, necessary measures to ensure the proper administration of justice or unassailable protection of one’s rights. Moreover, on the other side of the argument to advocates in favour of privacy and safeguarding the court process from external stakeholders, the Dagenais/Mentuck test has meant the end of liberally favouring certain individual values and the allocation of protection over the freedoms of expression at the expense of privacy.

The Dagenais/Mentuck test plays a pivotal role with respect to accessing court files and documents, including exhibits. By their very nature, rules on accessing court documents and files create limitations and place restrictions on the relationship between the public and media with court information and how that information can be accessed. With the creation and affirmation of the Dagenais/Mentuck principles as established by Canada’s highest court, it is

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69 Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 [Dagenais].
70 R v Mentuck 2001 SCC 76 [Mentuck].
argued that the provincial and territorial courts of our country should be adhering to the *Dagenais/Mentuck* principles in the formation and implementation of how each jurisdiction deals with limitations on how the public and media can access court files and records. Before this is further explored in greater detail in this thesis, it is worthwhile to provide a review of the history and development of the *Dagenais* and *Mentuck* decisions.

### 7.1 *Dagenais*

What was just a mini-series set to air in December of 1992 on the CBC turned into the basis for ground-breaking jurisprudence in recognition of the importance on freedom of expression and freedom of the press. ‘The Boys of St. Vincent’ was planned to be a four-hour television docudrama, an elaborately created Canadian co-production between the national public broadcaster and the National Film Board of Canada. The program was a fictionalized account of child molestation by Catholic clergy running an orphanage in Newfoundland. The story behind ‘The Boys of St. Vincent’ was based on the real life accounts of child sexual abuse that scandalized the Roman Catholic Church in Canada. It was no wonder that several members of the Catholic religious order, known as the Christian Brothers, took issue with the airing of the mini-series when some of their members were set to stand trial against similar allegations of sexual and physical assault on children.

At the centre of the Supreme Court of Canada case of *Dagenais v. Canadian Broadcasting Corp.* was whether a publication ban over the granting of an application for an injunction and any material related to it should be appealed. The respondents of the case, Lucien Dagenais, Léopold Monette, Joseph Dugas and Robert Radford, were teachers belonging to the Christian Brothers, who were all charged with the physical and sexual abuse of young boys in their care. The trials of the four respondents were scheduled to be heard in Ontario in the winter of 1992 and spring and summer of 1993.

In early November of 1992, the CBC began advertising for the mini-series, which was scheduled to air across Canada the following month. The respondents requested and were

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71 *Dagenais, supra* note 69.
granted an interlocutory injunction against the CBC. This injunction prohibited the national broadcaster from airing the mini-series anywhere in the country until the completion of the four respondents’ criminal trials. The respondents were also granted an order prohibiting the dissemination of information that the application existed and any material related to it.

In response to the court-sanctioned restrictions, the CBC, the NFB, and a few other parties appealed in early December of 1992. The injunction was reaffirmed, but its scope was limited to the prohibition against airing the program in Ontario and on CBMT-TV in Montreal. The appeal court also reversed the order banning publicity about the broadcast and disclosing that the fact of the existence of the application. However, the CBC and the NFB were still unsatisfied with the partial injunction, leading them to file an appeal to the Supreme Court of Canada.

At issue in this particular case was the tension between the Charter values of freedom of expression and the accused’s right to a fair trial. While this may seem to be a deviation from the central focus of this thesis regarding accessibility by the public and the media to access court records in light of privacy concerns, the principles derived in this case are central to the heart of the issues of public accessibility to the courts and the principle of open court. In this case, the Supreme Court of Canada laid down the legal structure that now determines whether any discretionary action that has a limiting effect on freedom of expression and freedom of the press is justifiable and applicable.

7.2 The legal test as established and applied in Dagenais

Lamer C.J. in his decision for the majority of the Court had acknowledged that the “pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests over those affected by the ban.”72 The Court found that it was “inappropriate”73 to continue to assign priority of one Charter right over another and that Charter principles “require a balance to be achieved that fully respects the importance of

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72 Ibid at 877.
73 Mentuck, supra note 70 at 457.
both sets of rights.” The Court had determined that it was necessary to “reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter.” The Court had reformulated the Oakes test, the legal test applicable when assessing whether a limitation of a Charter right is justifiable, to create a new standard in determining whether a the limitation of a ban is necessary to infringe upon free expression.

Writing for the majority, Lamer C.J. had ruled that if “reasonably alternative measures” were not available to prevent a risk to the court process that was “real and substantial,” what has been described in later decisions by the Court as “well grounded in the evidence” and not merely any kind of level of risk, then the imposition of a ban would be deemed to be “necessary.” Moreover, a ban should only be ordered if the “salutary effects” of the publication ban “outweigh” the negative or “deleterious effects” on the free expression of those affected by the ban. This two-step approach had marked definitive support by the Supreme Court of Canada in favour of a balancing or contextual analysis between competing values with respect to access and court proceedings.

Moreover in formulating the Dagenais two-step analysis, and as further modified and refined in the Mentuck decision as will be discussed, the Court’s positioning with respect to the presumption of openness and where the burden on proving otherwise fell in line with the approach carved out by Dickson J. in the MacIntyre decision when he stated:

Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and

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74 Dagenais, supra note 69 at 877.
75 Ibid at 878.
76 Dagenais, supra note 69.
77 Toronto Star Newspapers, supra note 6 at para 27.
78 Dagenais, supra note 69 at 878.
79 Dagenais, supra note 69.
the burden of contrary proof lies on the person who would deny the exercise of that right.\textsuperscript{80}

Similarly, in \textit{Dagenais}, the Court had concluded that the party seeking the publication ban carried the burden of justifying the limitation on freedom of expression.\textsuperscript{81} This was a key step in recognition by the Supreme Court of highlighting the importance and foundational position of principle of open court. This was later confirmed yet again by the Supreme Court in the case of \textit{Toronto Star v. Ontario}, wherein the Court had expressly acknowledged that the presumption in the legal test as originated in \textit{Dagenais} does favour openness.\textsuperscript{82}

\section*{7.3 The ‘Mentuck’ in the \textit{Dagenais}/\textit{Mentuck} legal test}

In \textit{R. v. Mentuck}, the Supreme Court of Canada had further refined the legal test as initially created in the \textit{Dagenais} decision. The issue in the \textit{Mentuck} case was also about the implementation of a publication ban. This time, the imposition of the ban was upheld, however the Court was thorough in its analysis in weighing the competing values to come to its decision. In \textit{Mentuck}, the Supreme Court had strengthened and refined the legal doctrine, thereby creating fertile jurisprudential ground to enable the \textit{Dagenais}/\textit{Mentuck} test to stand as the effective measure in determining the justifiability and application of any discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings, which also includes access to court records.

The case centered on a man named Clayton Mentuck, who was on trial for the second-degree murder of a 14-year old girl, named Amanda Cook. Amanda Cook had gone missing in July of 1996 after attending a summer fair in Rossburn, Manitoba. Mentuck stood trial the first time in March of 1998, but a stay of proceedings was entered after “crucial evidence” was

\begin{itemize}
\item \textsuperscript{80} \textit{MacIntyre, supra} note 5 at 189.
\item \textsuperscript{81} \textit{Dagenais, supra} note 69 at 840.
\item \textsuperscript{82} \textit{Toronto Star Newspapers, supra} note 6 at para 25.
\end{itemize}
brought forward and later ruled inadmissible.83 The next events in the sequence of this case brought to light the interesting world of the Canadian police and their undercover initiatives.

The Royal Canadian Mounted Police (“RCMP”) had decided to target Mentuck in an undercover sting operation with the code name of Operation Decisive.84 The mission was executed in what was a common tactic employed by the RCMP when going undercover: a target would be invited by undercover police officers to join a bogus criminal organization and engage in a series of tasks that would increase in involvement over time, such as counting large sums of money and delivering parcels.85 After building rapport and trust, the undercover officers would then set into motion an elaborate ruse in an attempt to gain whatever specific information they were seeking.

In this case, the police wanted more information from Mentuck about his involvement in the murder of Amanda Cook. They approached Mentuck and persuaded him to be forthright in discussing his involvement in the murder. When Mentuck had initially denied involvement in Amanda Cook’s murder, he was told that the “Boss” of the organization was angry that Mentuck was recruited. Again, Mentuck was “encouraged” to discuss the murder “honestly” with his new cohort.86 Soon thereafter, Mentuck was instructed that the criminal organization he was now involved with would arrange to have a person who was dying of cancer stand in and confess to the crime; after which point, the organization would then assist Mentuck in suing the government for wrongful imprisonment.87

As the undercover operation progressed, an indictment against Mentuck was reinstated less than a year later as a result of the evidence gathered against him, which resulted in Mentuck being brought back into court the following January in the year 2000.88 During the trial, the Crown had brought a motion for an application to prohibit the publication of certain facts that

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83 Mentuck, supra note 70 at 447.
84 Ibid.
85 Ibid at 448.
86 Ibid.
87 Ibid.
88 Ibid.
were to become part of the evidence, which included the names and identities of the undercover police, the conversations they had with Mentuck, and the specific scenarios that were used during the investigation. Mentuck’s lawyer opposed the application for the publication ban, and local newspapers, the Winnipeg Free Press and the Brandon Sun were granted leave as intervenors. The trial judge ordered the ban to protect the identity of the undercover officers for a period of one year, but refused to grant the ban to cover the RCMP undercover operational methods. The trial decision was appealed and during that time the order was stayed and orders granting the full publication ban as requested by the Crown and the sealing of affidavits filed with the trial judge were also granted. The case then made it to a second trial in the month of May in 2000, but was declared a mistrial due to a hung jury. A third trial in front of a judge alone commenced in September of 2000, at which point Mentuck was acquitted of the murder of Amanda Cook.

The Court was unanimous in its decision to uphold the trial judge’s order to uphold the ban on the identity of the undercover officers. Iacobucci J. wrote the decision on behalf of the Court and highlighted the difference in purpose and interests between the Mentuck case with that of the Dagenais case. In Dagenais, the tension existed between the accused’s right to a fair trial and freedom of expression. The four respondents charged with the physical and sexual assault of children were awaiting trial, fearful that the airing of ‘The Boys of St. Vincent’ would have a negative effect on the fairness of their proceedings. In Mentuck, it was essential and in the interest of the accused to have wider exposure with certain details of his arrest and trial published to promote his rights to a fair trial. The accused’s right to a fair trial was never an issue in Mentuck, since it was the Crown that sought the ban to protect the identity of the undercover police officers and preserve the secrecy of police undercover operations. Due to this marked difference in the central issue at the heart of each case, the Court in Mentuck had concluded that a “literal application of the test as set out in Dagenais”

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89 Ibid.
90 Ibid at 449.
91 Ibid at 443.
92 Ibid at 449.
93 Ibid at 460
would “not properly account” for the balancing of Charter interests in the current case and it was necessary to have the test “reconfigured” to apply to the legal issues in *Mentuck*.  

The Court in *Mentuck* decided that it was now necessary to frame the test “more broadly” in an effort to apply to the current case at hand and with respect to other cases where “such orders are sought in order to protect other crucial aspects of the administration of justice.” Therefore, Iacobucci J. for the majority of the Court determined that a “better way for stating the proper analytical approach” for cases where a publication ban should only be ordered was when:

1. such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
2. the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.  

The reformulation of the test was intended to be restated in terms that “more plainly recognize” that publication bans may trigger more interests and rights than the rights to a fair trial and freedom of expression.

It was the intention of the Court that the concept of “necessity” be encapsulated in the first element, as well as a few other key elements worth highlighting. One element that was highlighted and labeled as a “required element” by the Court was that the risk in question be a “serious one”. This was construed as meaning that the risk was “a risk the reality of which

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95 *Ibid* at 462.
96 *Ibid* at 462.
97 *Ibid*.
98 *Ibid*. 
is well-grounded in evidence” and that the risk “poses a serious threat to the proper administration of justice.” As the Court stated:

In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.

Iacobucci J. for the majority also forewarned that the reference to “the proper administration of justice” framed within the second element of the test requires discretion by judges. Iacobucci J. had indicated that judges “should be cautious in deciding what can be regarded as part of the administration of justice.” He warned that the courts

…should not interpret that term so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest.

This topic will be further explored in the next chapter of this thesis, specifically looking into whether the motivation behind the redaction and exclusion of documents and information from public accessibility of some common law jurisdictions’ access to court record policies are based on “serious danger” that poses a real threat or whether such restrictions possibly stem from unsubstantiated worry based on the perception of threats to privacy.

In revising the test as initially outlined in Dagenais, the Court in Mentuck also instructed that the consideration of “unrepresented interests” must be taken seriously, “especially where Charter-protected rights such as freedom of expression” are at issue. The Court had reiterated the principle established in the New Brunswick decision that “[t]he burden of

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99 Ibid at 463.
100 Ibid.
101 Ibid at 464.
102 Ibid.
103 Ibid at 465.
displacing the general rule of openness lies on the party making the application.”104 The Court also highlighted that it is imperative for the judge to consider not only the evidence before the court, but also the demands of the fundamental right, such as freedom of expression, that may or may not be represented due to the increase in numbers for these type of publication bans. The Court wrote:

The absence of evidence opposed to the granting of the ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.

It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincingly evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on matters of such public importance as the administration of justice.105

The Supreme Court has been clear in its position of supporting the existence of the “strong presumptive public interest” as a baseline and its importance in upholding this presumptive right even in the absence of counsel advocating for the accompanying rights of freedom of expression and freedom of the press. The Court has been unequivocal in its pronouncement that a judge is permitted to issue a ban only in those circumstances whereby the judge has “a convincingly evidentiary basis” for its issuance.

104 Canadian Broadcasting Corp v New Brunswick (Attorney General), supra note 1 at para 71; Dagenais, supra note 69 at 875 in Mentuck, supra note 70 at 465.
105 Mentuck, supra note 70 at 465-466.
7.4 Outcome of the *Mentuck* decision

In applying the test as developed within the *Mentuck* decision to the facts at hand, the Supreme Court of Canada held that the application of the publication ban over certain elements was justified. However, the Court also denied the extension of the publication ban over the operational methods of the undercover police officers. The Court had concluded that the republishing of the information did not pose a “serious risk” to the efficacy of the police operations and thus did not negatively affect the “proper administration of justice.”\(^{106}\) And to further highlight the importance and analysis of its decision, the Court had maintained that even if a “serious risk” to the administration of justice did exist, the resultant deleterious effects of the application would have prohibited the granting of the ban. The Court had recognized that the rights of the press to freedom of expression and the accused’s right to a public trial outweigh the benefits to the administration of justice: “Allowing public scrutiny of the trial process is to the advantage of the accused because it ensures that the trial is conducted fairly…”\(^{107}\)

With respect to the publication ban over the identities and names of the undercover officers, the Court had upheld this part of the ban. In coming to its conclusion, the Court had walked through a careful analysis of the various elements at play. The Court had continued in its application of the test by recognizing that the salutary effects of the publication ban had outweighed the deleterious effects. The Court had determined that upholding the ban would minimize the potential harm to the police officers currently operating within the field and would also ensure that ongoing police stings would continue unaffected; and further that there was no reasonable alternative pursuant to the first step of the legal test.\(^{108}\) The Court did believe that the negative effects of the “time-limited” publication ban were “not as substantial” and were outweighed by the salutary effects, as mentioned.\(^{109}\)

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\(^{106}\) *Ibid* at 444.

\(^{107}\) *Ibid* at 474.

\(^{108}\) *Ibid* at 444.

\(^{109}\) *Ibid* at 445.
7.5 Post-Dagenais/Mentuck

The *Dagenais/Mentuck* test has been progressively and steadily endorsed by all levels of courts in Canada, including the Supreme Court of Canada, in ways that support the application of the legal standard and the presumption of openness. In later decisions by the Supreme Court, it was held that the *Dagenais/Mentuck* test applied not only to the context of publication bans, as were at issue in the *Dagenais* and *Mentuck* decisions, but also to all discretionary judicial orders seeking to limit the openness of judicial proceedings. In the Supreme Court decision of *Vancouver Sun* decision, the Court stated that

> While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the Charter, whether it arises under the common law, as is the case with a publication ban...; is authorized by statute, for example under s.486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [[1996] 3 S.C.R. 480], at para.69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41).110

The Supreme Court has also recognized that the application of the *Dagenais/Mentuck* test applies at every stage of legal proceedings, not just during trial. As referenced earlier in this chapter and is worth repeating, the Court affirmed that the open court principle, as linked to the core value of freedom of expression, is applicable to every stage of trial, including the pre-trial stage:

> The open court principle is inextricably linked to the freedom of expression protected by s. 2 (b) of the *Charter* and advances the core

110 *Vancouver Sun*, supra note 19 at para 31.
values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, supra, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Edmonton Journal*, supra, at pp. 1339–40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

Furthermore, the principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage: *MacIntyre*, supra, at p. 183. Dickson J. found “it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy”: *MacIntyre*, at p. 186.111

The Supreme Court, once again, in the *Toronto Star* decision upheld this line of application of the *Dagenais/Mentuck* test when it had rejected the Crown’s argument that the *Dagenais/Mentuck* test did not apply in the circumstances of the Crown attempting to have search warrant application materials sealed from public access. The Court dismissed the Crown’s argument calling it “doomed to failure” as a result of “more than two decades of unwavering decisions in this Court.”112 Fish J. for the majority reaffirmed that the *Dagenais/Mentuck* test is to be “repeatedly and consistently” applied to “all discretionary judicial orders limiting the openness of judicial proceedings.”113

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111 *Ibid* at paras 26, 27.
112 *Toronto Star Newspapers*, supra note 6 at 199.
113 *Ibid*. 
While it has been closely explored within this chapter that the Supreme Court has upheld the importance and prevalence of the principle of open court in the context of freedom of expression and freedom of the press, it is important to recall that the Court has also been mindful of competing interests that seek to challenge the presumption of openness and the values that endorse public accessibility and openness of the judicial process. This has been established by the Court in its recognition that the Dagenais/Mentuck test is an adaptable standard that can be applied on a case-by-case basis, which, as highlighted earlier, has been endorsed by Chief Justice McLachlin in her recommendation of a “contextual” approach.

The Court has advised that the Dagenais/Mentuck test should not be applied “mechanistically.”114 Instead, the Court has instructed that “[r]egard must always be had to the circumstances.”115 And while the test is applicable at all stages, it is “a flexible and contextual one” and is “tailored to fit a variety of discretionary orders,”116 which therefore does indeed apply to the focus of this thesis, being what is the nature and extent of the limitations and restrictions imposed on public access to court records.

8 Competing Values to the Principle of Open Court and Freedom of Expression and Freedom of the Press

There are a variety of interests and values that compete with the open court principle and the Charter values of freedom of expression and freedom of the press. One main competing Charter value is an accused’s right to a fair hearing, which was at issue in the Dagenais decision. In that context, the application for the publication ban over the airing of the fictional mini-series focused on parallel real life events of child sexual and physical assault by a Catholic order. In bringing the application, it was sought to minimize any perceived prejudice towards the multiple accused’s trials based on similar charges. It is a logical extension that any public media coverage on the negative events and aspects of an accused’s

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114 Ibid at 200.
115 Ibid.
116 Ibid.
involvement in a crime may have an adverse effect on the accused’s due process rights and right of being considered innocent until proven guilty by a court of law. In today’s media-saturated and digital world, the court of public opinion can have lasting effects that could negatively impact the life of a person accused of criminal charges, even if a court of law may have found him or her or they not guilty of any wrongdoing. However, for the purposes of the topic of this thesis, the competing values of privacy and security will be considered and its connection to limitations placed on public accessibility to court records and documents.

In May of 2003, the Canadian Judicial Council had commissioned a research paper on “Open Courts, Electronic Access to Court Records, and Privacy”. This paper had deduced thirty-three conclusions on these issues with the major principles highlighted as the following:

1) the right of the public to open court is an important constitutional rule; and
2) the right of an individual to privacy is a fundamental value; and
3) the right of open courts generally outweighs the right to privacy117

Therefore, in line with this report’s findings, the competing value against the principle of open court and broad public accessibility that will be focused on in this thesis is that of privacy and its respective demands of placing barriers and limitations in an effort to curtail how the media and the public access court files and documents.

Moreover, in the Vancouver Sun case, the Supreme Court not only recognized the traits of the Dagenais/Mentuck test to be “contextual” and “adaptable”, but also recognized that the other competing rights and interests to freedom of expression and the press were “broader” in scope than simply the administration of justice and the rights to a fair trial.118 The Court highlighted that “privacy and security interests” also come into play.119 These were the competing values at issue in the Vickery case as referenced above, as well as the subsequent Supreme Court of Canada case of Dufour that will be explored in the next chapter.

118 Vancouver Sun (Re), supra note 20 at para 28.
119 Ibid.
9 Principle of Open Court ➔ Presumption of Openness ➔ Freedom of Expression ➔ Freedom of the Press ➔ Public Accessibility ➔ Broad Access to Court Files

As illustrated in this chapter, in Canada, it has been established and confirmed by courts that the principle of open court is based in common law and that there is a presumption of openness to our court system. Openness of the courts results in greater public confidence in the integrity of the judiciary and the proper administration of justice. It also fosters and promotes the Charter values of freedom of expression and freedom of the press. The Supreme Court of Canada has recognized that the principle of open court is “inextricably connected” to these values.

Chief Justice McLachlin has articulated that court openness fulfills a “therapeutic function” in that the public can “see” how “justice is done.” Not only can members of the community and the press attend hearings, but they are also permitted to access court records and documents. The Supreme Court of Canada has recognized the important function of the press and media to the principle of open court, court transparency and accessibility. While citizens may have to tend to everyday duties in taking care of and maintaining a household, some Canadians may not have the capacity to attend court proceedings when they are in session or access court records and files during a courthouse’s hours of operation. The press and media act as the “eyes and ears” of the public, relaying and disseminating information about trials to the public. Journalists and other proponents of freedom of expression and freedom of the press argue for broad accessibility to proceedings and access to court records and documents, and the Supreme Court of Canada has responded in turn to promote these values.

The Supreme Court of Canada has formulated the Dagenais/Mentuck test, a legal standard to determine whether all discretionary actions limiting freedom of expression of court proceedings are justifiable. This two-step legal test takes a “contextual” approach in balancing between court openness and freedom of expression with competing values, such as privacy and fair and impartial trials. It is imperative upon the party seeking the restriction on access and openness to provide convincing evidence that an order is “necessary” in order to prevent the high threshold of a “serious risk” to the “proper administration of justice” and the
sitting judge considers whether there are any “reasonably alternative measures” that would not prevent the risk. The judge is also to consider whether the positive effects of the restriction outweigh the negative rights to the parties and the public and their interests, which can include freedom of expression and freedom of the press.

It has also been deemed by the Court that the application of the *Dagenais/Mentuck* test applies at every stage of a legal proceeding. With that in mind, the next chapter explores the issues of privacy and how this competing interest to accessibility and openness have affected some Canadian jurisdictions’ rules on access to court documents. The next chapter of this thesis will provide an analysis into the case law and commentary surrounding privacy and highlight examples from current and previous access to court record policies from certain Canadian territorial and provincial jurisdictions that have swung the pendulum in favour of restricting access or creating barriers to access to court records and files. The second chapter will take a closer look at the various access to court record policies across Canada, providing an analysis as to which provinces or territories adhere to the *Dagenais/Mentuck* approach and which policies could benefit from updates and revisions.
Chapter 2
Restrictions and Limitations on the Principle of Open Court and Public Accessibility

The Supreme Court of Canada has recognized that there exists a presumption of openness to court proceedings, which includes access to court records. In addition to these findings, the Court has been clear in the essential function provided by the press and the media in disseminating information to the public. In order for there to be public confidence in the courts, the public must be made aware of what is happening during court proceedings. Members of the press attend court proceedings whilst public citizens deal with their day to day duties that prohibit them from being physically present to monitor what is happening at the courthouse. The first chapter provided background into the undeniably strong link between the open court principle as a fundamental aspect of the Charter guarantee of freedom of expression and freedom of the press.

Moreover, it has been presented that a logical extension to having physical access to the courts and attending proceedings is for the press and the public to have access to review and examine court records and documents. In order for the media to present the public with a comprehensive briefing on a court proceeding, it is critical for the public and journalists to have access to the documents within the court record. The first chapter presented what appeared to be a nonstop skyward climb in the late 1990s and early 2000s of jurisprudence from the Supreme Court of Canada that broadly supported the principle of open court, freedom of expression and freedom of the press, the importance of the role of the media, and public access to court records and documents. This upward swing also culminated in the formation of the Dagenais/Mentuck test.

However, as will be illustrated in this second chapter, the value of privacy has remained a key counterbalance to the principle of open court and the promotion of public accessibility to the courts and court records. The legacy of the Vickery decision and the formation of Dufour will be outlined in connection with the value of privacy and the consideration of a contextual approach in balancing between the values. As well, this chapter will also assess and measure the provisions of access to court record policies of the courts of the territorial and provincial
common law jurisdictions in Canada that implement limitations and barriers against public accessibility in an attempt to protect the information and privacy of involved parties. Special focus will be placed on the access to court record policy of the Nunavut Court of Justice for its unique positioning in placing a premium on implementing barriers and limitations against public accessibility to information. These policy provisions that demonstrate a leaning towards protectionist tendencies to safeguard privacy at the expense of public accessibility to court records and documents will be measured against the three principles of openness, accessibility and how the \textit{Dagenais/Mentuck} test is integrated or referenced within the access to court records policy.

1 \hspace{1cm} \textbf{In Defence of the \textit{Vickery} Decision [or] The Long Life of the \textit{Vickery} Decision}

Media law work in Canada is spearheaded by a handful of successful lawyers, mainly based in Toronto and Montreal, with some of these notable lawyers out further west in Canada and spread out east in Atlantic Canada. Unfortunately, there is not a plethora of new files on media law issues that make it to court in this country. This is due in part to downsizing and the shrinking of budgets of Canada’s more well-established corporate media entities. However, of the lawyers who do have the privilege of working on these interesting and coveted files, many of them belong to an elite, but inviting media law bar known as Ad IDEM/CMLA. The first acronym stands for Advocates In Defence of Expression in Media / Avocats pour la defense de l’expression dans les medias, with second part of the name standing for the Canadian Media Lawyers Association.\textsuperscript{120}

As members of Ad IDEM, these lawyers take an oath to work in support of the interests of media and publishers in defence of freedom of expression and freedom of the press. Most of these lawyers work on behalf of clients in the media and advocate for their clients’ interest in broad public accessibility to court proceedings and court records. It was a golden time for Ad IDEM lawyers for a brief period of a few years after the formation of the \textit{Dagenais/Mentuck} test, but before the release of the \textit{Dufour} decision. The legacy of media law cases brought

\textsuperscript{120} For more information about this group, visit online: <adidem.org>.
down from the Supreme Court of Canada favoured the principle of open court and the trajectory of public accessibility to the courts and court records seemed to only go upward in the direction desired by Ad IDEM and the media.

The one thorn in the side of media lawyers and other proponents in favour of court openness and public accessibility was the Supreme Court of Canada decision in *Vickery*. However, due to the lack of constitutional analysis in the decision, it can be said that those in favour of maximum public accessibility and court openness, such as members of the Ad IDEM bar, took the position of distinguishing *Vickery* as an aberration away from the line of argument in favour of openness as established in the *Dagenais* and *Mentuck* decisions.

As previously mentioned in the last chapter, the majority decision in *Vickery* upheld the privacy rights of a person acquitted of second degree murder against the competing value of broad public access to exhibits that were deemed to be judicially inadmissible against him. In *Vickery*, the Court was clear in ruling that the protection of the accused’s privacy rights justified the “curtailment of public accessibility.”\(^{121}\) The Court also found that the “open justice requirement” had already been fulfilled when the exhibits were introduced at trial.\(^{122}\) The Court had ruled that there should be no access to the illegally-obtained videotape exhibits and that the case warranted the protection of an innocent person:

> In short, curtailment of public accessibility is justified where there is a need to protect the innocent, and N must be considered an innocent person for this purpose. Someone who has been accused and convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of his *Charter* rights should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence.\(^{123}\)

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\(^{121}\) *Vickery v Nova Scotia Supreme Court (Prothonotary)*, supra note 37 at 672.

\(^{122}\) *Ibid*.

\(^{123}\) *Ibid* at 672, 673.
The Court relied on the *MacIntyre* decision, citing that this precedent had created an “exception” to the “general access rule” when it came to “innocent persons” that they should be protected from “unnecessary harm.”124 And for the next few years, *Vickery* did dampen the spirits of those Ad IDEM lawyers. However, it was not long before there would appear to be some winds of change blowing through the judiciary and opening up access much to the delight of the media and their lawyers.

2 Pendulum Swinging: In Favour of Open Court and Section 2(b) Charter Rights

As referenced in the first chapter, three years after the *Vickery* decision, the Supreme Court of Canada released its decision in *Dagenais v. Canadian Broadcasting Corporation*, the judgment that planted the roots of the legal test that systemically determine whether an imposition on access of the public or media was warranted. The Supreme Court decision in *R. v. Mentuck* would follow *Dagenais* six years later in 2001, resulting in the further refinement of the test in language and christening the title as the *Dagenais/Mentuck* test. In the following next nine years, there were several decisions, including two notable decisions by the Supreme Court and one from the Ontario Court of Appeal that would aid in creating a friendly and welcoming environment in support of the open court principle, access to court documents (specifically exhibits, contrary to *Vickery*) and the Charter values of freedom of expression and freedom of the press.

It is important to remember that the Supreme Court had consistently advised in favour of a contextual balancing of competing rights, including privacy, security, fair and impartial trials, which the *Dagenais/Mentuck* test did recognize and adhere to, as well as the decisions released subsequent to *Dagenais* and *Mentuck*. However, the results of the *Dagenais* and *Mentuck* cases, as well as those that followed were found in favour of the principle of open court and increased public and media accessibility. And as a result, this period in

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jurisprudential history was, for all intents and purposes, an especially opportune time for Canadian media and press and their respective legal counsel.

The perspective and legal strategy of viewing *Vickery* as an odd duck on jurisprudential balance was emboldened by the Supreme Court’s release of two decisions, being the *Vancouver Sun* case in 2004 and *Toronto Star Newspapers Ltd. v. Ontario*,\(^\text{125}\) which was released the following year. As referenced above in the previous chapter, the Court was effusive in its support and promotion of the open court principle, cautioning that the principle “is not to be lightly interfered with.”\(^\text{126}\) In the *Toronto Star* case, the Supreme Court had solidified the status and application of the *Dagenais/Mentuck* test to all discretionary judicial orders that sought to limit freedom of expression and freedom of the press in relation to legal proceedings.

These two Supreme Court cases were followed with the judgment by the Ontario Court of Appeal in *R. v. Canadian Broadcasting Corporation*,\(^\text{127}\) better known as the *Ashley Smith* decision as referenced above in the first chapter. Justice Robert Sharpe in his judgment in *Ashley Smith* favoured most arguments put forward by the lawyer acting on behalf of the CBC, Patricia Latimer, who argued successfully to have her client to have access and the ability to copy the videotape exhibits that were filed during the preliminary inquiry. This judgment was a proverbial “slam dunk” in the minds of media law proponents in favour of court openness and accessibility and the defence of freedom of expression and freedom of the press.

To the Ad IDEM lawyers, the delivery of the *Vancouver Sun* decision, immediately followed by *Toronto Star* and then the Ontario Court of Appeal in *Ashley Smith* gave them solid jurisprudential ground to argue in support of the principle of open court and public access to court proceedings and court documents. And while *Vickery* still remained on the media law

\(^{125}\) *Toronto Star Newspapers Ltd v Ontario* 2005 SCC 41, *supra* note 76.

\(^{126}\) *Vancouver Sun (Re).* *supra* note 20 at 26.

\(^{127}\) *R v Canadian Broadcasting Corporation,* *supra* note 19.
landscape, open court and freedom of the press advocates were able to effectively distinguish and dismiss the *Vickery* findings in light of the major decisions that followed.

This relatively golden period in favour of the principle of open court and public accessibility to legal proceedings, court documents and exhibits shone brightly for a number of years until 2011, when the Supreme Court published its decision in *R. v. Canadian Broadcasting Corporation*,128 better known as the *Dufour* decision. The Dufour decision had marked a return by the Supreme Court to more conservative sensibilities reminiscent of *Vickery* in promoting values like privacy, and favouring these rights over the ones that had been heralded by court accessibility advocates. It is unknown, but widely speculated that the celebratory mood and joviality at subsequent Ad IDEM gatherings were tempered immediately following this decision.

### 2.1 Pivot back: *Vickery* and *Dufour*

As a result of the judgment in *Ashley Smith*, media and public accessibility advocates had optimistically forecast the shrinking relevance and applicability of the *Vickery* decision. In dismissing *Vickery*, its critics believed that the evidence and arguments of *Vickery* were “notably limited” and that the applicant had failed to present affidavit evidence demonstrating that he had sought access.129 Practitioners declared the *Vickery* decision to be of no force and effect stating that “*Vickery* may be considered per incuriam to make formal overruling unnecessary.”130

As highlighted, the finding most relied upon by critics to further distinguish the applicability of the *Vickery* decision was that there were no Charter arguments based on freedom of expression and freedom of the press under section 2(b) that were raised and considered by the Court. The Supreme Court chose to decline the appellant, Claude Vickery’s *Charter*

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128 *Canadian Broadcasting Corp v The Queen* 2011 SCC 3.
129 David Crerar & Majda Dabaghi, “SCC upholds open court principle for media reporting on proceedings” (28 October 2005) TLW at 15 [Crerar & Dabaghi, “SCC upholds”].
arguments as he attempted to invoke the Constitution, because these specific arguments had not been raised or heard by the lower courts of the case. Interestingly, this line of reasoning was also raised by the Supreme Court in the *Dufour* decision. At issue in *Dufour* was the CBC and another broadcaster trying to broadcast a video recording of a statement made by an individual charged with aiding suicide that was entered as an exhibit. The Court had ruled that since the individual’s trial was over and he had been acquitted, then a court would have to consider what kind of impact would occur on the outstanding trial of the accused and the co-accused if the statement was publicly released. The accused had argued that because of his intellectual disability, airing the statement would be “particularly dire” to him.\(^{131}\) In this case, the Court ruled that there are cases, wherein, that “social values must prevail over openness”, and that the “protection of vulnerable individuals” was required.\(^{132}\)

The Court considered the applicability of *Vickery* to the facts at hand in *Dufour* and determined

…that case is not determinative, as the Court declined at the time to rule on whether access to exhibits was protected by the Constitution – that argument had not been raised by the courts below.\(^{133}\)

However, while the Supreme Court did distinguish how it reached its findings in *Dufour* from *Vickery* (since the constitutional guarantee argument had been expressly raised in *Dufour*), the Court still did acknowledge that “some aspects of *Vickery*” remain “relevant”. More specifically, the Court concluded that the “factors listed in *Vickery* remain relevant” but that “they must be considered in light of the framework in *Dagenais* and *Mentuck*.” These factors include:

1) The nature of exhibits as part of the court “record”.

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\(^{131}\) *Canadian Broadcasting Corp v The Queen*, supra note 127 at 1.


\(^{133}\) *Ibid.* at para 11.
2) The right of the court to inquire into the use to be made of access, and to regulate it.

3) The fact that the exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.

4) That those subjected to judicial proceedings must undergo public scrutiny or what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.\(^{134}\)

Interestingly, subsequent jurisprudence, \(^{135}\) as well as some legal commentators and scholars, \(^{136}\) have interpreted this acknowledgment by the Supreme Court as a full dismissal of the findings in the *Vickery* decision being overtaken by the *Dagenais* and *Mentuck* decisions. However, it is important to note that irrespective of this continued eagerness to bury *Vickery*, the spirit and legacy of *Vickery* still manages to survive, likely much to the chagrin of the Ad IDEM bar. *Vickery* continues to haunt the legal landscape via *Dufour*, through legal commentary mostly from privacy enthusiasts, and its influence can be found within some access to court record policies of certain common law jurisdictions in Canada.

3 **In Defence of Social Values, Privacy**

The Supreme Court of Canada in the *Dufour* decision did distinguish their findings in that case with the *Vickery* decision, however the Court still maintained that *Vickery* decision retained “relevance” in connection with *Dagenais* and *Mentuck*. Interestingly, the Court in *Dufour* had also based its decision on commentary from the same particular case that Stevenson J. for the majority in *Vickery* relied upon, which was the Supreme Court’s judgment in *A.G. (Nova Scotia) v. MacIntyre*. The last line of the *Dufour* decision is from the *MacIntyre* decision written by Deschamps J. for a unanimous court, which reads:

\(^{134}\) *Vickery v Nova Scotia Supreme Court (Prothonotary)*, supra note 37 at 681.

\(^{135}\) For example, see paragraph 26 of *R v Magnotta* 2013 QCCS 4395, which concluded that “Vickery has therefore been clearly overtaken by *Dagenais/Mentuck*.”

In my view, a situation requiring the protection of vulnerable individuals, especially after they have been acquitted, is one such case.\textsuperscript{137}

In \textit{Vickery}, the Court heavily referenced \textit{MacIntyre} throughout the majority decision and highlighted the “protection of the innocent”:

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent…\textsuperscript{138}

And again in the conclusion of the decision, the Court stated:

In \textit{MacIntyre}, Dickson J. said this (at pp.186-187):

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.\textsuperscript{139}

The principle of protecting “social values” has been a familiar argument raised by proponents who advocate in favour of the protection of individuals’ right of privacy and for increased security measures and barriers in the public access of court records and documents. One such commentator is Jo Sherman, who has written a 2011 report entitled, “Court Information Management – Policy Framework to Accommodate a Digital Environment, which was prepared for the Canadian Judicial Council”.\textsuperscript{140} In this report, Sherman outlines recommendations to be followed by Canadian courts in relation to the storing and dissemination of court files documents in the digital technological age.

\begin{small}
\textsuperscript{137} \textit{Canadian Broadcasting Corp v The Queen}, supra note 127 at 19.
\textsuperscript{138} \textit{Vickery v Nova Scotia Supreme Court (Prothonotary)}, supra note 37 at 681.
\textsuperscript{139} \textit{Vickery v Nova Scotia Supreme Court (Prothonotary)}, supra note 37 at 685.
\textsuperscript{140} Jo Sherman, \textit{supra} note 39.
\end{small}
While Sherman’s analysis has taken into consideration the effect of digital technology on access to information contained in court files, some believe that the issues of concern around physical access to court records should be identical in principle as digital access to court records. Prominent Nova Scotia media lawyer and Ad IDEM stalwart, David Coles, has argued that digital access, a topic that will be more thoroughly discussed in the next chapter, “is providing ready access to what should already be accessible”.¹⁴¹

In her report, Sherman has referenced and acknowledged the principle of open court and she has also alluded to aspects of Dagenais/Mentuck test, however these references are quickly followed with a warning call for increased vigilance and protection of privacy. In section 5.3 of Sherman’s report, she wrote:

> The Canadian caselaw (sic) suggests that there is a strong presumption in favour of openness and that the burden to displace that presumption rests with the party seeking such displacement. This party must establish that, on the facts of the case, a restriction of access to court information is necessary for the proper administration of justice.

> Frequently such requests to deny public access to court information will raise a number of competing rights, such as the accused’s right to a fair trial and the victim’s right to privacy.

> A hierarchical approach to the consideration of such rights, weighing some over others, should be avoided. Instead, the court should strive to achieve a contextual balance that fully respects the importance of all values...¹⁴²

While there is recognition of the principles that have been discussed in this thesis in Sherman’s report, such as the principle of open court and a contextual approach to the

¹⁴¹ Dean Jobbs, “ Courts struggle to balance privacy and openness in giving access to court files over the Internet” (28:12) (18 July 2008) TLW at 1 [Jobbs, “Courts struggle”].
¹⁴² Jo Sherman, supra note 39 at 18.
balancing of values as established in the *Dagenais* and *Mentuck* decisions, the support in favour of safeguarding information from public accessibility and the protection of privacy are never far behind and prevalent. Immediately after the above quote, Sherman writes the following:

> While it is often assumed that ‘openness’ will provide ‘public confidence in the courts, there are many circumstances that have the opposite effect.

Sherman’s line of argument echoes the Supreme Court of Canada’s sentiment in *MacIntyre*, *Vickery* and *Dufour* in protection of social values:

> There often appears to be a broad assumption that ‘transparency’, can best be achieved through unfettered access to Court Records even though that term is rarely defined in a clear and consistent way.

> It appears this mindset has unfortunately skewed the debate in so far as it is focused almost exclusively on the need for ‘transparency’ while, to some extent, other equally important values that underpin an effective justice system including ‘public confidence’, ‘fairness’, and ‘human dignity’ have been sidelined.

In an effort to achieve what Sherman believes is a “fair” and “effective” justice system, where “public confidence”, “fairness” and “human dignity” are maintained, the author quickly disregards the Supreme Court of Canada’s establishment of the presumption of openness as the starting point, and maintains instead that

> [i]t could be argued, for example that protection of the privacy and respect for civil liberty must be given equal weighting by the courts because they are essential principles to democratic society. An infringement of privacy will often amount to an infringement of liberty. 

Attention to fundamental human rights including a right to privacy may
strengthen public confidence in a court’s ability to handle sensitive information appropriately.

Interestingly, Sherman’s position in support of protecting privacy over the principle of open court in the form of minimizing public accessibility to court records as a way to promote confidence in the judicial system is the inverse of the Supreme Court of Canada’s position of supporting court openness in an effort to promote public confidence in the courts. As demonstrated in the first chapter of this thesis, the Supreme Court of Canada has repeatedly heralded the principles of open court and public accessibility as hallmarks of a healthy judicial system with Chief Justice McLachlin calling “the preservation of public confidence in the administration of justice” the “single unifying purpose” of the open court principle.143 Sherman has viewed the matter otherwise.

However, as also previously highlighted, Chief Justice McLachlin has made the astute observation that these interests from what seems to be opposite ends of the spectrum ultimately converge towards the same goal of public confidence in the administration of justice. Nevertheless, it is highly likely that members of Ad IDEM on behalf of their media and broadcast clients would still beg to differ and argue against Sherman’s perspective that favouring the social value of privacy over public accessibility would inspire public confidence. Further, in keeping with the modus operandi of David Coles and his colleagues at Ad IDEM, it is worth taking a closer look at the access to court record policies from various provincial and territorial jurisdictions in Canada that place a premium on protection of privacy over more open access to court files and documents.

Interestingly, one jurisdiction in Canada stands out from the rest in its protectionist tendencies in favour of privacy, which has the effect of limiting public accessibility to court documents and information. This jurisdiction is Nunavut, Canada’s newest territory. In recent years, the Nunavut Court of Justice has had an access to court record policy dating back to 2013, and was later updated in 2015.144 Long considered by local media as one of the most

143 Beverley McLachlin, supra note 9.
144 Nunavut fun fact: Nunavut is pronounced “Noon-a-voot” and not “None-a-vut” as commonly mistaken.
restrictive and inconsistently applied policies over the years, the Nunavut Court of Justice Access to Court Records Policy has made some changes to public accessibility to court records and documents. However, upon further analysis between the two versions of the policy and in comparison with other Canadian common law court jurisdictions, this thesis takes the position that the 2015 updating of the policy within Nunavut was a missed opportunity to more meaningfully embrace and incorporate the Dagenais/Mentuck principles, as well as the principle of open court, into the rules and guidelines of the policy.

4 Barriers and Limitations Against Court Openness and Public Accessibility

There are currently several types of access to court record policies in Canada from the following common law provinces and territories: Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Nunavut, Ontario, Prince Edward Island and Saskatchewan – all of which embrace the principle of open court and public accessibility in varying degrees. This thesis argues that it is incumbent upon the various common law jurisdictions and their courts to more meaningfully incorporate the Supreme Court of Canada cases of Dagenais and Mentuck and the principles established within these decisions in support of court openness and greater accessibility and transparency of the courts, including public access to court records and documents. Moreover, this thesis argues that there should also be a consistency between the policies in better reflecting and applying the Dagenais/Mentuck principles and the values of court accessibility and openness. At present, all access to court record policies within the common law jurisdictions of Canada vary in form and substance from a few paragraphs on a court website to robust and thorough polices that provide clear rules and guidelines regarding public accessibility to court records and documents, as well as background informative information on the court system and its files. It is argued that it would be in the best interests of the courts, all internal and external stakeholders and the public, including the media, to have a more consistent approach between the courts of the territorial and common law jurisdictions of Canada.
It is beyond the parameters of this thesis to provide an exhaustive compendium and examination of all the barriers and limitations against public accessibility of all access to court record policies of the common law jurisdictions in Canada. However, for the purpose of this chapter, this thesis will specifically focus and examine the issues within the policy containing the most restrictive provisions in limiting public accessibility to court records, which is that of the Nunavut Court of Justice, in conjunction with examining and highlighting the provisions of other access to court record policies of some common law jurisdictions in Canada as a way to provide insight into the differences in restrictiveness and accessibility against the presumption of openness and the *Dagenais/Mentuck* principles.

Therefore, the following principles will be referenced in considering the restrictive nature of some of the provisions from Nunavut’s access to court record policy, as well as the provisions from the policies of a few other Canadian common law jurisdictions: (1) openness, (2) accessibility, and (3) how well the principles from *Dagenais/Mentuck* are adopted and integrated within the policy.

In considering the first factor of “openness”, this thesis will analyze the starting position and tone established at the start of the access to record policy of the Nunavut Court of Justice, as well as the policies of a few other jurisdictions. Moreover, in measuring against the general term of “accessibility”, this thesis shall pay special consideration to how the Nunavut Court of Justice has allocated decision-making power to its court staff with the effect of the implementation of barriers that minimize public accessibility to court records, as well as focusing on unreasonable search and access fees, and the issue of making copies once court files have been accessed by the public. Finally, this thesis will highlight how the access to court record policy of the Nunavut Court of Justice falls short on meaningfully incorporating the *Dagenais/Mentuck* test and its principles into its 2013 and 2015 versions of its access to court record policy.

However, before delving into this analysis of the limitations and barriers against public accessibility of court records, it is worth exploring the concept of the application of uniform provisions within the access to court record policies of the common law jurisdictions of
Canada. Past case law as highlighted in the previous chapter has established that “every court has supervisory and protecting power over its own records.”145 And while some provinces and territories have updated their policies in recent years to ensure some conformity with the principles as established in the Dagenais and Mentuck decisions, other jurisdictions have not and as such fall short on adherence to the principles of open court and the presumption of openness. As stated there is no consistency amongst the access to court record policies within Canada’s common law jurisdictions.

5 Efforts at Exploring Uniformity in Access to Court Record Policies

Over the last fifteen years, the Canadian Judicial Council (“CJC”) has invested some effort and made recommendations to update access to court record policies in Canada, as well as commissioning research papers analyzing digital access of court records and information. The CJC was created by Parliament in 1971 and is mandated under the Judges Act146 to promote efficiency, uniformity, accountability and improvement of the quality of judicial service in Canadian superior courts.147 In carrying out its mandate, the CJC forms committees and subcommittees to explore issues affecting the Canadian justice system. Some of these committees have been permanently established while others are formed on an ad hoc basis to deal with specific issues or projects.148

The Judges Technology and Advisory Committee, referenced herein as the “JTAC”, is one such group that was formed and has been somewhat modified in more recent years. The JTAC has prepared two notable reports on access to court records in the early 2000s. The first report, as highlighted in the previous chapter, was published in May of 2003, and was entitled “Discussion Paper Prepared on Behalf of the Judges Technology Advisory Committee for the Canadian Judicial Council on Open Courts, Electronic Access to Court

145 AG (Nova Scotia) v MacIntyre, supra note 5 at 189.
146 Judges Act, RSC 1985, c. J-1
148 Ibid.
Records, and Privacy.”\footnote{JTAC, “Open Courts, Electronic Access to Court Records, and Privacy”, supra note 55.} This report presented several conclusions on these issues that, while somewhat dated, are still relevant to the landscape of access to court record policies in the digital age. This report will be raised again in further exploration in the next chapter of this thesis with regard to examples of public accessibility within access to court record policies and the issue of digital access to court record materials.

The 2003 report was followed up with JTAC’s second report in September of 2005, entitled “Model Policy for Access to Court Records in Canada”\footnote{Judges Technology Advisory Committee, “Model Policy for Access to Court Records in Canada” (September 2005), online: Canadian Judicial Council <https://www.cjc- ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf> [JTAC, “Model Policy”].} (“Model Policy”). This report provides recommendations for uniform provisions to be adopted and incorporated into access to court record policies. The Council’s intent in developing a model policy was not to put forward legal rules to govern court records; but rather the purpose of the Model Policy was to “serve as a basis for the development of access policies in the courts of Canada” and to “foster further national discussion on these issues.”\footnote{Ibid at iii.} This Model Policy was drafted to maintain technologically neutral, but with the intent of eventually accommodating the progression towards electronic, or digital access.

While general in scope, the Model Policy offers up the concept of a basic framework for a jurisdiction’s access to court record policy. In doing so, the Model Policy does recognize the principle of open court and the importance of public accessibility. The policy bases its recommendation of access on the “[o]penness of court proceedings” as the “fundamental constitutional principle” to ensure “public confidence in the integrity of the court system” and a “better understanding of the administration of justice and accountability of the judiciary.”\footnote{Ibid at 1.}

While most other common law jurisdictions have chosen not to follow the guidance and principles established in the Model Policy, Nunavut’s Court of Justice has been an early
adopter of the Model Policy’s positioning on safeguarding privacy and minimizing access to the personal information of parties of court files. The Model Policy recommends eight provisions that include general guidance on the purpose of an access policy, defined terms and other definitions, including an organization of the different kinds of court files, as well as instruction on how to parse personal information into a separate category of “personal data identifiers” that “should not be widely accessible to the public.”153 The Nunavut Policy in both its 2013 version and more recently updated 2015 version adopt the term of “personal data identifiers” and the recommendation to prohibit public access to the information that falls under the term as this thesis will now more fully explore in the following sections of this chapter.

6 Openness

The first chapter of this thesis has provided a broad legal analysis on the importance of the principle of open court and public accessibility to court records. In most jurisdictions across Canada, the courts and various ministries of the attorney general have prepared detailed written policies that articulate how a member of the public can access a court file and its contents. Most of these policies range from thirty to sixty-odd pages of written rules and guidelines on proper protocol of how court staff are to manage and maintain court files and how the public can access and handle these files.

However, there are some jurisdictions that do not have any written rules on access to court records. These jurisdictions include New Brunswick, the Northwest Territories and Yukon. According to a court registry in New Brunswick, a written and publicly accessible access to court record policy of the New Brunswick court has been forthcoming for a number of years. Reasons for a lack of written policy or guidelines of the northern common law jurisdictions of the Northwest Territories and Yukon are unknown. Nonetheless, the registries of all these jurisdictions ensure that court staff will gladly work to assist requests to access court files and documents. However, without a written policy it is impossible for the public and media to have a frame of reference in how court records are managed and made publicly accessible. It

153 Ibid at 6.
is also impossible without a written access policy to ensure or monitor consistent application and interpretation of rules and guidelines when it comes to the management, organization and access to court files and materials.

Interestingly, the jurisdiction of the Supreme Court of Newfoundland and Labrador does not offer a policy of complete written rules and guidelines. Rather, this jurisdiction offers only a few paragraphs on its website about general access to its court records and files. Similarly, the courts in Manitoba and Prince Edward Island offer brief written policies on access to court records. The total length of the policy in Manitoba is three and one-quarter pages; while the access to court record policy of Prince Edward Island is presented in just under a page.

Arguably, it is possible that with these types of access policies that merely consist of general written rules that do not provide any specifics in protocol or access would cause confusion and perhaps pose more difficulty in accessing court files to a relative foreigner to these two jurisdictions. Someone who is an unfamiliar face to court staff might encounter more difficulty in gaining access or knowing what may be customary unwritten “rules” that have formed over time between long-standing court staff and the same cadre of known lawyers who access these materials on a regular basis. The risks of inconsistent application and interpretation of rules are issues present in every provincial and territorial jurisdiction with written rules on access to court documents, but these risks are arguably heightened when there is even more room for interpretation with general rules and guidelines.

With respect to the jurisdictions that provide written rules on access to court documents, it is important and interesting to note that all of them preface their policies with recognition of the principle of open court and the importance of public accessibility to files. Some jurisdictions, however, prove to be less accessible than others irrespective of this recognition of the principle of openness in court. One prime example is the access to court record policy of the Nunavut Court of Justice.
6.1 Openness: Nunavut Court of Justice - Access to Court Records Policy

Beginning in the autumn of 2013 and culminating to their most current policy dated as of January 11, 2015 and accessible on their website, the Nunavut Court of Justice’s Access to Court Records Policy (hereinafter referred to as the “Nunavut Policy”) has undergone several rounds of edits. However, irrespective of updates made to the policy, Nunavut still remains one of the most restrictive, if not the most restrictive and protectionist in Canada with regard to its written policy that outlines rules that largely have the effect of implementing barriers and limitations against public accessibility of court information contained in court records and files. Incongruously, the 2013 version of the Nunavut Policy, as well as the 2015 version, both begin with an opening quote by Jeremy Bentham, almost identical to the quote already referenced in the first chapter by the Supreme Court of Canada in the *MacIntyre* decision:

“Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the very spur to exertion and the surest of all guards against improbity.”

Jeremy Bentham\(^{154}\)

Regardless of starting its policy on this note of openness, the Nunavut Policy leaves much to be desired from the perspective of advocates in favour of open court and access by the public.

In its policy, the jurisdiction of Nunavut places a premium on privacy and leans towards protectionist tendencies that raise barriers and limitations against the principle of court openness and public accessibility. For example, take into consideration what follows the Bentham quote in the 2013 version of the Nunavut Policy, which is a list of reasons behind restrictions against access. This list includes the following:

Restrictions upon the public’s right to access court records may be justified:

(a) To prevent improper interference with the court’s processes and the administration of justice;
(b) To protect the legitimate privacy interests of a justice system participant;
(c) To safeguard a justice system participant from a serious and credible threat to their personal security;
(d) To prevent compromise of important protections provided by law or by court order;
(e) To protect a justice system’s participant’s right to a fair trial.155

By highlighting these reasons in defence of implementing limits on public accessibility, the spirit and tone of the access to court record policy of the Nunavut Court of Justice shifted dramatically away from its starting point with the Bentham quote extolling the virtue of openness on justice. This juxtaposition of the reasons in support of restrictive access at the beginning of the Nunavut Policy thereby places a premium on barriers and limitations at the expense of access and openness.

Unlike the earlier version, the 2015 version of the Nunavut Policy has adopted some recognition of elements from the Dagenais and Mentuck decisions, however slight. Nevertheless, the 2015 version still includes the same list of reasons behind restrictions on access as highlighted from the 2013 version of the policy are listed within the most current version. However, this time the list is included further along in the policy and re-introduced as the “Interests to be Protected.”156

To be clear, the Nunavut Court of Justice is not “in the wrong” for highlighting those values and principles that run counter to the principle of open court and public accessibility. The Supreme Court of Canada, after all, has advocated for a contextual balancing of competing values when it comes to propositions and instruments that seek to place restrictions on the freedom of expression and of the press in limiting accessibility to the courts. However, as

will be further explored in this chapter, while some progress has been made to the Nunavut Policy, its protectionist tendencies fairly consistently override the counterpoint of court openness and the Dagenais/Mentuck principles.

6.2 Openness: When the public has access to a court record

Another distinctive element of the 2013 Nunavut Policy that set the tone in its promotion of privacy at the expense of openness was the rationale behind only permitting public access to criminal court files only in those circumstances when an accused has been found guilty. Subsection 4.4 of the 2013 Nunavut Policy carved out this restriction as follows:

4.4 Exceptions to Public Access
4.4.1 Ongoing Criminal Case Files

The public may only access criminal case files where the accused has been found guilty.

This exception to open access is essential to protect an accused’s presumption of innocence, which is a fundamental principle of the criminal justice system. The court is the only forum in which to assess all the evidence of a case for the purpose of determining an individual’s guilt or innocence. Public access to court records must not undermine the process by allowing an individual to be tried by the general public through the media.

Two main issues of concern immediately come to mind with respect to this provision that seems unduly restrictive. This provision clearly runs contrary to the principle of openness and the importance of access by the media and public to the courts and its records. Firstly, the issue of timely access comes to mind. If a case was currently before the court, the public and the media were prohibited from accessing the court file. On practical terms, this would have led to some great difficulty and challenges for journalists and media covering criminal cases that were presently before the court in Nunavut.
Effectively, a journalist following an active court case would be hamstrung from conducting thorough research in preparing his or her or their news story due to the high barrier against access to court files. It is well known that some court cases take years to make their way through the court system, resulting in a verdict that possibly took years to be released due to a complexity of issues and a host of other variables. Not only would one have to wait for the verdict to come down, but that verdict would also have to be the specific verdict of “guilty” before access to that court file is open to the public. Therefore, conducting concurrent and thorough research in preparation of presenting a news story on a particular criminal case before the courts would have proven to be increasingly challenging under this very particular and onerous provision.

Secondly, the latter half of subsection 4.4 of the 2013 Nunavut Policy included some additionally troubling language, which stated that “[t]he court” was to be the “only forum” to “assess all evidence of a case” to determine “an individual’s guilt or innocence”; and that “[p]ublic access to court records” should not be used to “undermine the process” lest an individual be “tried by the general public through the media.” One would not be remiss to wonder if the inclusion of such language within the policy would be indicative of a judiciary skeptical of the fairness and integrity of the media and public perception. It would seem that such a position harbours fear and suspicion against the media in its role to gather and disseminate news and information about the courts to the public.

However, as highlighted in the first chapter of this thesis, the role of the media is essential in promoting public confidence in the integrity of the justice system. The Supreme Court of Canada has been unrestrained in its position heralding the importance and purpose of the role of the media in its duty to inform the public:

Members of the public in general rely and depend on the media to inform them and, as a vehicle through which information pertaining to courts is transmitted, the press must be guaranteed access to the courts in order to gather information. Measures that prevent the media from gathering that
information, and from disseminating it to the public, restrict freedom of the press guaranteed by section 2(b).\textsuperscript{157}

Therefore, it would seem that the 2013 Nunavut Policy opening with the Bentham tenet is oddly out of place in light of subsection 4.4. It is with little wonder why the Nunavut Court of Justice chose to modify the provision in its updated 2015 version of the policy. The updated provision has now been filed under a newly created, yet still restrictive subheading under section 8, entitled “Limits on Public Access”. This updated section now includes a “non-exhaustive list of exceptions to the open access principle” – some of which are “required by law” or, interestingly, “because there is a compelling public interest”.\textsuperscript{158}

Under subsection 8.3 of the 2015 Nunavut Policy, the Nunavut Court of Justice “reserves the right” to “temporarily limit” access to a court file if the matter is before the Court in a hearing or trial. The Court rationalizes this barrier against openness in order to prevent “unrestricted” access to be “disruptive” or prohibit it from “potentially interfer[ing]” with the conduct of proceedings. Should a court file be deemed inaccessible under this subsection 8.3, one must apply for judicial leave to access any part of this particular court file. As will be further explored in this chapter, it is worth noting that this curb on access fails to reference the Dagenais/Mentuck principles.

As expressed, some criminal cases can last for years as they wind their way through the various stages of the criminal justice system, and that could be the case even without any unforeseen delays or surprises. Section 4.4 of the 2013 version of the Nunavut Policy, as highlighted and analyzed, implemented a prohibition against public access to court files unless an accused had been found guilty. Consequently, as analyzed, this provision of the outdated Nunavut Policy had created unusually high barriers against public access and openness by compelling the public and media to wait until a case made its entire way through the justice system with a rendering of a guilty verdict.

\textsuperscript{157} Canadian Broadcasting Corp v New Brunswick (Attorney General), supra note 1 at 3.
\textsuperscript{158} Nunavut Policy 2015, supra note 156.
The section immediately preceding section 4.4 of the 2013 Nunavut Policy was yet another example of the minimization against the principle of. Subsection 4.3, which was later moved to stand as section 7.1 in the 2015 version, includes a list of the types of criminal case information that is to be “available at all times from a Court Records Officer”. Perhaps section 4.3/7.1 was an attempt by the Nunavut Court of Justice to assuage the heavy-handedness of section 4.4 that follows. Nevertheless and irrespective of this speculation, section 4.3/7.1 raises its own series of issues that have a negative effect against public accessibility.

The list of information relating to an adult criminal case within this provision includes the following: “[c]onfirmation of the name(s) of the accused; [a]ge of the accused in years; [d]ate of the alleged offense; and [c]harges laid”, among other pieces of information. These are fundamental elements of information that, as mentioned, are labelled as “available at all times” within the policy, but are actually limited in availability to “only after 1st appearance/arraignment”. The timing of the release of such basic information to the public in Nunavut falls drastically behind other Canadian jurisdictions’ policies in allowing public accessibility to criminal court files once process is issued. In Ontario, for instance, the public has access to a criminal court file and documents once an arrest is made or a summons is served.

These examples of barriers against openness and public accessibility of court documents and files within the jurisdiction of Nunavut are worth noting due to their broad and restrictive nature. However, it is also important and necessary to delve somewhat deeper into the motivation behind the implementation of such limitations and barriers. Unlike other more densely-populated jurisdictions like Ontario and British Columbia, Nunavut’s population is significantly less. Therefore, it is possible that Nunavut deals with social concerns with respect to their smaller communities that are simply not an issue for other Canadian jurisdictions. Arguably in other populated provinces, litigants and the accused have more of

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159 Ibid at 8.
160 Ontario Ministry of the Attorney General, Court Services Division Policies and Procedures on Public Access to Court Files, Documents and Exhibits (November 2015) at s 2.1 [Ontario Policy].
the opportunity to fade into obscurity; whereas the luxury of anonymity may not be possible to those citizens in Nunavut who live in closely-knit communities with strong familial and generational bonds.

While naysayers would counter that this argument based on social concerns could apply to any smaller geographical community within any Canadian jurisdiction, it is the position of this thesis that the territory of Nunavut deals with concerns and issues that are special to its citizens and communities. Unlike other jurisdictions, the closeness of the communities and people in Nunavut are intensified by the remoteness of this territory in relation to the rest of Canada’s provinces and territories.¹⁶¹ This closeness combined with a scarcity in resources and access to resources provide some narrative or a deeper understanding into the Nunavut Court of Justice’s motivation behind implementing what can be considered as unduly restrictive barriers against openness and public access in relation to other Canadian jurisdictions.

7 Accessibility

7.1 Accessibility: The role of the Court Records Officer – Nunavut Court of Justice

It may not be realistic or practical to expect a judge to be immediately available to determine whether or not to restrict accessibility to a court file or court document upon a thorough application of the Dagenais/Mentuck test whenever the occasion arises. However, there is a level of expectation and legal requirement that such a formal analysis as prescribed by the Supreme Court of Canada would be applied by a sitting judge in a court of law. However, as will be illustrated, this is not always the case in the territory of Nunavut where resources are scarce. The Nunavut Court of Justice has been creative in its approach in determining how information from court documents be redacted and by whom. Specifically, the Nunavut

¹⁶¹ Entry into Nunavut is by flight only. There are no accessible roads to drive into Nunavut from any other province or territory in Canada.
Court of Justice has allocated significant responsibility upon their Court Records Officer. In doing so, this raises some questions about the reach of powers possessed by the Court Records Officer with respect to the Dagenais/Mentuck analysis and the privacy protectionist tendencies within the Nunavut Policy that takes away from court openness and public access.

As mentioned, accessibility to court files and documents in Nunavut is largely moderated and managed by the role of the “Court Records Officer”. This position was defined within the 2013 version of the Nunavut Policy as the following:

2.4 “Court Records Officer” is the officer of the Court responsible for vetting all requests of access to a court record by members of the public and for the operation implementation of this policy generally. The Court Records Officer shall maintain a log to clearly identify the date, time and identity of all persons other than court personnel who have had access to a case file. The Court Records Officer shall ensure that all persons seeking access to a court record are made aware of this policy.¹⁶²

The position of “Court Records Officer” was slightly modified in the 2015 version of the Nunavut Policy to read as follows:

1.5 “Court Records Officer” is the officer of the Court responsible for:

a) Vetting all requests for redaction to a Court Record that are not made directly to the Court in the course of a court proceeding;

b) Assisting the Court Registry in responding to requests for access; and,

¹⁶² Nunavut Policy 2013, supra note 155 at s 2.4.
c) Responding to any other media request for information not directly covered by this policy.\textsuperscript{163}

In both versions of the Nunavut Policy, the Court Records Officer (“CRO”) holds a powerful position within the court system in the jurisdiction of Nunavut. The CRO has the duty and the power to redact documents and information from court files, thereby minimizing public accessibility.

In both versions of the Nunavut Policy, there is reference to what are known as “Protected Case File Documents” that are sequestered in a “Protected Document Folder”. Interestingly, “Protected Case File Documents” are defined in the 2013 version of the Nunavut Policy as documents that require protection because “they contain sensitive personal information, personal data identifiers, or sensitive business information”.\textsuperscript{164} Under subsection 2.11 of the 2013 version, the CRO bears the responsibility of determining which documents are to be distinguished and segregated as “Protected Case File Documents”. Further, the rationale provided within that same provision again reflects the Nunavut Court of Justice’s protective approach in favour of privacy:

\begin{quote}
The purpose of this protection is to safeguard the important privacy interests of a party or witness or to prevent a disclosure that may be injurious to a legitimate public or private interest.\textsuperscript{165}
\end{quote}

Several issues of concern with regard to the principle of open court and public accessibility when considering the mechanisms put into place within the Nunavut Policy to safeguard privacy. Firstly, there is no reference to applying the standard established in the \textit{Dagenais/Mentuck} test in the 2013 Nunavut Policy. Secondly, it would seem that the CRO has unilateral power to determine what qualifies as “Protected Case File Documents.” Unlike the legal standards established by the Supreme Court, there is no onus of responsibility by the

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\textsuperscript{163} Nunavut Policy 2015), \textit{supra} note 156 at s 1.5.\\
\textsuperscript{164} Nunavut 2013, \textit{supra} note 155 at s 2.11.\\
\textsuperscript{165} \textit{Ibid}.\textsuperscript{165}
\end{flushright}
party requesting the redaction of information to demonstrate the elements within the Dagenais/Mentuck test before a court. Instead, redactions and restrictions are subject to the sole discretion and power of a member of the court staff.

In the 2015 Nunavut Policy, the Nunavut Court of Justice made some revisions and updates to this section. The defined term of “Protected Case File Documents” was updated so that it no longer contains references to the types of sensitive and personal information these documents contain. The term was also modified to not include who would be the designated authority to deem documents as “Protected Case File Documents,” therefore reference to the CRO in this regard has been dropped. Instead, the defined term of “Protected Case File Documents” in the 2015 Nunavut Policy simply reads as:

1.13 “Protected Case File Documents” are documents from a Case File that are restricted from public access under law or this policy. Protected case file documents are segregated in a Protected Document Folder to prevent access by unauthorised persons. Protected Case File Documents are not accessible by a member of the public except with leave of the Court. Any documents contained in a protected document folder are ordinarily accessibly by the Parties.166

Irrespective of the ambiguity of this provision and removal of reference to the CRO in this regard, the role of the Court Records Officer remains a powerful position in the updated 2015 version as this post was in the previous 2013 version of the Nunavut Policy.

Another example of the reach and might of the CRO comes under section 5 of the 2013 Nunavut Policy, which empowers the CRO to redact the court record.167 Under this provision, the CRO had the power to segregate information in his or her or their sole capacity, or as requested by a party to the court file. The CRO was prompted to redact what

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166 Nunavut 2015, supra note 156 at s 1.13.
167 In fact, section 5.1 of the Nunavut Policy 2013 referenced as “5.1 Court records officer obligated to redact the record” – see Nunavut Policy 2013, supra note 155 at s 5.1.
was first labelled in 2005 by the CJC’s Model Policy as “Personal Data Identifiers” and later defined in 2013 by the Nunavut Court of Justice as:

…personal information that, when combined with the name of the individual, enables direct identification so as to pose a serious threat to an individual’s personal security. This information includes:

a) Unique numbers, such as phone, social insurance FPS (fingerprint section) number, driver’s license, financial accounts, or health care numbers;

b) Biometrical information, such as finger prints, facial image, or DNA profile;

c) Personal information, such as day and month of birth and place of employment;

d) Civic, postal, email and IP addresses for the person’s home, business, or place of employment (other than community and or province/territory); and

e) Personal possession identifiers (e.g., license or serial number, property or land identification, corporate or business name).\(^{168}\)

Subsection 5.1 advised that “Personal Data Identifiers” may be “readily discoverable” by the CRO, but that it was incumbent upon a party filing a document or exhibit to inform the CRO in identifying other, less conspicuous pieces of information to be redacted. Moreover, subsection 5.4 identified the distinguishing power of jurisdiction of the Court Records Officer in their duty to redact information from court files:

Any decision to redact items requested by a party to a proceeding remains within the discretion of the Court Records Officer. The Court Records Officer is not bound to comply with a request for redaction made by a party to a proceeding.\(^{169}\)

\(^{168}\) Nunavut Policy 2013, supra note 155 at s 2.10.

\(^{169}\) Ibid at s 5.4.
Should a party disagree with the finding or decision by the CRO in granting a redaction, the 2013 Nunavut Policy had implemented an appeals process to deal with such circumstances.\textsuperscript{170} At that point, a judge would be brought into the fold to make a determination as to whether the CRO was “justified” in his or her or their assessment to redact or not to redact from the court file.

There were no references to \textit{Dagenais} or \textit{Mentuck} in the 2013 Nunavut Policy or any reference to the legal standard and process established from these companion cases by the Supreme Court of Canada. The only filter to impose restrictions or limitations to public access of court documents was allocated to the discretion of the Court Records Officer. The CRO was delegated relatively immense powers under this earlier version of the policy with the ability to redact and remove information from publicly-accessible documents in accordance with a unique set of standards as outlined under the 2013 version of the policy.

In the updated 2015 version of the Nunavut Policy, the Nunavut Court of Justice had made essential revisions to include acknowledgement and reference to the \textit{Dagenais/Mentuck} test. Yet, irrespective of this necessary addition, the Court Records Officer still maintains his/her/their questionably excessive powers under the 2015 Nunavut Policy to restrict public access by redacting and removing information from court files. Under section 6.4, the role of the Court Records Officer is outlined:

\textbf{6.4 Duty of the Court Records Officer}

The Court Records Officer will review and consider any requests received to ensure the request meets the guidelines and standards set out in this policy before granting or limiting Access to a Court Record.\textsuperscript{171}

\textsuperscript{170} \textit{Ibid} at s 5.5.
\textsuperscript{171} Nunavut Policy 2015, \textit{supra} note 156 at s 6.4.
Again under the 2015 version of the Nunavut Policy, the Court Records Officer is allocated with the duty to make decisions regarding redaction and removal of information from court documents. Subsection 6.2 advises that “whenever possible” requests for redaction “should be addressed to the presiding judge or justice during the course of court proceedings”. However, the provision goes on to say that if a request for redaction is made after a trial has ended, then this request will go to the Court Registry before the Court Registry passes it on to the Court Records Officer. At which point, the “Court Records Officer must, without delay, make a preliminary ruling” on whether a document or parts of a document should be redacted. Again, the Court Records Officer carries significant power in determining what information from court documents will be publicly accessible or not.

As previously raised, there is a noted shortage on access to resources within the territory of Nunavut. This includes staff resources within the judiciary at all levels of court in Nunavut. As such, it is apparent that the 2015 Nunavut Policy has been drafted in such a way that acknowledges and attempts have been made in an effort to follow the principles as outlined in Dagenais and Mentuck; but the policy has also injected its own makeshift solutions to compensate for its shortcomings by inserting the CRO as an ad hoc arbiter while also attempting to safeguard the privacy concerns of litigants as well. It will be illustrated further in this chapter how the Nunavut Court of Justice and other courts of the common law jurisdictions in Canada approached and attempted to integrate the Dagenais/Mentuck elements into their access to court record policies, but how these jurisdictions fell short.

7.2 Accessibility: Search fees to access court files

Another imposition upon accessibility of documents is the implementation of fees charged to a requesting party who would like to search and access a court file. While some fees are nominal, there are some jurisdictions that charge what seems to be unusually high search or handling fees that venture upwards towards forty dollars, depending on the age of the file. This begs the question of how jurisdictions decide upon the fee amounts associated with

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172 Ibid at ss 5.4, 6.2.
173 Ibid.
accessing court records and files? The following is a brief analysis of the range in search or access fees as implemented by the various jurisdictions and levels of court.

Referred to as “search fees” or “access fees” within access to court record policies, these costs vary from jurisdiction to jurisdiction. Most, if not all jurisdictions, have some form of fee attached with locating and accessing a court file. The jurisdictions of British Columbia, Manitoba, and Nunavut specify that fees do apply to access a court file, but these policies do not specify the amount of costs in fees. Nova Scotia, on the other hand, does provide the specific cost associated with its search fees, which is at the lower end of the scale at $6.00.174 On the opposite end of the scale is Ontario and Saskatchewan.

If a member of the public wants to search for a court file from the Court of Queen’s Bench in Saskatchewan, the fee starts at $10 for more recent files within five years and increases to $20 for all other files.175 At the Court of Appeal level, the cost to search starts at $20 for those files within the last five years and then jumps to $40 for files older than five years.176 Other jurisdictions, such as New Brunswick, Newfoundland and Labrador, as well as Alberta, charge on average between $10 and $20 to search and access court files.

Similar to other jurisdictions, the fee to inspect a court file in Ontario starts at $10. However, should a file require retrieval from storage, assuming that it is an older file that has since been archived off-site over time, the inspection fee climbs to the significant sum of $61. While these types of fees are subject to various jurisdictional court administrative legislation, one cannot help but wonder the process by which it has been measured that accessing an older court file from storage warrants an increase by 100% in Newfoundland, or 600% as is the case in Ontario. Whatever the official reasoning may be, the bottom line is that such costs may act as a barrier against members of the public who wish to follow a case or do research, yet cannot afford such prohibitively expensive costs in fees.

176 Ibid.
Jurisdictions that make no specific reference to dollar amounts with respect to search or access fees in their access policies, such as British Columbia, Nunavut, Manitoba, and Prince Edward Island, result in some level of frustration due to the lack of immediate clarity on the issue of costs. Posting such information in their policies or on court websites would create a greater ease of reference, if not accessibility, depending on the actual costs. Nevertheless, the jurisdiction of Nunavut in both its 2013 and 2015 versions of its access to court record policy, irrespective of their other barriers or limitations against access reviewed within this chapter, does acknowledge that if fees do create a barrier against access, then the Court Registry has the power to waive those fees.177

7.3 Accessibility: Right to make copies

This chapter has thus far covered the idiosyncrasies of some jurisdictions with respect to attempting to gain access to court records and files. What happens after a member of the public actually is granted access to a court file? What are they able to do to facilitate their research or gathering of knowledge in examining the documents and contents of the file? The next consideration at issue is whether that member of the public has the ability to make copies of the documents within a court file.

Most access to court record policies of various jurisdictions across Canada make reference to photocopy costs of court documents that range anywhere from $0.25178 to $4.00179 per page. Other jurisdictions are silent on exact costs, which are all nominal in their best and worst forms. A more pressing issue with respect to the right of making copies is less about the economic costs behind the technical machinery to facilitate duplication and reproduction, and more about having the automatic right to make those copies in whatever form once access to a court record and its contents are available to the public.

177 Nunavut Policy 2013, supra note 155 at s 6.6; Nunavut Policy 2015, supra note 156 at s 6.6.
178 Nova Scotia Policy, supra note 174.
179 Ontario Policy, supra note 160.
As referenced in the first chapter of this thesis, the Supreme Court of Canada has supported the proposition that once access to court documents and/or exhibits is granted, then the right to make copies is intrinsic in that decision. As outlined earlier, Justice Sharpe of the Ontario Court of Appeal, in referencing Named Person v. Vancouver Sun, stated that the Supreme Court had

[r]eaffirmed the holding in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R.1326 at p.1338, that the right to access exhibits includes the right to make copies as “s.2(b) provides that the state must not interfere with an individuals’ ability to ‘inspect and copy public records and documents, including judicial records and documents’.”

Contrary to this position, the Nunavut Court of Justice in its 2013 version of the Nunavut Policy highlighted the possibility that a judge could impose two conditions upon access of a court document or exhibit under its subsection 6.4. These conditions included: that a record “may not be further published, copied or disseminated in electronic or paper form to any other person…”; and a copy of the record “may not be posted electronically on the internet or on any internet based social medium without leave of the Court.” These pre-emptive restrictions focus on the dissemination of information through digital means over the internet, including a reference against dissemination over social media. It is also interesting to note that these restrictive provisions are prefaced with subsection 6.4 opening with the recognition of the public’s right of access to a court record or exhibit as an “unrestricted right”. Again, the tendencies towards privacy and the exercise of restrictive discretion are areas of concern that the jurisdiction of Nunavut seem to favour in comparison to other jurisdictions, irrespective of the positioning of other courts and the Supreme Court of Canada.

In the Ashley Smith judgment, Justice Sharpe for the Ontario Court of Appeal stated that

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180 Ashley Smith, supra note 21 at para 32.
181 Nunavut Policy 2013, supra note 155 at s 6.4.
182 Ibid.
[t]he open court principle and the rights conferred by s. 2(b) of the Charter embrace not only the media’s right to publish or broadcast information about court proceedings, but also the media’s right to gather that information and the rights of listeners to receive the information.\textsuperscript{183}

As illustrated by Justice Sharpe and as discussed in the first chapter of this thesis, access to court proceedings and court documents by the media exemplify the principle of open court as conferred by the Charter right of freedom of the press. The right of access to a court document by the public and the media translates to having the right to disseminate and publish that information in accordance with the “rights of listeners to receive the information.” Media presence within Canada is prevalent through a multitude of platforms including print journalism in hard copy and digital online forum, as well as radio and television broadcasting.

Justice Sharpe then follows the above paragraph with references from two Supreme Court of Canada cases:

"[T]he press must be guaranteed access to the courts in order to gather information” and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.”: CBC v. New Brunswick at paras. 23-26. In Vancouver Sun (Re) at para. 25, the Supreme Court of Canada described the openness of the courts and judicial processes as being "necessary to maintain the independence and impartiality of courts", "integral to public confidence in the justice system" and "a principal component of the legitimacy of the judicial process".\textsuperscript{184}

Therefore, it is interesting to note that the Nunavut Court of Justice in its 2013 policy preemptively stipulated the restrictive conditions upon which a judge may place on court access.

\textsuperscript{183} Ashley Smith, supra note 21 at para 24.
\textsuperscript{184} Ibid.
documents and exhibits, and specifically highlighted restrictions against digital and online communications.

It is important to note that the situation does not improve in the Nunavut Court of Justice’s updated 2015 version of its policy. The provision begins the same way with a recognition of the right to access court documents as being “an unrestricted right to obtain a copy.” However, the same provision expands upon the possible restrictions of access to include the original two as immediately outlined above, and adds a third condition that confusingly stipulates that “[t]he copy must be destroyed when the information is no longer required for the purpose for which it was disclosed.” It would appear that this third condition effectively goes against the proposition that inherent within the right of access to court records is the ability to disseminate and publish the information to the public.

Under both the 2013 and 2015 versions of the Nunavut Policy, a member of the public must sign a written undertaking to acknowledge compliance with any conditions imposed upon access. An interesting difference between the two policies is the specification of who is responsible for creating and imposing the conditions upon access. In the 2013 version, conditions are imposed by the “Court”; yet in the 2015 version of the Nunavut Policy, restrictions are to be imposed by either the “Court” or the “Court Records Officer”, thereby creating yet another exercise of power for the administrative position of the CRO.

A final and seemingly telling aspect of these rights to copy provisions of both versions of the Nunavut Policy is they end on the following note:

If a user obtains a copy of the court record in the course of their employment on behalf of a media or other corporate organization,

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185 Nunavut Policy 2015, supra note 156 at s 7.4.
186 Ibid.
187 Ibid.
the parent organization is bound by the conditions attached to the provision of the copy to their agent or employee.\textsuperscript{188}

This is an interesting reference and would lead one to believe that this is another example of the Nunavut Court of Justice possessing some level of skepticism or suspicion against the media and the press. This would seem to go in the opposite direction as the Supreme Court of Canada in its various decisions that include descriptions of the role of the media and the press as an essential institution in promoting integrity and public confidence in the judiciary. However, in recalling the prospect of practical realities that are specific to different jurisdictions, it may be reasonable to presume that the Nunavut Court of Justice has implemented such conditions against public accessibility due to negative past experiences with local media. Nevertheless, this provision of the Nunavut Policy is yet another example of a restrictive, protectionist stance against efforts at fostering and promoting public accessibility to court records and documents, which runs contrary to several key landmark judgments by the Supreme Court of Canada that many Ad IDEM lawyers could recite at the drop of a hat.

\section*{8 \textbf{Dagenais / Mentuck}}

In the first chapter of this thesis, the history and judicial importance of the \textit{Dagenais/Mentuck} was outlined. To the members of the media bar at Ad IDEM, their broadcast and media clients, journalists and other proponents in favour of publication and freedom of the press, the creation and application of the \textit{Dagenais/Mentuck} test, as a measure to determine whether a limitation against freedom of expression and freedom of the press in relation to legal proceedings is justifiable and necessary for the proper administration of justice, has deepened and enriched the area of law to their benefit. The legal test is based on the presumption of openness and recognizes and heralds the principle of open court, as well as the role of the media in promoting public confidence in the judicial system. In accordance with the \textit{Dagenais/Mentuck} test, the party seeking the limitation bears the onus of fulfilling the

\textsuperscript{188} \textit{Ibid.}
elements of the legal standard. The *Dagenais/Mentuck* test created a forum to challenge courtroom secrecy and push the doors wide open instead of leaving the doors merely ajar. In most access to court record policies across Canada, there is recognition and reference to the *Dagenais/Mentuck* test. Some jurisdictions honour the legal standard by substantively adopting and implementing the test within the access policies. Other jurisdictions are less thorough in their adoption of the *Dagenais/Mentuck* standard and the incorporation effectively stops just after the acknowledgment of the existence of the legal standard. This section will provide some analysis of the 2013 and 2015 versions of the Nunavut Policy, as well as other provincial jurisdictions that fall short in their access to court record policies in recognizing and applying the *Dagenais/Mentuck* standard.

### 8.1 2013 Nunavut Policy

Not surprisingly, as based on the above analysis of the Nunavut Court of Justice’s protectionist tendencies that favour privacy over the principle of openness, the access to court records policy of this jurisdiction fails to meaningfully adopt the *Dagenais/Mentuck* test. In the 2013 version of the policy there is no reference to the *Dagenais/Mentuck* standard. The 2013 version of the Nunavut Policy does acknowledge the presumption of access: “[m]embers of the public have a presumptive right of access to all court records…”, however the policy immediately backtracks with references to “…the exception of protected case file documents and restricted case files”.189 Moreover, as highlighted, there is no acknowledgement or reference of the Supreme Court of Canada-created legal standard of the *Dagenais/Mentuck* test. Instead the Nunavut Court of Justice provides guidelines that outline access to court files:

**4.2 Guidelines**

Access to a case file is subject to the following guidelines:

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a) Public access is an important element of judicial accountability and can only be curtailed where there is a need to balance or protect other important values or constitutional rights.

b) The Court must be vigilant to ensure that all witnesses, victims of crime, those accused of a crime but not found guilty, and those vulnerable to court processes do not have their privacy rights violated or find themselves subjected to harassment due to an inappropriate disclosure of a record.

c) Public access to filed documents must not harm legitimate privacy interests or compromise protections established by law or court order.

d) Where there is any question about whether access to the information requested is permitted under this policy or a statute, the Court Records Officer shall make a preliminary ruling. If the person seeking access is dissatisfied with the position taken by the Court Records Office, the issue shall be referred to the judiciary for a final determination of the issue.

e) The Court reserves the right to redact any document in a case file, including an exhibit or transcript that contains personal data identifiers, sensitive personal information, or sensitive business information prior to granting access to any member of the public.190

Reference to “harassment” via “inappropriate disclosure” in subsection 4.2(b) seems to be more telling about the Nunavut Court of Justice and may be yet another indication of the Court’s position in favouring the protection of privacy of litigants and other stakeholders at the expense of public accessibility. This is further buttressed by what follows with subsection 4.3(c) calling out for the protection of “legitimate privacy interests” against public access.

Subsection 4.3(d) is an interesting provision in that it establishes that the Court Records Officer retains broad powers in determining whether access to a court file or document is permitted. While recognition of the principle of court openness may have preceded subsection 4.3, the presumption of openness is quickly vitiated by the overarching powers accorded to the Court Records Officer. Subsection 4.3(e) prepares the public to be notified that the Court reserves the right to redact any document and the information contained in a document as it sees fit. As highlighted earlier, it is quickly established that the Court Records Officer, in their duty as second in command to a presiding judge in the administration and management of court files and documents, is likely to be the first, and in some cases, only filter to determine which documents the public will have access to and which documents and information will be redacted.

In accordance with the guidelines as outlined in subsection 4.2 of the 2013 Nunavut Policy, the public and media are warned that the Court Records Officer has the right to preemptively redact documents and information from court files to further the objectives and protections of privacy as outlined throughout the policy. Subsection 4.4.11 outlines the function of a “Protected Document Folder” and the contents of documents and information are to be allocated to that folder. Documents containing “personal data identifiers, sensitive personal information, or sensitive business information” are filed within the Protected Document Folder, which is then segregated from the rest of the file and not accessible by the public.191

Affixed to the 2013 Nunavut Policy are two appendices that further suggest the Nunavut Court of Justice’s preference in favour of the protection of privacy of litigants and other judicial system participants over public accessibility and openness. Appendix A to the 2013 Nunavut Policy, entitled “Appendix A: Court Record Access Guidelines” outlines the specific types of court documents available and the specific access rules that correspond with how each type of document or file is to be treated and whether public access is granted or denied.192 The first category of “General Access” denotes those documents that are the most accessible to the public, which include basic court file information such as the name(s) of the

191 Ibid. at s 4.4.11.
192 Ibid. at Appendix A: Court Records Access Guidelines at 1.
accused, the date of the alleged offence, charges laid, and other fundamental pieces of information. The public is further instructed under the category of “General Access” that they are to make an application to the Court Records Officer to have other parts of a court record released that may contain “sensitive personal information”.193

Appendix A has identified a variety of types of documents found within a court file, such as bail documents, sentencing reports, court orders, criminal records, etc. Some of these documents are paired up with designations, such as “personal data identifier”, “sensitive personal information”, “sensitive business information” and other terms that provide the basis for possible pre-emptive redaction and removal from the court file as per the terms of the Nunavut Policy.194 Other documents, such as pre-sentence reports and probation reports are associated with an “Access Rule” that outlines that “special emphasis [is placed] on the protection of sensitive medical/psychiatric information or personal data identifiers.”195 Again, this category and designation of court documents is subject to preemptive redaction and removal of documents from a court record that would otherwise remain publicly accessible in accordance with the principle of open court and the Dagenais/Mentuck principles. And as expressed earlier, there is no reference in the 2013 Nunavut Policy of the Dagenais/Mentuck test. Therefore, the pre-emptive redaction and removal of documents pursuant to the policy and its appendices is questionable. While there exist concerns of security and personal safety in Nunavut that are unique to the jurisdiction based on its remoteness and closeness of communities, the protectionist bias of the Nunavut Policy, particularly in its 2013 version, seems overly broad and excessive in its blunt application.

Appendix B of the 2013 Nunavut Policy, entitled “Appendix B: Court Record Redaction Guidelines”, contains the defined terms relating to the process of redaction executed by the Court Records Officer, as well as manual redaction methods in using a “black felt tipped marker” to cover up and strike out information to limit readability.196 Appendix B outlines

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193 Ibid.
194 Ibid at 2-5.
195 Ibid.
196 Ibid at Appendix B: Court Record Redaction Guidelines at 2.
the term “Redaction” to mean “the careful editing of a document, especially to remove confidential references or offensive material”. The term, “Sensitive Personal Information”, is defined as

…information about an individual which a person would have a reasonable expectation of privacy, including, but not limited to, medical or mental health records, rehabilitation reports, and income and source of income information.

The choice of words within this defined term is interesting. What constitutes a “reasonable expectation of privacy” is not a legally defined term, but a colloquial reference that again relates to the almost holistic approach to safeguarding the privacy of litigants and the accused that the Nunavut Court of Justice appears to be dedicated in protecting.

Another interesting defined term is that of “Sensitive Business Information”, which covers

…private corporate information the public availability of which would infringe legitimate business interests, including, but not limited to, non-public financial data and trade secret.

Again, this is an example of the protectionist position of the Nunavut Court of Justice, protecting not just the interests and position of people, but also that of corporations and businesses. It is interesting to note that the Nunavut Policy in both of its versions takes this broad position on minimizing public accessibility to documents and information, pre-emptively removing information without any regard for the Dagenais/Mentuck principles and making it unnecessary for a litigant to file an application for a discretionary order, such as a sealing order, to have information removed from a court file – at which point a sitting judge at court would apply the Dagenais/Mentuck analysis to determine whether the limitation

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197 Ibid at 1.
198 Ibid.
upon access is necessary. This pre-emptive redaction policy of the 2013 Nunavut Policy has created conditions under which the Dagenais/Mentuck test is a non-issue and is not applied; which leads to an upending of the regular course of action in litigation with interested parties filing applications for discretionary order as these matters arise.

8.2 2015 Nunavut Policy

The updated 2015 version of the Nunavut Court of Justice’s Access to Court Records Policy does not expressly acknowledge the Dagenais or Mentuck cases and the legal test. As well, the 2015 Nunavut Policy still maintains its protectionist approach in favour of privacy over public accessibility and court openness. However, there are a few updates to the policy that do demonstrate a greater awareness of the Dagenais/Mentuck test. Yet, nevertheless, it is important to note that Nunavut continues to position itself as one of the jurisdictions within Canada that focuses more on privacy and imposing limitations and barriers against public accessibility and openness of the court.

There is recognition of the “Open Court Principle” and the “Presumption of Open Access” as a part of the “Guiding Principles” of the 2015 Nunavut Policy. However, within the recognition of court openness, there still remains a conflicting message of accessibility and restrictions in the balancing of other values:

2.1 The “Open Court Principles” and the Presumption of Open Access

Members of the public have a presumptive right of Access to all Court Records with the exception of the Protected Case File Documents and Restricted Case Files. Even where a Case File is sealed, members of the public have a right to know that a

199 Nunavut Policy 2015, supra note 156 at s 2.
200 “Protected Case File Documents” is defined under Nunavut Policy 2013, supra note 155 at s 1.3 as “…documents from a Case File that are restricted from public access under law or this policy. Protected case file documents are segregated in a Protected Document Folder to prevent access by unauthorized persons. Protected Case File Documents are not accessible by a member of the public except with leave of the Court. Any documents contained in a protected document folder are ordinarily accessible by the Parties.
201 “Restricted Case File” is defined under Nunavut Policy 2013, supra note 155 at s 1.17 and “includes, but is not limited to: (a) criminal case files for which a record suspension has been obtained; (b) child protection files; (c) adoption files; and (d) contingency fee agreements.”
Case File exists. Public Access is an important element of judicial accountability and can only be curtailed where there is a need to a balance or protect other important values or constitutional rights.

While the Nunavut Policy merely references the balancing and protection of “other important values or constitutional rights”, it is a logical deduction that this provision, as well as others (as highlighted in this chapter), serve the purpose of safeguarding privacy over and above public accessibility. Moreover, this specific provision is reminiscent of section 1 of the Charter, which reads:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.  

Known as the Oakes test, the Dagenais/Mentuck test is similar in form and purpose to the section 1 test of ensuring that any impairment upon said right is as minimal and necessary as possible. Therefore, it would seem strange that while the Nunavut Policy fails to acknowledge and reference the Dagenais/Mentuck test and meaningfully incorporate provisions reflective of court openness, it still somehow references wording similar to the Oakes test followed by its provisions that promote privacy and implement limitations against public accessibility.

As illustrated, the element of “Protected Case File Documents” remains in the 2015 version, as well as the mechanism of pre-emptive redaction by the Court Records Officer. The five interests that warrant protection that were highlighted above from the 2013 Nunavut Policy, remain in the updated version under section 2.3. They include: (a) the prevention of “improper interference with the court’s processes and the administration of justice”; (b) protecting the “legitimate privacy interests of a Justice System Participant”; (c) to “safeguard a Justice System Participant from a serious and credible threat to their personal safety”; (d)

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202 Supra note 18.
preventing “compromise of important protections provided by law or by court order”; and (e) the protection of the right to a fair trial.\textsuperscript{204}

However, immediately after listing those parties and interests and their rights of privacy that the Nunavut Court of Justice seeks to protect, this section is followed by a list of criteria for the court to consider with respect to “balancing the open court principle” in relation to “competing interests as outlined in section 2.3 above”.\textsuperscript{205} The first three criteria also appeared in the 2013 version of the policy, but it is important to note the slight progression in recognition of the \textit{Dagenais/Mentuck} test with the inclusion of the fourth criterion that was not included in the 2013 version of the Nunavut Policy, language that affords some balancing between values – vaguely reminiscent of a contextual approach:

\textbf{2.4 Criteria to be Considered}

In balancing the open court principle with the competing interests outlined in section 2.3 above, the Court must consider:

(a) The connection between the purposes for which Access is sought and the rationale for the constitutional right to an open court.

(b) The potential detrimental impact on the rights of individuals and on the proper administration of justice, if a request for restricted Access is not granted.

(c) The adequacy of existing legal norms, and remedies for their reach, if improper use is made of information contained in the Court Records; and,

(d) The availability of reasonable alternatives, other than restricting Access which will prevent detrimental effects.\textsuperscript{206}

\textsuperscript{204} Nunavut Policy 2015, \textit{supra} note 156 at s 2.3.

\textsuperscript{205} \textit{Ibid} at s 2.4.

\textsuperscript{206} \textit{Ibid} at s 2.4.
Therefore, although this section of Nunavut Policy is not an identical reflection of the elements established in the *Dagenais* and *Mentuck* cases, there does exist some overlap of the concepts, especially the inclusion of subsection (d) in the updated 2015 version.

Moreover, in both versions of the Nunavut Policy, there is recognition that the onus is on the party who is seeking restriction or limitation of access to court records. However, the Nunavut Court of Justice reserves the right to carve out an exception to this provision in relation to the pre-emptive redaction and segregation of the “personal data identifiers” by the Court Records Officer.\(^\text{207}\) Recognition of the burden of onus could be considered as an example of the Nunavut Court of Justice’s efforts at adhering to the principles established by higher courts, while still attempting to implement mechanisms that address its own unique concerns over privacy and safety within the jurisdiction.

The 2015 Nunavut Policy does include a provision on “The Principle of Restraint”, which is further reflective of the *Dagenais/Mentuck* test, acknowledging that “a restriction must not exceed that which is minimally necessary to adequately safeguard the right or interest sought to be protected”.\(^\text{208}\) While this is a welcome sign of integration and acknowledgement of the *Dagenais/Mentuck* test, on balance, the updates made to the 2015 version of the Nunavut Policy do not overturn the protectionist approach as reflected in the 2013 version that favours pre-emptive redactions and removal of information, amongst other barriers and limitations against public accessibility.

Various other limitations and barriers of the Nunavut Policy are outlined in the chart that follows this thesis, including how exhibits and police warrants are restrictively dealt with in comparison to other jurisdictions across Canada. In sum, Nunavut, on balance, has implemented the most restrictive limitations on public accessibility and barriers against the principle of open court. Furthermore, the Nunavut Policy is the least adoptive of the Supreme

\(^{207}\) Nunavut Policy 2013, *supra* note 155 at s 1; Nunavut Policy 2015, *supra* note 156 at s 2.5.

\(^{208}\) Nunavut Policy 2013, *supra* note 155 at s 2.6.
Court of Canada-created legal standard as established in the *Dagenais* and *Mentuck* decisions.

9 Conclusion

As raised throughout this chapter, Nunavut has its own challenges and concerns that may be unique to the territory. Whatever the case may be, it is clear that the Nunavut Court of Justice has implemented an access to court record policy that stands out from the other access to court record policies of the courts of the common law jurisdictions in Canada. However, this thesis argues that the Nunavut Policy does not stand out in a way that makes it a model jurisdiction for other courts across the country to mirror their policies upon. In fact, this thesis would encourage the Nunavut Court of Justice to continue on its path of evolution to ameliorate and broaden public accessibility to court records.

This chapter provided a rundown on the case law of *Vickery* and *Dufour* that demonstrated a departure from the Supreme Court of Canada’s positioning with respect to embracing the principle of open court and public accessibility to court documents and records. In these cases, there was a greater adherence to recommending the cultivation of a contextual approach and an upholding of the value of privacy over public accessibility and the principle of open court. Moreover, this chapter also provided an in-depth analysis of the aspects and provisions of the 2013 and 2015 versions of the Nunavut Policy that demonstrated that jurisdiction’s predilection for upholding the value of privacy over and above access by the public and media to court records and documents. By measuring against the principles of openness, accessibility and the *Dagenais/Mentuck* test, this chapter outlined the ways in which the Nunavut Policy cultivates its protectionist tendencies after having taken a page out of the model policy as established by the JTAC in 2005. While there has been some progress made in the 2015 updated version of the Nunavut Policy, on balance, both versions include provisions that create a climate that favours the privacy of litigants and other stakeholders close to the judicial process. As well, the role of the Court Records Officer is less administrative and more adjudicative, bordering on judicial, in that position’s overarching
powers to redact and withhold court record information and documents from public accessibility.

One example of the Nunavut Court of Justice dismantling a barrier against public accessibility instead of stacking them up, is the court registry’s willingness to waive search and copying fees of documents in the event a user cannot afford these costs. There are various other examples of promoting public accessibility to court records within the access policies of other common law jurisdictions in Canada. When measured against the principles of openness, accessibility and the Dagenais/Mentuck test, the next chapter of this thesis will outline the provisions of the access to court record policies of the courts of other common law jurisdictions in Canada, followed by recommendations for policy provisions that support and promote public accessibility while still respecting litigant privacy and their incorporation into access to court record policies of the courts of the common law provinces and territories across Canada. The next chapter will close on a brief analysis of digital access to court records, including the long-standing fears associated with digitizing court record systems and the progress made by some jurisdictions of Canada wading through the digital age.
Chapter 3
An Analysis of Access to Court Record Policies and Provisions Supportive of Public Accessibility, Recommendations for Best Practices, and a Brief Look into Digital Court Record Systems

As highlighted, Nunavut has its own set of challenges and traits that are specific to the region and its communities. The Nunavut Court of Justice does not have the same access to equivalent resources and staff as courts in other Canadian common law jurisdictions do. This has resulted in the access to court record policy of Canada’s youngest common law jurisdiction diverging in direction from the access policies of other jurisdictions. Specifically as illustrated in the previous chapter, it appears that the positioning of the Vickery and Dufour cases in protecting privacy and minimizing public accessibility remains alive and reflected in the Nunavut Policy.

Fortunately, there are provisions within other access to court record policies from the courts of other more established common law jurisdictions, spanning the width of the country, including British Columbia, Alberta, Saskatchewan, Ontario, and Nova Scotia, that contain provisions that promote court openness and public accessibility to court records. Some of these policies do so without taking an overly-protectionist approach in safeguarding the privacy of litigants and other involved parties. And in keeping with the case law as presented, these policies have operated from the default position of promoting openness, enabling the public and the press to have better accessibility in order to relay information about court proceedings to the wider public, thereby promoting greater transparency and invoking public confidence in the judicial system.

This chapter will walk through the provisions of various access to court record policies that promote public accessibility to court records and documents in accordance with the principles of (1) openness, (2) accessibility, and (3) the implementation of the Dagenais/Mentuck test. The focus of this chapter will be to explore and analyze the various access policies across common law Canada that support and promote the principle of open court and public accessibility and how they compare with each other. This chapter will also
provide recommendations on best practices and policy provisions that promote court openness and public accessibility to be included in every court record access policy.

Specifically, it is recommended that the courts of the common law provinces and territories have publicly available policies on access to court record that contain the same main principles in support of public accessibility, including the meaningful incorporation of the Dagenais/Mentuck test in each policy. Each policy should also balance the value of privacy in monitoring who requests access to certain court records, as well as safeguarding certain pieces of highly sensitive personal information of litigants and other involved parties from public accessibility (i.e., social insurance number), particularly since such information is typically unrelated to the court proceeding and unnecessary to share publicly. Further, all members of the public, irrespective of whether or not a person is a professional journalist, gainfully employed by a mainstream media organization, be treated the same under each policy and have the same rights of access to court records and files.

This chapter will also briefly explore the issue of digital access to court records, an area that is rife with its own set of issues, but is still largely affected by similar issues that relate to the access policies that rule how hard copy court records are handled. The technological progression from hard copy court records to digital soft copy versions with digital public accessibility is an area that proponents have been discussing for a number of years with more attention focused on the issue in the early 2000s. There are critics who have been quite vocal in warning courts and the judiciary about the possible risks involving information mishandling and misuse in contrast to hard copy physical court records and documents. There are also concerns stemming from the apparent changing position of the court registry from passively storing court records and acting as keeper to actively reproducing court documents electronically to be uploaded into a digitized repository. Irrespective of these risks and concerns, this chapter will end with a brief survey of the status of the digitization of court records and the incorporation of technology in some jurisdictions in Canada and how some provinces are ahead of the curve over others.
1 Openness

In the previous chapter, the Nunavut Court of Justice’s Access to Court Record Policy in its 2013 version began with the “Guiding Principle” of the “Open Court Policy”; and more recently the 2015 version followed this same beginning with a section on the “Presumption of Open Access”. It would seem on first glance that some strides have been made within the Nunavut Policy in better reflecting a better balance between its privacy-focused protectionist tendencies and public accessibility. However, as illustrated throughout the previous chapter, the approach taken by Nunavut’s Policy quickly rebounds back into a position that favours provisions that implement and encourage restrictions and barriers against public accessibility. There are other common law jurisdictions in Canada that start on the same foot as Nunavut, but are more dedicated in form and substance to the principle of open court and the presumption of openness.

Alberta is one such jurisdiction that highlights the “Open Court System” as one of its introductory sections of its policy. Section 1.2 of the “Public and Media Access Guide” of the Alberta Courts (“Alberta Policy”), including the Court of Appeal of Alberta, the Court of Queen’s Bench of Alberta, and the Provincial Court of Alberta, acknowledges that “[g]enerally, court proceedings and court files are open to the public.” The Alberta Policy then follows this up with recognition of the importance of the Charter value of freedom of expression and quotes from the Supreme Court decision in the Vancouver Sun case that “the “open court principle is inextricably linked to the freedom of expression protected by s.2(b)...” The recognition of the open court principle and the importance of freedom of expression are counterbalanced with the acknowledgement that “full access” to court records may be restricted when that restriction is “necessary to protect other social values of superordinate importance.” The Alberta Policy acknowledges that access may be limited by law or a court order made by a judge, and that each court has the power to protect its own

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210 Ibid.
211 Ibid.
212 Ibid.
records, so access to court records is subject to judicial direction.\textsuperscript{213} However, unlike the Nunavut Policy, the Alberta Policy acknowledges that any limitation or barrier against access is prescribed by “law” or a “court order made by a judge”, and not seemingly indiscriminately implemented by a member of the court staff, even if redaction guidelines are offered, as is the case in Nunavut.

Similarly, the Ontario Ministry of the Attorney General’s “Court Services Division Policies and Procedures on Public Access to Court Files, Documents and Exhibits” (“Ontario Policy”) leads with recognition and acknowledgement of the open court principle: “Ontario’s court system is based on the fundamental principles of openness and accessibility” and that “most documents are publicly accessible, unless a statutory provision, common law rule or court order restricts access.”\textsuperscript{214} Similar to the Alberta Policy, the Ontario Policy starts off on the presumption of openness, then gives a nod to the possibility of a limitation upon the foundational premise of openness based on law. The tone conveyed by both policies is that of consistency based on legal structure and principles, rather than policy provisions based on protecting privacy and safeguarding against immediate and perceived threats.

Saskatchewan is another prime example of a common law jurisdiction within Canada that leads with the principle of open court and adheres to the principle in form and substance throughout its provisions. In the first section of the Saskatchewan Law Courts “Public Access to Court Records in Saskatchewan – Guidelines for the Media and the Public” (“Saskatchewan Policy”), there is a reference to the \textit{Dagenais} and \textit{Mentuck} cases and includes the following quote from the 2011 Supreme Court of Canada case of \textit{CBC v. Canada (Attorney General)}:

\begin{quote}
The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how the courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial
\end{quote}

\begin{footnotes}
\item[213] \textit{Ibid.}
\item[214] Ontario Policy, \textit{supra} note 160 at s 1.1.
\end{footnotes}
processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.\textsuperscript{215}

The Saskatchewan Policy then follows that up with a quote from the \textit{MacIntyre} case, acknowledging the exceptions to the principle of open court, including “[c]urtailment of public accessibility” only when there is the need to protect “social values of superordinate importance.” The introduction of the Saskatchewan Policy ends on the note that its judiciary strives for “an appropriate balance between open courts and the fair administration of justice” – which is an approach that has long been established by the Supreme Court of Canada.

2 Accessibility

As mentioned, it does take some time for a member of the public to access court record material of an adult accused of criminal charges in Nunavut. Unlike Ontario and other jurisdictions wherein the public can gain access to a court file once an arrest is made or a summons is served, public accessibility to court cases in Nunavut only happens after the first appearance or arraignment; and that is only to access some of the basic information. Even after waiting this period of time, it is possible, and the public is warned that under the 2013 Nunavut Policy “[a]ccess to a court file may not be immediate.”\textsuperscript{216} Subsection 6.2 goes on to advise that once a request is submitted, it may take “several hours to several weeks before the records may be viewed, if the request is approved.”\textsuperscript{217} Again, the overarching powers of the Court Records Officer enables that person occupying this post to “endeavor to provide such access no later than 30 days after the request is received.”\textsuperscript{218}

Fortunately for the public and media looking to access court records in Nunavut, the timeline to access court files has been significantly improved in the updated 2015 version of the Nunavut Policy. A possible month-long wait has been reduced to a response time of “no later

\textsuperscript{215}\textit{Canadian Broadcasting Corp v Canada (Attorney General), supra} note 14 in Saskatchewan Policy, \textit{supra} note 174 at 5.

\textsuperscript{216}Nunavut Policy 2013, \textit{supra} note 155 at s 6.2.

\textsuperscript{217}\textit{Ibid}.

\textsuperscript{218}\textit{Ibid}.
than 5 days after the request is received."\textsuperscript{219} The updated Nunavut Policy now acknowledges that “[t]imeliness is an important part of Access”, even if the policy neglects to confirm a set time frame and bases delivery time on the “complexity” and “location of the records”.\textsuperscript{220} It is a great improvement that there is acknowledgement by the court that time is of the essence. Moreover, it is also important to note that the Nunavut Court of Justice commits to responding within five days, which is the most transparent and steadfast in comparison to all other access to court record policies in Canada.

Most access to court record policies of the common law jurisdictions in Canada do not include a reference to timeframes in responding and delivering court records requests. There are those policies that contain some reference to timing, but it is not as forthright as Nunavut. For instance, Saskatchewan, is one jurisdiction that does provide some acknowledgement of “[t]iming of response”,\textsuperscript{221} however this is provided somewhat hesitatingly. The Saskatchewan Policy informs the media and public that court officials have “conflicting demands on their time” and that they must ensure that the “necessary tasks” in the “operation of the court” are met.\textsuperscript{222} The policy goes on to state, in somewhat of a discouraging way, that “[i]t is impossible to impose any particular time frame on responses to access requests” and that blanket searches “will, obviously” involve a lengthier time frame for response.”\textsuperscript{223}

Therefore, if you are a member of the public or media in Saskatchewan who is eagerly anticipating the opportunity to review a court record, it may take an unknown period of time before access is granted.

Meanwhile, Ontario, while not as forthcoming as Nunavut, is the only other jurisdiction that does provide some measure of relief to a member of the public or media seeking access to court records in a timely manner. Subsection 1.3 of the Ontario Policy does not specify a solid timeframe for retrieval, but the policy does recognize that “[t]imeliness is essential to

\textsuperscript{219} Nunavut Policy 2015, supra note 156 at s 6.5.
\textsuperscript{220} Ibid.
\textsuperscript{221} Saskatchewan Policy, supra note 175 at 15.
\textsuperscript{222} Ibid.
\textsuperscript{223} Ibid.
ensure access to court files and documents”. That the provision goes on to explain the existence of a retention schedule and the other demands and responsibilities of court staff that might delay delivering upon a request to access a court file. However, the provision ends off on a positive note with an acknowledgment that court staff will facilitate public access to files “as quickly and efficiently as possible.”

2.1 Accessibility: Remote Access

In September of 2005, the Judges Technology Committee of the Canadian Judicial Council had published a report, entitled, “Model Policy for Access to Court Records in Canada” (“Model Policy”). As will be more fully explored in this chapter, this discussion paper is one of the only initiatives undertaken by an influential and official organization in the last few years on this topic. The report provides a comprehensive breakdown and assessment on the state and issues with respect to access to court record policies in Canada. The Model Policy does embrace the principles established by the *Dagenais* and *Mentuck* decisions in its promotion of the principle of openness and the presumption that “all court records are available to the public at the courthouse.” While the Model Policy does endorse remote access to judgments and most docket information, it does not endorse remote access of court records. The Model Policy acknowledges and advises that some courts may decide to provide remote access to only those documents where the “risks of misuse are low”. Otherwise, it advises that users could enter into an “access agreement” with the court to gain remote access to court records, which could also cover bulk access to files.

There are a few jurisdictions that offer any kind of remote or bulk access to court records and information. The most accessible in this regard is Ontario. Interestingly, the Ontario Ministry of the Attorney General permits remote access to information from court records by

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224 Ontario Policy, *supra* note 160 at s 1.3.
225 Ibid.
227 Ibid at iii.
228 Ibid.
229 Ibid.
230 Ibid.
telephone.\textsuperscript{231} Information that is generally accessible by the public is also available at no charge over the telephone.\textsuperscript{232} Ontario also offers bulk access to family and civil court files.\textsuperscript{233}

In addition, the Nova Scotia Judiciary in its “Guidelines for Press, Media, and Public Access to the Courts of Nova Scotia”\textsuperscript{234} (“Nova Scotia Policy”) accommodates requests for court record information by telephone. Under section 3(d) of the Nova Scotia Policy, members of the public can make a “Telephonic Request” for general information, as is recommended by the CJC’s Model Policy, to gather information about pending court appearances, locations, time, and criminal charge information.\textsuperscript{235} Should a member of the public request “more detailed information” over the telephone, they must pay a search fee of $6.00 per file plus HST.\textsuperscript{236} The Nova Scotia Policy also acknowledges a type of frequent user status with a “Bulk Search Card” that enables a card-carrying member to bypass costs and fees associated with searches and photocopying.\textsuperscript{237}

In keeping with the recommendations of the CJC’s Model Policy, the 2015 Nunavut Policy offers basic information about an adult criminal court record “available at all times” in person, as well as over the telephone. However, this information, as explored in the previous chapter, only becomes available after the first appearance of an accused. However, Nunavut, unlike most other common law jurisdictions and their access to court record policies, does offer some dissemination of information remotely, albeit with some limitations as discussed earlier.

\textsuperscript{231} Ontario Policy, supra note 160 at s 1.4.
\textsuperscript{232} Ibid.
\textsuperscript{233} Ibid at s 7.2.
\textsuperscript{234} Nova Scotia Policy, supra note 174.
\textsuperscript{235} Ibid at s 3(d).
\textsuperscript{236} Ibid.
\textsuperscript{237} Ibid at s 3(e).
3  **Dagenais/Mentuck**

As mentioned, it would seem that the Nunavut Court of Justice’s access to court record policy follows the lead of the CJC’s Model Policy in its recommendation to segregate and remove the personal information of litigants and parties of a court file from public access. The Nunavut Policy, however, deviates from the Model Policy in its foundational principles and recommendation to adopt the language from the *Dagenais/Mentuck* test and the principle of court openness. The Model Policy’s adoption of the *Dagenais/Mentuck* test is as follows:

The model policy is therefore built upon the following principled framework:

(a) the open courts principle is a fundamental constitutional principle and should be enabled through the use of new information technologies;

(b) restrictions on access to court records can only be justified where:
   i. such restrictions are needed to address serious risks to individual privacy and security rights, or other important interests such as the proper administration of justice;
   ii. such restrictions are carefully tailored so that the impact on the open courts principle is as minimal as possible; and
   iii. the benefits of the restrictions outweigh their negative effects on the open courts principle, taking into account the availability of this information through other means, the desirability of facilitating access for purposes strongly connected to the open courts principle, and the need to avoid facilitating access for purposes that are not connected to the open courts principle.238

Other common law jurisdictions, unlike Nunavut, do fall in line with the Model Policy in their shared regard and adherence to the principle of open court and the *Dagenais/Mentuck* test. For instance, Saskatchewan, as previously mentioned, starts off its access to court record

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policy with recognition of the *Dagenais* and *Mentuck* decisions and the principle of open court, citing these principles in its very first section.\textsuperscript{239}

Moreover, Alberta is another common law jurisdiction with an access to court record policy that promotes and applies the *Dagenais/Mentuck* standard. Not only is there reference to the *Dagenais/Mentuck* test, but this standard is presented in its proper context as developed by the Supreme Court of Canada. The Alberta Policy is thorough in its presentation and explanation of its provisions, providing additional background information to enlighten readers. In section 2.3 of the Alberta Policy, it outlines the two types of court orders and when the *Dagenais/Mentuck* analysis is to be applied. As outlined earlier in the first chapter, the *Dagenais/Mentuck* test is the standard applied in those circumstances wherein a court order has a limiting effect on freedom of expression and freedom of the press. Section 2.3 of the Alberta Policy states:

> Discretionary court orders happen when the judge makes an order without being required to by law. In this case, the judge had a choice whether or not to make the order. When judges consider making a discretionary order that restricts access or publication, they apply a test developed by the Supreme Court of Canada in line of cases (the “*Dagenais/Mentuck* test”):
> The order should be made only when:
>
> (a) it is necessary to prevent a serious risk to the proper administration of justice because reasonable alternatives will not prevent that risk; and
>
> (b) the order’s beneficial effects outweigh its harmful effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the administration of justice.\textsuperscript{240}

\textsuperscript{239} Saskatchewan Policy, *supra* note 175 at s 1.

\textsuperscript{240} Alberta Policy, *supra* note 209 at s 2.3.
No other common law jurisdiction is as thorough and complete in its inclusion and expression of the Dagenais/Mentuck test within an access to court record policy. Furthermore, the Alberta Policy even offers a notification system for media to “receive notice of applications for discretionary court orders that restrict access or publication.”

The jurisdiction of Ontario takes a somewhat different stance in its approach and attitude towards openness and public access to court files. Unlike Alberta in its full embrace and verbatim inclusion of the Dagenais/Mentuck test, as well as additional information on background and restrictions, the Ontario Policy takes a general and more stream-lined approach in confirming that the policy is based on the “General Principle of Public Accessibility” and applies such to all aspects of the policy, including access to criminal files, civil and family court files, but that accessibility is subject to legislation, the common law or a court order that may restrict access. While perhaps not as positively inclusive and expressive in its support and observance of the principle of open court and the Dagenais/Mentuck principles, the Ontario Policy still leans towards public accessibility and minimizes the presence of barriers and limitations against access to their court files.

Like Ontario, the Executive Office of the Nova Scotia Judiciary takes a similar approach in basing its access to court record policy on the general rule of access. The policy starts off with the reference that as “a general rule, all court documents in all courts are a matter of public record” and remain as such “unless a legislative provision or court order restricts public access.” The policy does not delve deeper into the applicability of the Dagenais/Mentuck test in the event of any initiatives to limit freedom of the press. However, the Nova Scotia Policy does make reference to the Dagenais decision in connection with the implementation of publication bans:

Dagenais and Publication Bans: As a result of the 1994 Supreme Court of Canada decision in Dagenais v. CBC, Judges, in exercising common

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241 Ibid.
242 Ontario Policy, supra note 160 at s 2.1.
243 Nova Scotia Policy, supra note 174 at s 3.
law or discretionary authority to impose publication bans in criminal cases, must weigh all competing *Charter* rights (e.g. freedom of expression, right to a fair trial) and impose, at most, the minimal ban necessary to protect fundamental rights.  

The policy goes further in highlighting the rights of media when an application for a publication ban are before a court:

> The decision [*Dagenais*] establishes that members of the media have standing to be heard and to raise objections in open Court when a party requests that a Judge impose a non-statutory ban.  

This acknowledgement in the Nova Scotia Policy of the rights of media in gathering more information and challenging the implementation of a publication ban is an interesting component that empowers, rather than limits, public accessibility.

As mentioned, in British Columbia, there are two access to court record policies covering the Supreme Court and the Provincial Court. While similar in substance, there are still differences between the policies, which necessitates the added attention of the public and media in reviewing the rules to access court files. One key difference is that the “Policies Regarding Public and Media Access in the Provincial Court of British Columbia” cite the *Dagenais* case, while the “Court Record Access Policy” of the BC Supreme Court does not. In the former policy, there is reference to the *Dagenais* decision with regard to the implementation of discretionary bans and the judge’s duty to find a balance between competing values. Moreover, in comparison with the other access to court record policies, the policies of the different courts in British Columbia do not include the same level of

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acknowledgement and support of the open court principle, perhaps leaving some proponents in favour of greater public accessibility with something more to be desired.

4 Best Practices and Policy Recommendations

Over the first chapter of this thesis, case law was presented with a specific emphasis on the jurisprudence of the Supreme Court of Canada in relation to the principle of open court and public accessibility, and the importance of access to court records and the role of the press with respect to the Charter right of freedom of expression and freedom of the press. In the second chapter of this thesis, there was a deeper exploration into the access to court record policies that minimize access and institute barriers and limitations against public accessibility with a particular focus on the access to court record policy implemented by the Nunavut Court of Justice. In this most recent chapter, this thesis has analyzed and surveyed elements from other access to court record policies of other common law jurisdictions in Canada that highlight and promote court openness and public access to court records. Presently, this thesis now turns to a discussion on what principles are recommended to be adopted by all access to court record policies across Canadian common law jurisdictions that better reflect the Supreme Court principles and adherence to the importance of the rights of the public and media in accessing court records and documents, as well as exercising their Charter right to free expression and freedom of the press whilst also balancing other competing interests.

There are five general recommendations to be applied to the access to court record policies of the various common law jurisdictions in Canada. The first recommendation is the need for the adoption of a publicly-available and official access to court record policy in those common law jurisdictions that have yet to implement such a policy. These jurisdictions include New Brunswick, the Northwest Territories and Yukon, all of which have yet to release access to court record policies publicly. The implementation of such a policy and guidelines would assist the public and media in being able to review and understand what the rules of access are. Without a policy that the public can refer to, how is one to know what the rules are? Presumably guidance would come in the form of helpful court staff who would assist a member of the public in how that person can access court records and the information
contained within these files. However, there is the risk of inconsistency in permitting access to court records, particularly if there is no official frame of reference. Further, even when there is a written policy, the possibility of inconsistent application and interpretation of the rules and provisions by court staff can happen. Therefore, confusion and inconsistency are compounded with the lack of a written and publicly-available policy on access to court records. Without such, there is an increased chance for the inconsistent application and access to court records and files within these jurisdictions.

It should also be noted that within the common law jurisdiction of Yukon, where there is no public policy on access to court records, a court staff source has confirmed that there are internal guidelines on how court staff handle access requests from the public to access court files and records. The issue of concern in having an internal policy for court staff, but no official public policy, is that the balance of favour is shifted away from the public and its right to accessibility to court records and documents. This type of arrangement whether deliberately or inadvertently obscures court transparency and promotes court secrecy.

Moreover, without any formal public accessibility policy of court files and records, there is a greater risk that the principles established by the Supreme Court in Dagenais/Mentuck and various other jurisprudence in support of the open court principle and the importance of public accessibility are neither followed, nor recognized. In sum, the first recommendation is to ensure that all jurisdictions of the various levels of court in the common law system of Canada each establish an access to court record policy that is publicly available. Further and ideally, not only would each common law province and territory offer the public official and available access to court record policies, but that there be some similarity in substance between these policies.

More specifically, this thesis advocates for the adoption of the same main principles with respect to court openness and a commitment to public accessibility within the access to court record policies that are now available across all common law provinces and territories. Therefore, the corollary to the first recommendation is to ensure that all common law jurisdictions not only have a publicly viewable accessibility policy, but that there be some
level of uniformity of provisions between the policies across common law jurisdictions in Canada. This means that current common law jurisdictions with no access to court record policies (ie. New Brunswick, Northwest Territories, and Yukon) adopt policies that contain provisions that support and facilitate access by the public as contained in the policies of all other common law jurisdictions.

It is further recommended that those jurisdictions with minimal guidelines, such as Manitoba, Newfoundland and Prince Edward Island, amend their current minimal policies to include more substantive provisions regarding access. This would have the overall effect of taking the guesswork out of how the registry deals with access to court record requests from the public by those who may not be as familiar with local procedure. In addition, providing similar principles in support of public accessibility and court openness would also have a positive effect on minimizing the inconsistent application and interpretation of the rules of access. Therefore, it is recommended that all common law jurisdictions of the various court levels in Canada adopt access to court record policies that contain similar and consistent principles that reflect the open court principle and facilitate and inform the public on how they can gain access to court file documents and materials.

While most common law policies in Canada do recognize the principle of open court and a few more specifically have acknowledged and highlighted the Dagenais and/or the Mentuck cases, it is recommended that all access to court record policies across all of the common law jurisdictions of Canada not only recognize and make reference to the principle of open court, as well as the Dagenais/Mentuck principles, but also substantively espouse the values of these principles within access policy. It is not enough for an access to court record policy to start off with an acknowledgement of the principle of open court and the presumption of openness, only to then immediately devolve with provisions that create and implement barriers and limitations against public accessibility. If there is a presumption of access and recognition by Canada’s highest court of the importance of public accessibility and court transparency, it is not enough for the courts of common law jurisdictions to merely recognize these legal principles. They must be meaningfully incorporated and abided by within policy.
For instance, while the Saskatchewan Policy might clearly and almost emphatically begin its policy on the introductory note of “The Principle of Openness in the Court” and immediate references of both the Dagenais and Mentuck decisions, barriers and limitations against public accessibility quickly follow and run counter to the spirit and values of open court. Similar to the overarching powers allocated to the Court Records Officer under the Nunavut Policy, Section 6 of the Saskatchewan Policy, called “When Access is Denied”, authorizes its court officials to have the extensive power to “conclude that a particular request comes within one of the exceptions to the open access principle” – at which point the court official is granted the power to “refuse the request and advise the individual that he or she may apply to court to have the matter determined by a judge”. According to the Dagenais/Mentuck principles, the presumption or starting point is access and if a party wishes to limit accessibility and negate freedom of expression, it is then up to that party to prove the elements of the Dagenais/Mentuck test and for a judge to make the consideration whether the elements of the test have been fulfilled and the limitation is justifiable. The Saskatchewan Policy, on the other hand, advocates for the reverse of the Dagenais/Mentuck test and principles. Access is not the baseline principle and instead a member of the public seeking access must seek access by requesting it from the court.

Interestingly, immediately after section 6 of the Saskatchewan Policy is a section identified as section 7 in the “Table of Contents” and is entitled “Legal Limitations on Access”. This next section of the Saskatchewan Policy provides an extensive chart containing information on limitations of access to various court documents in the civil, family, criminal, and youth criminal law contexts. While perhaps helpful from an information perspective, inclusion of such information is not always necessary and runs counter to the spirit of the principle of open court and public accessibility. This section of the Saskatchewan Policy is similar to “Appendix A: Court Record Access Guidelines” of the 2013 version of the Nunavut Policy., which provides an information chart highlighting the “Access Rule” associated with criminal, criminal youth and civil court files and documents. However, it should be noted that the Nunavut Court of Justice decided to remove that appendix in the 2015 updated version of the

247 Saskatchewan Policy, supra note 175 at s 6.

248 Ibid at 2, 20.
Nunavut Policy, which by virtue of doing so, improves the most recent version of the policy with respect to increased accessibility.

As such, the second recommendation is that all access to court record policies of the various levels of provincial and territorial courts in common law Canada highlight the principle of openness and proceed on this basis in eliminating undue and overly restrictive provisions that pose barriers against access to court files and documents by the public and media. For instance, the “Public and Media Access Guide” of the Alberta Courts (“Alberta Policy”) starts off in not only recognizing the principle of openness, but all of its provisions throughout the policy adhere to this principle. There are substantive commitments within the provisions that actively support this principle and create conditions that maximize public accessibility of court files, while also maintaining balance in restrictions and protections of competing values to freedom of expression through public accessibility.

A third recommendation to be adopted by all access to court record policies in the common law jurisdictions of Canada is to treat all members of the public equally. More specifically, this thesis recommends to eliminate any provisions that create a tiered system between members of the public and journalists, the latter of whom may be accorded special rights and privileges over and above those delegated to ordinary members of the public. Under section 3(a) of the “Guidelines for Media & Public Access to the Courts of Nova Scotia” (“Nova Scotia Policy”) as established by the Executive Office of the Nova Scotia Judiciary, “media representatives” are given the added right, over and above photocopying court file documentation that is afforded to both the public and the media, to “photograph or video tape court documentation in the Halifax Law Courts Administration Office”. While this is a minor point, the right of public accessibility should be equally conferred upon all members of the public, whether or not they qualify to be considered as “media representatives”.

Interestingly section 3(b) of the Nova Scotia Policy covers access to exhibits, which restrictively entails that there is not an automatic right of access and that “members of the media” may request access before a presiding judge and other instructions on how they can further make inquiries. There is no reference to the general public and whether or not they are
entitled to the same request for access process.\textsuperscript{249} Irrespective of whether someone is affiliated with the most prestigious of news organizations or may be a private citizen with their own blog or just an interested and motivated citizen, this thesis recommends that there be no differentiation in status and access rights. It is recommended that all access policies of the territorial and provincial courts in common law Canada treat all members of the media in the same manner as members of the public, who are not affiliated or identify themselves as a part of the media or press, equitably with equal access to all interested people.

Understandably, a court’s motivation behind creating a tiered system between the public and the media may be based on concerns regarding privacy of the information of the litigants and the case within the court record. This preference for journalists and the media over the public is premised on the belief that members of the media have a significant or more valuable purpose in accessing court records and the information contained within, which would be in the sharing and dissemination of information about the courts to the wider public. However, with recent developments in technology over the last few years, relatively obscure and unknown individuals have been able to become sources of information in their own right. Because of the ubiquity and increased speed within which everyday citizens are able to share information over digital networks, independent talent has emerged, disseminating information to a broader base on various online platforms. More specifically, the advent of “citizen journalism”, which is now a dated term, has since evolved and we are now experiencing an era wherein every person with a smartphone and data plan has the potential to become a news source in accessing and sharing information instantaneously and publicly. There are various kinds of journalists and newsgatherers in this day and age. Individuals like Jesse Brown, a newsmaker who has created his own media platform via a crowd-funded online website known as Canadaland, have effectively changed the traditional mold of the press and news media.

\textsuperscript{249} Notwithstanding the issue that according to Supreme Court of Canada case law, members of the public (be it as the public or as part of a media organization) do have an automatic right to exhibits. See \textit{Toronto Star Newspapers}, supra note 6, at para 7; Crerar & Dabaghi, “SCC upholds”, supra note 129.
In any event, this thesis recommends equal public accessibility to court records and information. In addition to the established media and press, as well as self-funded citizen newsgathers, there may be other individuals who simply want to conduct their own research and wish to access court information to feed their own curiosity. It would be presumptuous and discriminatory to assume that journalists and members of the media from recognized media organizations within Canada, such as the CBC, CTV, Global, and Rogers from the broadcast media realm, and the Globe and Mail, the National Post, the Toronto Star, the Winnipeg Free Press and the Ottawa Citizen from the newsprint world, deserve greater access to information from court records over other persons not affiliated with an established media institution.

In fact, historically in the *MacIntyre* decision, the Supreme Court had decided to follow U.S. courts in their approach to consider all members of the public, including media and lay people, as everyone having the common law right to inspect court records. The Supreme Court followed the U.S. approach over the differing opinion of the British courts. In Britain at the time of release of this decision, entitlement of access to court records was only extended to “interested persons”, meaning journalists or members of the media who could demonstrate a special interest in court proceedings. As a consequence of these roots with respect to special access and position, this thesis recommends that access to court record policies treat all requesters for information, the media and public alike, on an equal basis.

In doing so, this does not address the issue of privacy concerns premised on the notion that persons from established media organizations have a “greater” purpose to access those documents from court records and are therefore more “trustworthy” over a regular lay person, who incidentally enough, may actually be a one-person news-gathering and creating machine through advances in digital technology and the internet. With that in mind, the fourth recommendation that this thesis posits to be adopted by the courts of all territorial and provincial common law jurisdictions in Canada and incorporated in their accompanying access to court record policies is only partial redaction of the personal information of litigants.

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251 Ibid.
and other parties involved in a court proceeding that is of a sensitive personal nature, and consequently not necessary to be shared and incorporated in any news stories to the public. To be clear, it is not recommended that there be lengthy lists of types of information to be redacted before there is public accessibility to a court record. Rather, personal information such as social insurance number or certain addresses may not be necessary for any one external to its owner to know. Odds are that these types of information are not essential to any news story or necessary to quench the thirst of the most curious. While this recommendation is at odds with those advocates who believe in full access to all information contained within a court record, this thesis argues that there are practical considerations that necessitate this measure and in doing so, there are practical merits that outweigh any perceived imposition upon the principles of open court and public accessibility. By enforcing a very minimal standard on limiting access to only certain types of sensitive information and standardizing this requirement, the principle against very minimal limitations on access could create a more stable and efficient system for litigants and members of the public who wish to access court records.

It is likely that advocates of full public accessibility to all information contained in court records would view this fourth recommendation as a negation from the principle of open court and attrition from public confidence within the integrity of the judicial system. However, such a position would be based purely on principle without more practical considerations. A clean sweep of information to be unnecessarily redacted from a court record to ensure that a member of the public is divested from information central to a court case is not recommended. Rather, I recommend a systematic and minimal approach to removing personal information that is not central to the main issues of a court file. More specifically, in the Model Policy, a Canadian Judicial Council report, entitled, “Use of Personal Information in Judgments and Recommended Protocol” by the Judges’ Technology Advisory Committee, or JTAC as earlier referred, that was published in March of 2005,252

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had referenced guidelines on what kind of information can be removed in order to find a balance between public accessibility and concerns over privacy.\footnote{JTAC, “Model Policy”, \textit{supra} note 150 at 6.}

As mentioned earlier in the second chapter, the Nunavut Court of Justice had appeared to adopt some guidance from the Model Policy as established by the Canadian Judicial Council back in 2005. However, Nunavut has opted to take a more robust approach in the personal information that the Court chooses to redact from court records and files. The Model Policy, as based on guidelines established by the March 2005 report of the JTAC, endorsed the approach to “Personal data identifiers” to include the following:

“Personal data identifiers” refers to personal information that, when combined together or with the name of an individual, enables the direct identification of this individual so as to pose a serious threat to this individual’s personal security. This information includes

\begin{itemize}
  \item[a)] day and month of birth;
  \item[b)] addresses (eg. civic, postal or email);
  \item[c)] unique numbers (e.g. phone, social insurance, financial accounts); and
  \item[d)] biometrical information (e.g. fingerprints, facial image).
\end{itemize}

“Personal data identifiers” does not include a person’s name.

In both 2013 and 2015 versions of the Nunavut Policy, the Nunavut Court of Justice had adopted the term of “Personal Data Identifiers” and the above criteria as established by JTAC, as well as additional pieces of information to be redacted, such as place of employment, a range of sources that provide unique numbers (ie. Health care numbers, driver’s license), and other “personal possession identifiers”. The Nunavut Policy also has established that in addition to this broad and general assortment of “Personal Data Identifiers”, the Court also reserves the right to expand upon the criteria and categories of information to be redacted. Recall as well that the Nunavut Policy’s guidelines and rules
delegate many duties to the Court Records Officer, who is effectively empowered with supernumerary abilities to redact in what seems, arguably, to be a more liberal manner than would pass muster if held up against the *Dagenais/Mentuck* test.

It is not a recommendation to expand upon the criteria as established by JTAC for the CJC in the way that the Nunavut Policy has. Rather, a better position would be that courts of the common law territories and provinces of Canada consider adhering to the set categories as established by JTAC for the CJC in redaction of personal information without adding a reservation of right to automatically expand upon the criteria of information to be removed from a court file and public accessibility. Redacting a minimal level of highly personal information of litigants and other parties involved in a court proceeding is a logical and prudent next step, which has the overall effect of balancing out the competing values. I believe that the integrity of the court record is maintained when such redactions are restrictive in order to only minimally impair public accessibility, thereby addressing and ameliorating privacy concerns.

There is a measure of balance between the competing values of court openness and privacy that is achieved from this practical measure. Moreover, it seems highly unlikely that a restriction of personal information as recommended would negatively affect a member of the public or of a media organization. It does not seem useful or necessary for a journalist to have access to a subject’s social insurance number for the purpose of writing a story about someone involved in a court proceeding. The purpose of access of such information would be questionable.

The fifth recommendation put forward by this thesis is yet another measure of contextual balancing to find secure footing between proponents for maximum public accessibility to court records and those who favour privacy. This thesis recommends that members of the public, irrespective of whether they retain formal employment with an established media organization or not, register or check in with court staff to verify their identities, should they wish to have access to a court record. This is one action item that has been endorsed by the Model Policy, which again was written eleven years ago back in 2005.
Counterarguments against such recommendation could include a strain on administrative resources, or, possibly, privacy concerns on behalf of the requester of access. In response to the first possible concern, such obtainment of the identification of individuals who wish to view and access court records is an action that several common law jurisdictions already facilitate. In addition, court staff would merely be tasked with the responsibility of checking someone’s government-issued identification card and then perhaps have that person sign a log sheet. There is no need for anything overtly complex. The structure can be basic, requiring minimal effort and resources from both sides involved. Moreover, a member of the court staff would have to be present anyway to receive the request and retrieve the court file as requested.

In response to the second possible counterargument based on privacy concerns for the gathering of identities when an individual requests access to a court file, one has to wonder what the real issue is underlying such apprehension. A member of the public or the media who wishes to gain access to a court record will be privy to a cornucopia of information, some personal, all of it detailed. Therefore, this thesis posits that such a requirement to identify yourself would be a quid pro quo of sorts in the exchange for information and not a breach of privacy. A requester of court file access has given their implicit consent in being identified just by walking into a courthouse and approaching the court registry counter for assistance by court staff as there is security surveillance and cameras in most high-traffic public areas of courthouses across the country. The recommendation of implementing a registry or log to keep track of who requests and accesses court records and files can act as a useful repository of information that could placate the privacy concerns of those litigants and other parties whom are actively involved in court proceedings.

Lastly, I would like to put forward, not another recommendation on how to modify access to court record policies, but a suggestion for next steps once there is some uniformity and consistency of policy to access physical court files between the courts of the common law.

254 Nunavut Policy 2015, supra note 156 at s 6.1; Saskatchewan Policy, supra note 175 at 14.
jurisdictions of Canada. Once each province and territory establishes a balanced access to court record policy that is accessible to the public, it will be necessary for the provincial and territorial courts, as well as the ministries of the attorney general of each province and territory, to consider how best to tackle the issue of digital access to court records by the public. This issue has been explored with greater focus some ten years ago, and has since fallen off the radar of courts and the Canadian Judicial Council. However, I argue that such a transition to the digital world is but a mere yet powerful inevitability. This thesis recommends that exploring these next steps in the formation of committees and the conducting of research into digital or online access should not be entertained until access to court records in their paper form are better managed or even settled amongst the various courts of common law Canada. To skip this essential step and head straight into tackling the issue of electronic or digital access to digitized versions of court records would likely result in the continuance of inconsistent policies across common law Canada, more delays and no real progress.

5 Digital Access to Court Records

While the access to court record policies of various provincial and territorial common law jurisdictions within Canada have been explored throughout the chapters of this thesis, this analysis would be deficient without addressing the proverbial elephant in the room. The mammalian reference is, of course, with respect to technology and access to court records and documents that have been transposed from paper hard copies into digital format. It has been conveyed within these chapters that there remains a need to implement a consistency of principles with regard to court record policies of the common law jurisdictions in Canada that recognize court openness while also balancing privacy interests without establishing unnecessarily broad barriers and limitations against public accessibility. To jump ahead and focus efforts on public access to digital court records and files without first determining and universally adopting consistent principles of public accessibility to court records (in addition to determining requirements and duties to be abided by the public while accessing court files) would create more divergence and disarray between the common law jurisdictions, rather
than organize and create a balanced and consistent approach to public accessibility to court records across the country.

For a number of years, the Canadian Judicial Council has engaged its Judges Technology Advisory Committee and other consultants to explore the issue of digitization of court files and public accessibility. It appeared that the CJC had allocated significant resources and focus to the issue with several discussions held and reports published by the JTAC and associates between 2002 and 2005. Interest seemed to wane after 2005 until 2010 at which point author Jo Sherman prepared a report for the CJC on the topic, entitled “Court Information Management: Policy Framework to Accommodate the Digital Environment”.255 There have been no other publicly-accessible publications released by the CJC since this 2010 report. It seems that the issue of the digitization of court documents and records in connection with digital accessibility by the public has lost some traction in the last few years with law professor, Karen Eltis, in her book entitled, “Courts, Litigants, and the Digital Age”, observing that electronic or online court documents are “only now attracting sober thought” which is “amid the unbridled enthusiasm that originally greeted them.”256

It seems that warnings about the advent of the digitization of court records and digital accessibility by the public, or rather “electronic access” to court records, as the term was more frequently used in the early 2000s,257 have been stuck in time. While Eltis’s book was published just this year in 2016, she still raises concerns cited from sources dating several years back in 2008. This falls in line, with the dated reports from the CJC that placed undue emphasis on the value of privacy. In Eltis’s book, she quotes Canada’s privacy commission from a newspaper article dating all the way back to 2008:

> Canada’s privacy commissioner pointed to this emerging predicament, offering this caution: “the open-court rule – which is extremely historically important – has become distorted

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255 Sherman,” Digital Environment”, supra note 40.
256 Eltis, Digital Age, supra note 37 at 65.
Undoubtedly, this sage reticence or simply skepticism against the security of information flowing online was borne from the shifting landscape of technology, and the historical information and privacy breaches and fears that have emerged over the years as the internet and digital technology has continually evolved. And while, it is agreed that risks do continue to exist (and will perhaps always be a factor) with respect to digital accessibility of online information, improvements and changes in digital technology, digital filtering and online security are ever-evolving with increasing speed and sophistication. Nevertheless, the warnings and guidance illustrated in these earlier reports and continued in more recent sources like Eltis’s book, provide important markers in concerns that were once, and for some, continue to be, an issue based on the naissance and factor of unknown of the early technology and those concerns that continue to persist irrespective of the innovation of technology in the last few years.

As highlighted, it is the position of this thesis that it is essential to determine the shared principles with respect to public accessibility of physical court records and files before digitization and access to digital court records are sorted. Once these common guidelines are established and adopted, espousing the principle of court openness and maximizing the public’s ability to gain access to court files, while also acknowledging and implementing appropriately proportionate mechanisms to address concerns from a privacy perspective, then this thesis argues that the courts of the common law jurisdictions will be better positioned to deal with digitization. While some may see the merits in skipping this critical step and moving forward with a collaborated effort on digitization since it is largely accepted that this is the inevitable direction, this thesis argues otherwise.

Some may argue that it is not worth the investment to organize and coordinate efforts with regard to public accessibility of court records. And while this thesis does recognize that the two mediums are very different, which could require differences in approach specific to each

258 Kirk Makin, “Online tribunal Evidence Leaves Citizens’ Data Open to Abuse” The Globe and mail (20 August 2008) at A5 in Eltis, Digital Age, supra note 37 at 65.
format to each format, this thesis believes that the universal principles and guidelines adopted into policies regarding public accessibility of hard copy records can also apply to digital accessibility of digital court records and document files. As such, this thesis endorses the recommendation by the JTAC in its 2005 report to establish some uniformity in access to court record policies be adopted. 259

Notable media lawyer, David Coles, who is based in Halifax and frequently represents media clients such as the CBC, does not see a difference between the formats of the court files and public accessibility. In considering digital access, Coles is quoted from a 2008 article by legal journalist and academic, Dean Jobb, as saying:

“All it’s doing, in my opinion, is providing read access to what should already be accessible…There’s inconvenience and perhaps expense now to exercise one’s right of access. Being able to do it electronically eliminates those barriers, but those barriers aren’t philosophic barriers, they’re just simply practical barriers.”260

Coles does not believe that information should be removed from the public record “simply because electronic access makes it easier to find”. 261 In support of the principle of court openness, Jobb writes that Coles believes that “Canada’s courts are open to public scrutiny and should remain open in the Internet Age”. 262 Coles states:

“Surely the issue is, are they documents that should be public? If they are, then we should facilitate ready access. If on the other hand, the nature of the document is such that for policy reasons it should not be public, then it doesn’t belong in the public registry.”263

261 Ibid.
262 Ibid.
263 Ibid.
While Coles might take a marked departure from those who favour privacy over the principle of openness and public accessibility, this thesis endorses his position that whatever information is made public and accessible in hard copy form, so too should there be public accessibility to those documents in digital format.

In addition to this positioning, this thesis posits that there are various other issues of concern in the context of digital accessibility that require special consideration that are not an issue of concern in relation to hard copy court records and files. The first issue that will be explored is the commonly-held privacy concerns that seem to plague the notion of electronic accessibility of digital court records and files. The second issue is the possibility for defamation and the defence of privilege. Finally, the third issue to be explored in this remaining third chapter are the existing advancements made in some jurisdictions in Canada regarding electronic accessibility and the conversion over to digital court records and files. However before delving into these three issues, it is worthwhile to take stock in how the CJC has approached the Dagenais/Mentuck test in relation to digital accessibility of digital court records in those earlier years of focusing on the issues.

5.1 Electronic Access: Dagenais/Mentuck Test

In January of 2005, the JTAC on behalf of the CJC had published a report entitled, “Synthesis of the Comments on JTAC’s Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy”. JTAC had engaged the assistance of Lisa Austin, then Assistant Professor, and now currently Associate Professor of Law at the Faculty of Law at the University of Toronto, and Frédéric Pelletier, then Assistant Editor at CANLII and a Research Officer with the University of Montreal’s Centre de recherché en droit public, to research and write the follow-up report to a previous report published by the CJC in September 2003, entitled “Open Courts, Electronic Access to Court Records, and Privacy”. The September 2003 report was a general research report focused largely on the broader issues of what was “electronic access”, corresponding case law into public accessibility, the status of electronic accessibility in Canada and the United States, as well as general
considerations with regard to court file documents. In Austin and Pelletier’s follow-up, they had concluded that the *Dagenais/Mentuck* test was

…an appropriate framework for balancing the right of the public to have access to court information with the right of individuals to preserve their privacy… ²⁶⁴

Interestingly, Austin and Pelletier had recommended that the *Dagenais/Mentuck* test “must be adapted to the specific context of e-access to court information”.²⁶⁵ According to Austin and Pelletier, the “question of access” was not “whether court information should be open to the public inspection or not”, but rather

…the question is whether existing accessibility of this “public” information should be enhanced through the provision of some form of access through electronic means.²⁶⁶

Austin and Pelletier had recognized that “any information” could be “digitally available on electronic networks” and as such “adapted” the *Dagenais/Mentuck* test to “allow restrictions on access to court information” where:

(a) such restrictions are necessary to prevent a serious risk to the rights of individuals to protect their privacy or to other important interests such as the proper administration of justice;

(b) the restrictions are carefully tailored to minimally impair the open courts principle;

and

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²⁶⁵ Ibid at 11.

²⁶⁶ Ibid.
(c) the salutary effects of the restrictions outweigh their deleterious effects on the open
courts principle, taking into account the continuing availability of this information at
the open courts principle, and the need to avoid facilitating access for purposes that
are not connected to the open courts principle.267

The authors raised the fact that the first part of the Dagenais/Mentuck test was a reflection of
the minimal impairment requirement of the Oakes test268. Therefore, Austin and Pelletier
believed that public accessibility in relation to court records was not simply a black-and-
white assessment between “sealing the file or providing unrestricted access to everyone.”269
They believed that

…options for access can fall along a spectrum between these extremes,
where neither the right of individuals to privacy nor the right to open
courts must absolutely prevail over the other.270

More specifically, Austin and Pelletier believed that “[c]areful tailoring that recognizes
differing levels of access” would better accommodate the values of the open court principle
and privacy.271

Austin and Pelletier based their conclusion of a spectrum-based approach to public
accessibility to digital court records on the Supreme Court’s conclusions in the Mentuck
decision. The Supreme Court in Mentuck partially upheld the publication ban with respect to
the identity of the undercover police officers, but did not extend the ban over the covert
operational methods employed by the police in their elaborate takedown operations. Austin
and Pelletier put forward this supposition since this was…

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267 Ibid at executive summary page (unnumbered).
268 Supra note 203.
269 Ibid at 11.
270 Ibid.
271 Ibid at 12.
…not a ban on the presence of the media in the courtroom – or the general public – but rather a ban on the further publication of information that was already “publicly” revealed in court.\textsuperscript{272}

Therefore, Austin and Pelletier had extended this principle in relation to varying levels of digital accessibility by the public to electronic copies of documents within court records.

There is no doubt that in today’s digital world incorporating simple filter restrictions based upon varying levels of accessibility clearance to different groups of the public interested in having access to a digital court records system is a relatively easy implementation. However, Austin and Pelletier’s view that the implementation of a partial publication ban is sufficient grounds to extend an argument that the first step of the \textit{Dagenais/Mentuck} test calls for a spectrum of accessibility to the public and other stakeholders is misguided. There seems to be a disconnect between Austin and Pelletier’s extension of the Supreme Court’s conclusion in \textit{Mentuck} and the application of a partial publication ban to the endorsement of varying degrees of accessibility.

As raised by Austin and Pelletier, the ban did not apply to attendance by the media or the public in the courtroom, but to what could be disclosed by them after they left the courtroom. Such a publication ban would also be applied to the information that perhaps would make its way into a court file. The media and the public would still have access to that court file and the contents within under a publication ban, but the ban would restrict them from further sharing that information with the outside world. The function of a publication ban is to prohibit the dissemination of certain information publicly, and in some ways to prohibit or limit the disclosure of this information to wider segments of the population. However, a publication ban does not prohibit public accessibility to information as disclosed in court (unless that proceeding be held in camera) or access to a court record. Having access to a court record during the application of a publication ban contrasts with the recommendation by Austin and Pelletier that limitations upon access be adopted on the basis of their

\textsuperscript{272} \textit{Ibid.}
interpretation and extension of argument from the *Mentuck* case. Austin and Pelletier’s analysis appears to be an inconsistent deduction.

As recommended in the previous chapter, the principle of open court and the *Charter* value of freedom of expression would be better endorsed if members of the public were treated equally, which includes members of the press, members from established media organizations and those individuals who are merely interested members of the public. This general categorization, of course, does not include litigants and other parties directly involved in a court case, as well as their counsel, judges, and court staff, who should and presently do have increased rights of accessibility to court records under various existing policy rules and guidelines of access to physical court records. In the previous chapter, I maintained that the establishment of common principles to be adopted by all territorial and provincial courts of the various common law jurisdictions in Canada, including equal accessibility amongst the public, be adopted first with respect to the policies that dictate public accessibility with respect to physical court records and documents, and then later extended to digital access to soft copy court records and documents.

There is an underlying recommendation in this suggestion, which is that digital court record systems should maintain the same court document formatting once digitized into soft copy form. This means that digitized soft copies of court records would be saved and viewable in the same form as they are in hard copy as a document nestled in a physical court record file sitting on the shelf in a courthouse. While some may view this perspective as a lost opportunity given the infinite possibilities in creating various levels of accessibility and search function capability within a digital environment, nevertheless, maintaining the integrity of court documents in their proper context eliminates a number of possible risks. Furthermore, this approach also eliminating the need for the additional implementation of barriers and limits against public accessibility to court files, including granting a spectrum of various levels of accessibility.
5.2 The Supposed End of Practical Obscurity and the Loss of Privacy

A popular argument adopted by several scholars and critics\(^{273}\) in relation to the difference between hard copy paper court records and documents with digital court records and files is that of “practical obscurity”. This means that anyone who wishes to access hard copy court records and the paper files must physically travel to a courthouse and request access to the court file. “Practical obscurity” exists in such a practice since there is a hurdle against ready access. One must muster up the energy and effort in physically having to obtain the court file, in contrast to the relative ease of retrieving something from the digital environment with the simple input of a search term into an online search engine, resulting in an instantaneous recall of information appearing right in front of you. Scholars and critics urging caution and greater adherence to privacy with regard to digital access and digital court records mainly base their reasoning on the lack of “practical obscurity” that they claim is lost once paper is exchanged for the digitized medium.

Professor Karen Eltis, is one such scholar who believes that “practical obscurity” is lost in a digital world and that there should be greater adherence to privacy for the sake of litigants over the presumption of openness and the rights of public accessibility. Eltis relies on the “practical obscurity” argument that digital court records are no longer protected as hard copy court records were “of years past.”\(^{274}\) According to Eltis, the loss of “practical obscurity” of paper court records and documents means that the digitization of court records

\[\text{...[t]ranslates into boundless, unprecedented, and unchecked distribution, with the ills commonly associated with most “good things” in unlimited and wholesale offering.}\(^{275}\)

Another author that relies upon the loss of “practical obscurity” with digital access to digital court records is Jo Sherman in the 2010 report prepared for the CJC. Sherman notes that a

\(^{274}\) Eltis, Digital Age, supra note 37 at 6.
\(^{275}\) Ibid.
“key difference” between paper and digital records is that “paper records by their nature provide “practical obscurity” of the information contained within them”. The author believes that paper records with their “practical obscurity” provides a “natural barrier” because “it is rarely cost and time effective for anyone ….to go to such lengths”. Sherman argues further that

...[e]lectronic information, on the other hand, may be easily disseminated via the Internet anywhere and anytime at a low cost therefore making it easily accessible to the world at large.

Both Sherman and Eltis share a number of ideas and positions about how to approach digital access to digital court records. For instance, both Sherman and Eltis in their respective writings proffer that due to the loss of “practical obscurity” greater focus should be placed on the value of privacy over that of public accessibility. There is also an overlap in the risks that both authors highlight associated with digital access and digital court records.

In a 2011 article by Eltis, entitled, “The Judicial System in the Digital Age: revisiting the Relationship between Privacy and Accessibility in the Cyber Context”, she explores the tension between accessibility and privacy with respect to digital court files in the “cyber context”. After acknowledging that “the starting point (in both Canada and United States) is full access to court records”, the author argues, nevertheless, that

...judges would presumably be more inclined to use their discretion to protect litigants’ (and other participants’) privacy if doing so would not be regarded as sacrificing openness or transparency

277 Ibid.
278 Ibid.
280 Eltis, Digital Age, supra note 37 at 9.
but rather as a facilitator of access and enabler of court control over its records.\textsuperscript{281}

While Eltis provides an interesting perspective on the differences in the historical and legal development of rights of privacy between the common law jurisdiction and civil law tradition, the author lands on the conclusion that there are too many risks associated with supporting public accessibility over privacy. She argues that “safeguarding privacy” as “deriving from human dignity” pursuant to its civil law lineage should be viewed as “a facilitator rather than a detractor of accessibility” that does “comport with the court’s various duties (to foster transparency and to protect litigants and control its documents).”\textsuperscript{282} She then concludes that ultimately what is required is a rethinking of privacy as “an ally of openness in the court system.”\textsuperscript{283}

In her 2016 book, Eltis further argues that in addition to embarrassment, digital accessibility that is unrestricted “may dissuade individuals in sensitive contexts.”\textsuperscript{284} She references “the now infamous Ashley Madison privacy scandal”, a recent online controversy that resulted in an information breach of users of a website that caters to matching people interested in conducting extra-marital affairs.\textsuperscript{285} She argues that individuals would “[avail] themselves of legal remedies” out of “fear of being further exposed or even re-victimized.”\textsuperscript{286} While this was a salient observation to make in relation to this particular situation, I do not believe that this view is necessarily applicable to the general notion of digital access to electronic court records. In the Ashley Madison scandal, at issue was being implicated with regard to marital infidelity, a very specific matter fraught with shame and is strongly culturally and, for some, religiously, frowned upon. Whereas, it seems too far of a stretch to argue that availability of a general digital system for online court records would be the equivalent of participating in an Ashley Madison security breach class action lawsuit, thereby “outing” yourself. No doubt

\begin{thebibliography}{999}
\bibitem{281} Eltis, “Digital Age: Revisiting the Relationship”, \textit{supra} note 279 at para 53.
\bibitem{282} Eltis, \textit{Digital Age}, \textit{supra} note 37 at 12-13.
\bibitem{283} \textit{Ibid} at 1.
\bibitem{284} \textit{Ibid} at 67.
\bibitem{285} \textit{Ibid}.
\bibitem{286} \textit{Ibid}.
\end{thebibliography}
there would be some trepidation by individuals contemplating pursuing a matter in the justice system once this technology is more widely available. However, as time and technology progress, so too will the public’s level of comfort and acceptance of this inevitable direction.

Likewise, Sherman in her 2010 report prepared for the CJC, as referenced earlier in this chapter, takes a similar position as Eltis in shifting attention and focus on the importance of privacy over an emphasis on public accessibility and transparency. Sherman argues that the “mindset” focused on the latter values has “unfortunately skewed the debate”, effectively “sidelin[ing]” other “equally important values”, such as “‘public confidence’, ‘fairness’ and ‘human dignity’”. As such, Sherman concludes that...

...the protection of privacy and respect for civil liberty must be given equal weighting by the courts because there are essential principles of a democratic society. An infringement of privacy will often amount to an infringement of liberty. Attention to fundamental human rights including a right to privacy, may strengthen public confidence in a court’s ability to handle sensitive information appropriately.

Both Sherman and Eltis argue that if a premium is not placed on privacy in the digital context of court records, the result would be a loss of control of information. Sherman believes that “[i]t is impossible to control information once it’s released on the internet” and that “[t]his could potentially, over time, erode the integrity of our legal system and may reduce public confidence in the courts.” Sherman claims that “[i]t is easy for a court to lose control over the quality of its information” and cautions against the “inadequacy of distribution constraints and quality control checks”. Similarly, Eltis believes that “contrary to one of the foundational principles of accessibility”, digital access to soft copies of court documents...
can lead to “the courts’ loss of control over its own materials”, thereby “undermin[ing] judicial authority”.291

This loss of control then spirals out to a number of risks outlined by both authors. Both Eltis and Sherman caution against data mining292 and questionable third parties gaining access to information.293 Both authors caution against the vulnerability of litigants. Sherman states that there will an “increased risk of identity theft, harassment and fraud”294 Eltis argues that a “free-for-all admission to court records online significantly facilitates witness-litigant bullying” – a move that she believes “may even nourish an intimidation industry”.295 A final risk worth noting is a warning from Sherman that the risks do not lie solely with litigants, but that those members of the public who access the digital court records could come across “disturbing material” that “may cause distress and harm”, in particular from “‘horrific’ evidence” from violent crimes.296

While both authors are detail-focused in their respective analyses of the risks of digital access to digital court files, it is worth taking a few steps back to take stock of the context surrounding their fears of risks of a digital court record system. Firstly, specialized perspective from a technology expert to provide greater insight on the options available for firewalling, creating an enclosed intranet, and a variety of other countless possibilities to promote greater security of a digital court record system is not provided. While it is beyond the parameters of this thesis to provide a survey of technical advances in digital technology over the last few years, it is argued that surely there have been advancements and improvements made in the last while that can facilitate in the creation of a stable automated system to access digital court records that can be adopted by the courts of common law Canadian jurisdictions.

Moreover, Sherman’s perspective is taken from a research report written several years ago in 2010. And while Eltis is quoted from her book that was published this year in 2016, her perspective is a continuation of arguments based on an article dating back to 2011. Therefore, while stated that this is beyond the purview of this thesis and perhaps the sources written by Sherman and Eltis, I would be remiss to not raise the issue that innovations in technology proliferate exponentially as the years advance – and this includes likely options to apply to the digitization of court records to address both privacy concerns and offering public users broad and organized accessibility.

Furthermore, it is a possibility that the risks raised by Eltis and Sherman may continue to persist even when applying appropriate and effective technological measures against breaches; however, I respectfully disagree with their perspectives that are expressed in an arguably unfair and unreasonably critical perspective, particularly against those who will potentially utilize a digital system to publicly access digital court records. The “humiliation, intimidation, or retribution”\(^{297}\) that Eltis cautions against, or Sherman’s belief that “‘busy-body’ enquiries and privacy violations due to the removal of practical obscurity barriers”\(^{298}\) will proliferate, seem to take a one-sided and overtly anxiety-inducing and negative viewpoint that seems to be based on fear of the unknown. With the proper infrastructure and filtering and monitoring systems, it is likely to be technically possible to address and minimize the potential security risks without sacrificing the principles of open court, accessibility and transparency.

While Eltis and Sherman believe that the security risks are more serious once court records are digitized due largely in part to the loss of the “practical obscurity” of hard copy records, I do not believe that the distinction and difference of security risks between the two types of media, digital and paper, however measured, are material in considering the next steps in the organization and evolution of public access to court records. So while the “practical obscurity” of hard copy court records dissuaded some of those who could not be bothered to

\(^{297}\) Eltis, “Digital Age: Revisiting the Relationship”, supra note 279 at para 56.

physically go down to the court registry in person to unearth the information found in court records for nefarious purposes, the level of security risks with respect to paper court records still remains quite considerable. If someone wanted to wreak havoc on a litigant’s life by accessing information about them from a court file, they would find a way to physically access the physical court file provided that they were following procedure. The recommendation highlighted earlier in this chapter of maintaining a sign-in registry and the verification of identity of those requesting access to court files could aid in addressing some concerns about who is accessing a digital court file. Further, if brought into the digital court record context, the adoption of this suggestion of tracking who is accessing which file would be implemented and executed with a swiftness and ease that could possibly alleviate the concern from critics like Eltis and Sherman who question the motives of those accessing information from court records.299 Therefore, once universal principles are established and adopted by the courts of the provincial and territorial jurisdictions in common law Canada into their access to court record policies in physical form, these can then be applied to the digital realm of court record systems when we are ready to cross this threshold.

It has been argued in these chapters that not only should we keep the universal rules as established with regard to physical court records and apply them to the digital court record system, but that information collected in the digital court record system should reflect the way in which information and documents are collected in a physical court file (ie. same format, template, sequence, etc.). And while several arguments raised by Eltis have been questioned, I am in agreement with her perspective that “precision and preservation of the integrity of data are tremendous issues.”300 It seems then that this would mean that the digital system would largely reflect or mirror what has been established under the physical court record system in an effort to minimize risks and safeguard the privacy of litigants and other parties involved in court proceedings with information contained in court files, while also adhering to the same principles of openness and public accessibility. Moreover, there is the

299 However, it should be noted that there are separate additional issues of consideration with respect to tracking access of digital court records – specifically, to what extent are users tracked in the information that they access (ie. statistical information about which types of information they access and for how long they linger on certain pages) and what privacy considerations arise pertaining to the rights of users of the digital court record system. For a brief breakdown of these logistical issues, see JTAC, “Open Courts, Electronic Access to Court Records, and Privacy”, supra note 55 at 41.

300 Eltis, Digital Age, supra note 37 at 87.
possibility and potential of building the online architecture and paths to determine and control how the public accesses court records online.

An option contemplated in a CJC report prepared by the JTAC back in 2003 was to “establish the same policies and presumptions of openness in the paper and the electronic environments”.301 This report had highlighted that proponents believed that “there is no justification for restricting access to court records and docket information in the electronic medium”.302 Moreover, it was put forward that gaining access to a court record through an electronic medium would mean that “not only would practical obscurity disappear, but meaningful access will finally be provided”.303

5.3 Aggregation of Data and Legal Puzzles

In addition to mirroring common principles under the policies of access to physical court records, undoubtedly, there will be other unique elements and the corresponding need for appropriate guidelines or rules that would not be an issue or applicable to the paper court record context. One such unique trait of a digital court record system would be the quick and expansive aggregation of data and the resultant technical instant search capabilities of the digital information. The search function capabilities and possibilities are endless and retrieval of certain information is instant - certainly a trait that would not apply in an analog hard copy court record filing system. However, with this great power comes great concern about recklessness and a loss of control that led Sherman to caution against the risk of data mining.304 While taking stock and requiring those who wish to access a digital system to register or sign-in every time they log into the court record network alleviates some of the fear of risk, there still remains the issue of what may occur in the event that a user aggregates the information and distributes this information to unauthorized third parties or sells this information for commercial gain. This is an issue of significant concern to proponents on both sides of the swinging pendulum. It is in the best interests of all parties involved in court

302 Ibid.
303 Ibid.
proceedings and jointly supported by privacy proponents and public accessibility proponents alike. It is believed that with the advances in modern digital technology, there are measures, such as special effect interfacing or digital rights management mechanisms that would come to the rescue in minimizing these kinds of threats.

While several risks have been identified as outlined by critics in favour of privacy over maximizing public accessibility and the exciting potential of digital access to digital court record systems, there still remains another consideration (undoubtedly amongst a vast array of limitless other considerations) that is worth raising. This consideration is in relation to legal paradoxes or puzzles that arise due to the shift in resulting medium. In a traditional paper court record system, files and documents are in hard copy paper form. Access to court record policies of these hard copies enable a requester of information to photocopy documents as needed. Should they photocopy pleadings which include information that could be construed as defamatory against one of the parties, which means that certain comments lower the reputation of someone, individuals who duplicate this information are protected under the defamation defence of privilege. However, questions arise with whether or not the same defences and protection would be applicable in the digital context.

In order for comments to be defamatory, in short, the words or comments must be spoken or written to a third party. In a recent key case in the law of defamation, the Supreme Court of Canada, outlined the three elements as:

(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person;
(2) that the words in fact referred to the plaintiff; and
(3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.  

If these elements are met, then the next step as someone who may be on the hook for having

305 Grant v Torstar Corp 2009 SCC 61 at para 28.
expressed the defamatory comments would be to turn to one of the available defences against
defamation. In the context of defamatory comments made during court proceedings, the
defence of absolute privilege and/or qualified privilege could apply. The defence of absolute
privilege is accorded to “judges, witnesses, advocates, and parties” who are accorded the
absolute privilege to speak freely while participating in judicial proceedings without the fear
of legal liability in defamation.\textsuperscript{306} Qualified privilege, on the other hand is “a conditional
immunity that attaches to certain occasions deemed to be of lesser importance.”\textsuperscript{307} This
privilege arises when “the person who makes [the] communication has an interest or a duty,
legal or social, or moral, to make it to the person to whom it is made” and further, “the
person to whom it is so made has a corresponding interest or duty to receive it”.\textsuperscript{308}

The JTAC 2003 report identify that there is controversy and debate about whether the
defences of absolute privilege and qualified privilege apply to the reporting and publication
of the contents of pleadings.\textsuperscript{309} Assuming that the defamatory statements are written in the
context of pleadings prepared by the legal counsel of a plaintiff, a defendant, or a respondent
counsel in paraphrasing events and information that may have transpired, or if comments
were made by a witness while being questioned on the stand and this information is
subsequently captured in a hard copy transcript that is now accessible in paper form as part of
the court record, I believe that there is an increased applicability of the defences of privilege
to attach to these potentially defamatory situations.

However, “controversy” or an increase in confusion arises in whether the privilege defences
can apply or are even an option to protect the court registrar in digitizing information and
making it publicly accessible. Pleadings will be submitted by the parties and their counsel to
the court and then a court registrar would be responsible to make those pleadings, which may
contain potentially defamatory statements, available to the public through the digital system.
The question then becomes whether the court registrar has “published” this information in

\textsuperscript{306} JTAC, “Open Courts, Electronic Access to Court Records, and Privacy”, supra note 55 at 38.
\textsuperscript{307} \textit{Ibid.}
\textsuperscript{308} \textit{Ibid} at 39.
\textsuperscript{309} \textit{Ibid.}
relation to defamation law, by making it available through the digital filing system, which then may fulfill the third element in a finding of defamation. The 2003 CJC report recognizes that the “registrar is not specifically included in the persons who are entitled to absolute privilege”, however the report goes on to offer that there is still the possibility that the registrar could rely upon the defence of qualified privilege since the registrar has the “legal duty to publish the pleadings”.310

Aside from this legal confusion about defamation and the availability and applicability of defences against defamation, the 2003 CJC report by the JTAC also raises another interesting legal quandary once the progression towards digital court record filing systems are implemented, which is the possible snowball effect of an increase in defamatory verbiage in legal pleadings. More specifically, if the implementation of a digital court record system means the end of “practical obscurity” and the applicability of absolute privilege attaches to what is contained within pleadings, the report warns that litigants could take advantage to include libelous material knowing that their sentiments will be readily and swiftly accessible and read by others in an electronic environment.311 A digital court record system could encourage litigants to more readily air their grievances and express their potentially defamatory dismay while enjoying protection from liability. In light of this specific legal concern as well as the general concern over the liability of a court register in potentially “publishing” defamatory material, the JTAC in 2003 ever sagely recommended the following:

The implications of electronic filing and electronic access on the tort of defamation be considered.312

Another legal puzzle that arises in the context of a digital court records system is whether or not uploading and sharing certain legal documentation by a court registrar would trigger certain sections of legislation inadvertently. For instance, the JTAC 2003 report highlights

310 Ibid.
311 Ibid.
312 Ibid.
the possibility that there may be some controversy about the accessibility of some of the contents of the court file, such as the information or indictment, or pleadings or judicial orders.\textsuperscript{313} The report goes on to highlight what was then known in 2003 as section 486(4.1) of the \textit{Criminal Code},\textsuperscript{314} which is now cited as section 486.4(1), which outlines the provision calling for an order restricting publication regarding crimes of sexual offences. Section 486.4(1) grants a presiding judge the power to make an order “directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way…”\textsuperscript{315} Therefore, there may be some difficulty in navigating the offering of digitized documents and information in an electronic court record filing system in circumstances where a legislative provision or a court order prohibiting the dissemination of “any information” or some other similarly vague instruction is lawfully applied.

Undoubtedly, there will be challenges in implementing a digitized court record system and accompanying policy across all common law jurisdictions in Canada. As explored within this thesis, the state and quality of current access to court record policies differs across the country. However, as maintained, I advise that the courts of the common law jurisdictions in Canada will be better positioned to enter into the digital realm of court record accessibility once every jurisdiction has either adopted or updated their access to court record policies to include universal principles that reflect the Supreme Court of Canada’s approach in supporting court openness and transparency through public accessibility, while also taking into consideration implementing only essential measures to address privacy concerns. While this may take some time to organize and coordinate, there are currently some jurisdictions in Canada that are ahead of the curve in going digital.

\textbf{5.4 Who’s Doing What and How}

There are a few jurisdictions in Canada that are forging ahead in implementing digital systems to enable the public to access information from the court. It seems that offering

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{313} \textit{Ibid} at 33.
\item\textsuperscript{314} \textit{Ibid}.
\item\textsuperscript{315} \textit{Criminal Code, supra} note 34 at s 486.4(1).
\end{itemize}
\end{footnotesize}
electronic or digital filing for litigants in small claims matters has been the gateway into modernizing court systems. For instance, British Columbia first introduced electronic filing for small claims litigants in 2008, which Newfoundland followed in 2010, and a few years later in 2014 by Ontario.\textsuperscript{316}

British Columbia has since graduated to offering what it calls Court Services Online (CSO). BC’s CSO offers a number of core services. The “eSearch” service enables counsel and parties to have access to Provincial and Supreme Court civil files, as well as Provincial traffic and criminal court files 24/7.\textsuperscript{317} Members of the public are able to view information that is already publicly-available from Provincial and Supreme Court files, as well as Court of Appeal files.\textsuperscript{318} This general information includes items such as style of cause, names of the parties, and lists of filed documents.\textsuperscript{319} Publicly-available information is also made available to the public on the CSO regarding Provincial traffic and criminal court files,\textsuperscript{320} which can include information like the file number, name of participants, charges, appearances and other general information.\textsuperscript{321}

Another jurisdiction that offers digital access to court information through court websites is Manitoba. The province offers digital court record information of the Court of Appeal, as well as the Court of Queen’s Bench, which covers civil, family and adult criminal proceedings.\textsuperscript{322} Publicly-available information about court proceedings is available, such as the list of documents filed, court parties, and a schedule of hearings.\textsuperscript{323}

\textsuperscript{317} British Columbia Court Services Online, online: Government of British Columbia, Ministry of Justice <\url{https://justice.gov.bc.ca/cso/about/index.do}> [BC Court Services Online].
\textsuperscript{318} \textit{Ibid}.  
\textsuperscript{319} \textit{Ibid}.  
\textsuperscript{320} Cook, “Ontario launches”, \textit{supra} note 315.  
\textsuperscript{321} BC Court Services Online, \textit{supra} note 316.  
\textsuperscript{322} Manitoba Courts, \textit{Policy: Access to Court Records in Manitoba}, online: Manitoba Courts <\url{http://www.manitobacourts.mb.ca/site/assets/files/1129/access_policy_final.pdf}>.  
\textsuperscript{323} \textit{Ibid}.  

Finally, it is worth mentioning what has been happening in the civil law jurisdiction of Quebec with regard to digital systems to access court information. Quebec, unlike its common law counterparts, has been investing in digitizing its court systems for decades! For about forty years, docket information, known as the “Les Plumtifs” has been “progressively computerized since 1975 by the Department of Justice.” Impressively, through Les Plumtifs as administered through the provincial corporation, Société québécoise d’information juridique (SOQUIJ), users can now search from their own computer for direct online access to civil, criminal and penal judicial records from Quebec courthouses and municipal courts. Users can search for criminal records, disputes or prosecutions of individuals and corporations.

While the courts of the common law provincial and territorial jurisdictions in Canada have some catching up to do with respect to electronic access to digital court records and files, there are several aspects from existing access to court record policies across the country that support and espouse public accessibility to court records. Jurisdictions like Alberta and Ontario do a progressive and substantial job in placing a premium on openness and accessibility, as well as other courts of other common law jurisdictions that more fully embrace and meaningfully integrate the Dagenais/Mentuck principles into their access policies. Moreover, there are common provisions that courts can and should consider adopting into their access to court record policies in an effort to provide universal principles to support public accessibility and minimize concerns regarding the privacy of litigants and other stakeholders in court proceedings. Adopting universal principles into the access policies that oversee hard copy court records and documents will result in establishing a solid base when courts are ready to migrate to digital systems regarding court records and accessibility. As explored in this chapter, there are no shortage of issues and challenges with respect to electronic access to digital court records and files. No doubt some challenges are more complex than others that involve other fields of law, such as defamation, or legislative issues, such as statutory provisions within the Criminal Code. However, it is extremely likely

324 Pelletier and Austin, “Synthesis of Comments”, supra note 264 at 28.
325 SOQUIJ Intelligence Juridique, online: SOQUIJ <http://soquij.qc.ca/fr/english>.
326 Ibid.
that strides and advancements in technology and a more collaborative effort amongst jurisdictions will enable us to work together smarter, not harder, as we move into the future.

6 Conclusion

In this chapter, certain access to court record policies of some provincial and territorial courts from common law jurisdictions within Canada were identified and the provisions from those policies that promoted public accessibility to court records against the principles of openness, accessibility and the Dagenais/Mentuck test were presented. While several aspects of the Nunavut Court of Justice’s access to court record policy were highlighted in the previous chapter for their lack of promotion of public accessibility and implementation of various limitations and barriers against public accessibility, surprisingly, there are other aspects of the Nunavut Policy that fared better in the promotion of public accessibility over other access policies and as such were highlighted in this chapter. This chapter also took a look at the provisions of the other territorial and provincial courts’ access policies and highlighted those that demonstrated support of public accessibility to court records in accordance with the principles of openness, accessibility and the Dagenais/Mentuck test.

When it comes to the principle of openness, the “Public and Media Access Guide” from the Alberta Courts is an access to court record policy that fully embraces the principle of open court. The access to court record policies of Ontario and Saskatchewan are two other jurisdictions that promote openness of court. Further, when it comes to accessibility, Nunavut, most surprisingly, is the only jurisdiction with an access to court record policy that commits to a response timeframe when there is a request for court record access by the public. The commitment of issuing a response to a request within five days in the updated 2015 version of the Nunavut Policy is a significant improvement from the vague non-committal response that was included in the policy’s previous version, not to mention in comparison to the access to court record policies from the courts of other common law jurisdictions.
The Model Policy established by the JTAC of CJC in September of 2005 had included a recommendation against remote access of court records. Interestingly, the policies of Ontario and Nova Scotia enable users to obtain information from court records over the telephone. While the Nunavut Policy does offer basic information about an adult criminal record at “all times”, this only occurs after the first appearance of an accused.

As mentioned, the Alberta Policy promotes and applies the Dagenais/Mentuck test and principles in a thorough manner, complete with in-depth background information about the formation of the legal standard. The access to court record policies of Ontario and Nova Scotia, on the other hand, take a more general and streamlined approach by basing its policy on the general principle of public accessibility. In the common law jurisdiction of British Columbia, there are two access to court record policies covering the Supreme Court and the Provincial Court. The latter of the two court policies references the Dagenais/Mentuck test, while the former does not.

After surveying the provisions that best promote and severely limit public accessibility to court records, this chapter provided five general ideal provisions recommended to be incorporated into the access to court record policies of the courts of the common law jurisdictions in Canada. The first ideal provision to be considered is that all jurisdictions should have a publicly-accessible access to court record policy. Moreover, those provincial jurisdictions with existing minimal access policies should expand their policies to include more substantive provisions that are clearly outlined and available to the public. All policies should advocate for the principle of open court and meaningfully reference and integrate the Dagenais/Mentuck test and principles to ensure that any encroachment upon freedom of expression or limitation upon access is justified and warranted under the legal standard. As well, the third recommendation is that all policies consider and treat all members of the public equally. This means no special status or access rights accorded to members of established media organizations. Furthermore, in an effort to balance privacy concerns of litigants and other stakeholders involved in a court matter, I recommend that there be minimum and minimal measures taken to redact highly sensitive personal information from court records. This information would be sensitive and personal to a party to the litigation,
but would have no bearing or use for a member of the public or someone external to the file. The final recommendation is to ensure that the access to court record policies dealing with hard copy court records and files be organized and established before the collective Canadian judiciary and the attorneys general attempt to tackle the issue of how to govern and manage digital access to digital court records and files.

The issue of digital access to digital court records and files is one that gained popularity in the early 2000s and then tapered off a few years later. While no official body has come forward in recent years to propose a plan of action, it is highly likely that the digitization of this forum is inevitable and will have to be considered, integrated and adopted at some point. Perhaps if the existing access to court record policies remain in an inconsistent and varied state, then this may prolong the introduction of widespread digitization of court records. However, it is only a matter of time before the inevitable is unavoidable.

There are several proponents who caution against electronic access to digital court records, citing fears of data mining, fraud and the loss of privacy. However, these authors published their critiques of a digital advancement in court records a number of years ago. There have been many technological advances and possibilities that can work to safeguard and address general fears and concerns with respect to maintaining the integrity and structure of public accessibility to digital court records.

The shift from court registries as gatekeepers of court records and information in the analog, hard copy world shifts to them turning into publishers in building and maintaining digital court record repositories. With this shift in function and role, court registries find themselves in legal predicaments that unintentionally set off aspects of different areas of law that could possibly have a negative effect on them. One example is the reproduction or publication of potentially defamatory verbiage within court documents of a record that could invoke some liability upon the court register as he/she/they reproduce the documents, building upon the digital court record library.
Irrespective of these legal puzzles and outstanding questions, the digital shift is happening in large leaps and strides in some jurisdictions and in baby-steps by other jurisdictions. Quebec, Canada’s only civil law jurisdiction has been investing in digital court records and files for decades. Other common law jurisdictions, such as Manitoba and BC offer their own preliminary versions of access certain pieces of court information online. Either way, this is a matter that will have to be dealt with as time progresses. Hopefully in the interim, the courts of the common law provinces and territories of Canada can organize and adopt access to court record policies that bear some resemblance to each other in similar principles and substance that honour the open court principle, public accessibility, the Dagenais/Mentuck test while balancing, and not needlessly incorporating provisions that safeguard the privacy of litigants and other stakeholders in a court proceeding.
Conclusion

What may come across as something relatively innocuous – a bunch of court records sitting on a shelf – is rife with complexity and intricacy of issue when it comes to the organization and public access to these files. A number of issues and topics that pertain to public accessibility to court records and the policies that dictate how accessibility is granted have been covered in these chapters. The focus of this thesis has been an analysis of the access to court record policies of the provincial and territorial courts of common law Canada.

The first chapter of this thesis has provided a survey of the case law with respect to the principle of open court, as well as highlighting the importance of public confidence in the integrity of the judicial system and the proper administration of justice. This chapter also covered the importance of the Charter value of freedom of expression and of the press, specifically with regard to its function in disseminating information about the courts to the larger public, which includes the importance of the public and media having full and proper access to court records to assist in accurate newsgathering and reporting. Lastly this first chapter provided the jurisprudential history behind the Supreme Court of Canada formation and establishment of the Dagenais/Mentuck test, a legal standard of the utmost importance in determining whether an imposition or limitation upon freedom of expression is justified. In relation to access to court records, the Dagenais/Mentuck test fulfils an important role in how a determination is made as to whether or not the public should be restricted from accessing certain information from a court record.

Specifically, in accordance with case law, the Dagenais/Mentuck test is the standard upon which a judge decides what information should be unavailable to the public. The starting point is that there is a presumption of openness and therefore I argue that this is the starting point that should be adopted by access to court record policies (with some caveats as discussed above and summed up below). Instead of access policies allocating a broad right of power to redact and remove information from court records by court administrative staff prior to making these court records available to the public, I have argued that because the
onus is on the party requesting the information to be redacted to prove the elements of the *Dagenais/Mentuck* test, pursuant to case law, this is the process that should be followed.

The second chapter of this thesis has provided some insight into case law that demonstrates a movement by the Supreme Court away from a full embrace of the principle of open court towards greater protection of the social value of privacy. This chapter provided highlights from provisions from access to court record policies that seek to protect the privacy of litigants and other involved parties and individuals to a court case at the expense of limiting public accessibility. Such example provisions from access to court record policies included those that empower a member of the court staff to unilaterally and pre-emptively redact information from public accessibility, and provisions that fail to provide clarity about the costs associated with search fees and the prohibition against making copies of documents.

In the second chapter of the thesis, the general principles of openness, accessibility, and how the policy integrated (or failed to integrate) the *Dagenais/Mentuck* test provided a frame of reference in how certain provisions of some access to court record policies fell short. As the least friendly towards public accessibility of court records, special focus was placed on the access to court record policy of the Nunavut Court of Justice and the barriers and limitations within that policy. Nunavut is a remote territory with significant traveling distance between its towns and populations. Communities are small and closely-knit, some of which have experienced a disproportionately high concentration of violent crime. There are realities and factors unique to this jurisdiction that are not an issue in other provinces and territories within Canada. The chapter also highlighted the provisions of a few other access policies that offered some provisions that were similar in the overall approach taken by the policy of Nunavut.

The same principles of openness, accessibility, and the integration of the *Dagenais/Mentuck* test were considered in the third chapter of this thesis when determining which policies actually provided provisions that aided and assisted with better public accessibility to court records. The access to court record policies of Alberta and Ontario seem to be ahead of the curve in comparison to the other jurisdictions. However, there are provisions from other
access to court record policies from other common law jurisdictions that also have a
provision or two that furthers public accessibility, which even included recognition of a
provision from the Nunavut Court of Justice access to court record policy.

The third chapter also provided a rundown of ideal provisions that are recommended to be
adopted and incorporated into all access to court record policies of the territorial and
provincial common law jurisdictions in Canada. One major ideal recommendation was to
ensure that the access to court record policies with respect to hard copy court records be
established before the Canadian and provincial judiciaries move forward with organizing and
establishing a digital system with regard to electronic soft copy court record files and how to
manage public accessibility. It has been argued that there is overlap between the policy
provisions that apply to hard copies as they would apply to digital copies of court documents
and records, and the implementation of some consistency between policies would create a
logical foundation to build from when the common law provinces and territories of Canada
are ready to deal with a digital court record system. Moreover, considering that electronic
access to digital court records has been an area long neglected by the courts of the common
law provinces and territories, it simply makes sense to implement some order and
consistency between the policies.

It should also be noted that while some common law jurisdictions have dipped into the wide
pool of the digitization of court information, the civil law jurisdiction of Quebec has been
investing and implementing various policies and techniques in electronic court access since
the early 1970s. While no clear leader has emerged in recent years to lead the common law
provincial and territorial courts in how to approach and deal with the digital age, the
Canadian Judicial Council has made some investment in researching this area. I believe that
the CJC is the appropriate body to continue in leading options and strategy for how the
common law provincial and territorial courts of Canada should approach a digital system of
court record access.

By implementing similar provisions in the access to court record policies of the common law
territorial and provincial courts of Canada that support consistent public accessibility to court
records, this would be a key support of the Charter right of freedom of expression and freedom of the press, which would have a direct and positive effect on promoting public confidence in the integrity of the judiciary and the proper administration of justice. Members of the public and the media could stop guessing and instead work within a structure of reliable and clear policies with shared values that not only assist in fulsome and meaningful public accessibility to court records, but also within a system that respects and protects the highly sensitive personal information of litigants and other involved individuals and parties.

Further, I believe that greater resource allocation is necessary to distribute to courts to ensure the proper formation and application of consistent policies – especially those jurisdictions that have circumstances and realities that are unique to the region, such as Nunavut.

While there will always exist a fear of the unknown, being able to write the future also comes with limitless possibility. It is up to the courts and official bodies to ensure that our current systems are addressed and ameliorated, and that the implementation of future systems that bring with them progress and potential for improvement are not that far behind. Until then, we wade through the inconsistency and barriers in policy, whether deliberate or as a result of scarcity of resources, hoping that what we are reading is an accurate account of what is happening with the powers that be behind the doors that we are told should be open when they seem closed to us in practice.
APPENDIX 1

Breakdown of common elements in the access to court record policies of the provincial and territorial courts of common law Canada

<p>| ITEM                                    | AB   | BC                                        | MB  | NB  | NL  | NS  | NU  | NWT | ON  | PEI | SK  | YT |
|-----------------------------------------|------|-------------------------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| Access to court record policy           | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 65 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Aug 1, 2013                        | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 35 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Nov 2012                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 4 pgs.                            | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Aug 1, 2013                        | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 39 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Nov 2012                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 4 pgs.                            | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Aug 1, 2013                        | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 41 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: n/a                                | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 18 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Updated in 2015                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 43 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Nov 2015                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 43 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Nov 2015                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 43 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Nov 2015                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | Yes  | Written &amp; publicly accessible             | Yes | -   | -   | -   | -   | -   | -   | -   | -   | -   | Yes |
|                                        | -    | Length: 54 pgs.                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |
|                                        | -    | Dated: Oct 2011                           | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   | -   |</p>
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<th>- Yes</th>
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<th>- Yes</th>
<th>- ss.1, 2</th>
<th>- Yes</th>
<th>- s. 2.1</th>
<th>- Yes</th>
<th>- Section 1.1</th>
<th>- Yes</th>
<th>- Pg.30 General rule: “Court documents are a matter of public record.”</th>
<th>- Yes</th>
<th>- s.1, p.5</th>
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<td>- Yes</td>
<td>- s.5(b), p.32</td>
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<td>- no</td>
<td>n/a</td>
<td>- No</td>
<td>n/a</td>
<td>- No</td>
<td>n/a</td>
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<td>- Yes</td>
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<td>- Yes</td>
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<td>- s.1.2(c), p.6</td>
<td>- s.2.2, p.2</td>
<td>n/a</td>
<td>Access without delay unless legislation or order prohibit (on website)</td>
<td>- s.3</td>
<td>- s.7</td>
<td>n/a</td>
<td>- s.2.1</td>
<td>No specification other than court documents are matter of public record (p.30)</td>
<td>- s.4, p.13</td>
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<td>s.7, various</td>
<td>s.(d), p.31</td>
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<td>- Search fees, s.1.2(C)(i), p.5</td>
<td>- Photocopy fees, s.1.2(C)(iv), p.7</td>
<td>- Photocopy fees, s.1.2(C)(iv), p.7</td>
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<td>- Photocopy fees, s.1.2(C)(iv), p.7</td>
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<td>Access to Exhibits</td>
<td>- Civil, s.7.1</td>
<td>- Family, s.7.2</td>
<td>- Youth Criminal, s.7.3</td>
<td>- Criminal, s.7.4</td>
<td>Prov Court of BC</td>
<td>- s.3(b)(16)</td>
<td>n/a</td>
<td>Access to exhibits filed in Criminal, Civil and Family courts all specified (on website)</td>
<td>- s.3(b)(16)</td>
<td>n/a</td>
<td>- Criminal, s.6.1</td>
<td>- Civil and Family, s.6.2</td>
<td>Not specified</td>
<td>- p.38</td>
<td>n/a</td>
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Alberta

British Columbia
Supreme Court of BC
http://www.courts.gov.bc.ca/supreme_court/announcements/BCSC%20Court%20Record%20Access%20Policy%20-%20February%202014%202011.pdf

Provincial Court of BC

Manitoba
http://www.manitobacourts.mb.ca/site/assets/files/1133/access_policy_final.pdf

Newfoundland & Labrador
http://www.court.nl.ca/supreme/general/accessproceedings.html

Nova Scotia
http://www.courts.ns.ca/Media_Information/media_docs/media_guidelines_08_12_20.pdf

Nunavut
http://www.nunavutcourts.ca/court-policies/court-policies-and-fees

Ontario
https://www.attorneygeneral.jus.gov.on.ca/english/courts/policies_and_procedures/public_access/public_access_to_court_documents-EN.html

Prince Edward Island (p.30)
http://www.gov.pe.ca/courts/supreme/PracticeDirections.pdf

Saskatchewan
BIBLIOGRAPHY

Legislation


Canadian Jurisprudence

*AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175.

*Canadian Broadcasting Corp. v. Canada (Attorney General)* 2011 SCC 2.


*Canadian Broadcasting Corp. v. The Queen* 2011 SCC 2.

*Canadian Broadcasting Corp v The Queen* 2011 SCC 3.


*Grant v Torstar Corp* 2009 SCC 61.


*R v Magnotta* 2013 QCCS 4395.

*R v Mentuck* 2001 SCC 76.


*Toronto Star Newspapers Ltd. v. Ontario* 2005 SCC 41.

*Vancouver Sun (Re)*, 2004 SCR 43 at para 24.

**United Kingdom Jurisprudence**


**American Jurisprudence**


**Books**


**Monographs**


**Journals and Articles**


Crerar, David; Majda Dabaghi. “SCC upholds open court principle for media reporting on proceedings” (28 October 2005) TLW.


Jobbs, Dean. “Courts struggle to balance privacy and openness in giving access to court files over the Internet” (28:12) (18 July 2008) TLW.


**Access to Court Record Policies**


Other Resources

Ad IDEM/Canadian Media Lawyers Association, online: adidem.org

British Columbia Court Services Online, online: Government of British Columbia, Ministry of Justice https://justice.gov.bc.ca/cso/about/index.do.


SOQUIJ Intelligence Juridique, online: http://soquij.qc.ca/fr/english.