

Second Study Commission
Civil Law and Procedure
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Questionnaire 2020
HOW DATA PROTECTION RULES
ARE IMPACTING ON CIVIL LITIGATION

Response from the Canadian Association of Superior Court Judges,
CANADA

Introduction

Under Canada's federal system and government, the authority or "jurisdiction" to make laws is divided between the Parliament of Canada and the provincial and territorial legislatures. Parliament can make laws for all Canada, but only about matters assigned to it by the constitution. The provincial or territorial legislature, likewise, can make laws only about matters over which it has been assigned jurisdiction.

In Canada, each of our ten provinces and three territories have courts of general jurisdiction with authority over criminal and civil matters. The trial division is called either the Superior Court (in Ontario and Quebec), Court of Queen's Bench (in Manitoba, Saskatchewan, Alberta and New Brunswick) or Supreme Court (in British Columbia, Nova Scotia, Prince Edward Island and Newfoundland and Labrador). The appeal from these courts goes to each province's Courts of Appeal and then on to the Supreme Court of Canada. Each province and territory also have provincial courts with limited jurisdiction over criminal, family, and small claims matters.

In addition, Canada has a federal court system (the Federal Court (trial), Federal Court of Appeal, and the Tax and Martial Courts). These courts hear intellectual property disputes, cases against federal agencies and government, immigration and admiralty matters, as well as federal tax and military disputes.

Canada is a bijural country, one with two types of law. In matters of private law, common law is applied outside the Province of Quebec, while similar matters in the Province of Quebec are dealt with under the Civil Code. Common law is utilized for public law applied in and outside the Province of Quebec.

1. Do you store digital data in your jurisdiction?

Canadian Courts have stored digital data for sometime although the digital data was limited since there were very few jurisdictions that had any e-filing capability. The Pandemic has accelerated the acceptance of digital material by our Courts. Each provincial, territorial and federal Court jurisdiction store their own digital data.

2. How is it stored and for how long?

Each court jurisdiction is responsible for storing its digital data so the methods of storage vary across Canada. The Canadian Judicial Council (the “CJC” - comprised of Chief Justices across the country), through its Technology Committee, have over the years hired experts to provide guidelines and blueprints about storing digital court information independently which are then implemented in various jurisdictions (to varying degrees). These are public and can be found on its website at www.cjc-ccm.ca/resources-center/publications.

Generally, digital data has been stored indefinitely. However, with the explosion of data now being stored, and more to come, this issue will have to be re-visited.

Most jurisdictions store their data on government servers with firewalls. The Supreme Court of Canada is an example of an exception where it stores its information on independent Court servers. The use of the Cloud, and storage issues that result, is slowly being implemented and has been the subject of intense study recently.

3. Who has access to the digital data in your jurisdiction?

Generally, our Courts have allowed public access to digital court information based on the open court principle. The starting point is full access to court

proceedings and court information. The open court principle will be curtailed only in exceptional circumstances.

The CJC issued guidelines in 2012: “Court Information Management Policy Framework to Accommodate Digital Framework”. Some Courts have also instituted procedural steps to safeguard more sensitive information, such as in divorce files.

More recently, the following reports have been prepared to deal with the issue of bulk access requests by third parties and more work has been done on the refinement of the definition of Judicial Information in light of the movement by Courts to store data on the Cloud (“Bulk Access to Court Information”, April 2021, by Jo Sherman and “Model Definition of Judicial Information”, September 2020, by Martin Felsky – both available on the CJC website noted above).

4. Are there digital data protection rules in place in your jurisdiction?

Our Courts generally protect private information via publication bans, sealing orders, criminal code legislation and federal and provincial privacy acts. These restrictions on access may be set out in statute, or applied pursuant to the common law. As well, Courts have policies with respect to publishing judgements (i.e. to anonymise the parties referenced in the judgment in certain instances).

5. Who covers the costs relating to the storage and protection of the digital data in your jurisdiction?

Provincial governments cover the storage costs of digital data for Courts in their jurisdiction and the federal government covers the costs for the territorial, federal and Supreme Courts of Canada.