

CANADIAN COMMERCIAL LEGAL PUBLISHERS

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Introduction

In centuries past, simpler societies which operated without a written tradition, supported only a rough existence for their members. The advances of science and the civilizing effects of law required, among other things, the accumulation of knowledge in written form. Without this store of information, properly critiqued and analyzed through widespread discussion and distribution, could modern society have developed within an oral tradition?

A handful of publishers,¹ commercial as well as non-profit, provide, through their distribution, legal information and analysis in Canada. Commercial publishers are the main channel for its dissemination. Their role as publishers impacts the legal system. Comprehensive libraries of current, citeable,² precedent-value, appellate decisions are basic to the justice system. More speculatively, if Marshall McLuhan is correct in theorizing that the medium is the message, then print sources may be important for the development and maintenance of rational, lineal thinking, so basic to law.

For the purposes of this short discussion of the function and future of commercial legal publishers in Canada, let us define legal literature in three categories. Primary legal material provides the authoritative text of the law itself in the form of statutes, regulations, administrative board decisions and rules, and law reports from the various courts. Second, legal search tools, such as statute and case citators, various indices, digests and legal encyclopedias, provide access to primary material and a means to update, in an efficient fashion, changes by later primary material as well as combine the various sources of primary material together. Lastly, secondary legal literature, in the form of texts and law reviews, provides analysis and the intellectual integration and criticism of the law so necessary to perspective. The report *Law and Learning* outlined a series of purposes for secondary literature:

Conventional texts and articles—research designed to collect and organize legal data, to expound legal rules, and to explicate or offer exegesis upon authoritative legal sources;

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¹See, for example, the list of major Canadian and U.S. legal publishers in Peta Bates, "Selection Sources for Legal Materials," (1985) 10 *Canadian Association of Law Libraries Newsletter/Bulletin* 142 at 145.

²The Canadian Law Information Council has assisted the law publishers in clarifying this area. First, all the major Canadian legal publishers are now using CLIC's standards for case identification. This will mean a standard method for the style of cause or case name. Second, some Canadian courts are implementing (Alberta) or considering implementation (Newfoundland) of the CLIC/CBA Decision Numbering System. This would provide a "unique numbering system for decisions rendered by all Canadian courts. CLIC believes that a unique numbering system is a prerequisite to the future control of duplication of decisions retrieved from online retrieval systems. In addition, such a system would facilitate research of particular decisions and assist in tracking all decisions relating to the same matter." *Report to the Canadian Law Information Council's Funding Agencies: Council Activities for the period April 1, 1988 to December 31, 1988* (Ottawa: CLIC, Jan. 24, 1989) at 2.

Legal theory--research designed to yield a unifying theory or perspective by which legal rules may be understood, and their application in particular cases evaluated and controlled; this type would include scholarly commentary on civil law, usually referred to as doctrine;

Law reform research--research designed to accomplish change in the law, whether to eliminate anomalies, to enhance effectiveness, or to secure a change in direction;

Fundamental research--research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law.³

No secondary legal literature usually is solely of one type. Elements of some or all are frequently found in a publication. Secondary legal literature plays an important role through the "intellectual integration" of the various primary sources of law. From the "conventional" approach through "fundamental research," secondary legal literature provides intellectual beacons to help shape the law.

Commercial legal publishers provide us with much of our legal literature. Among the primary materials, they gather decisions, index and headnote them, as well as publish full decisions, or their summaries, in a citeable book form. Statute citators from commercial publishers provide references to case interpretations of the statute sections as well as, depending on the publication, reference to later statute amendments and their in-force dates. For some jurisdictions, the regulations and later regulatory amendments are presented by commercial publications in a more integrated fashion than the official sources provide. Legal digests abound. Legal encyclopedia continue to be produced by commercial publishers, while a 1975 law reform proposal for a government subsidized legal encyclopedia⁴ languishes.

Secondary legal literature by commercial publishers includes all of our basic reference texts seemingly without exception, as well as commercial law reviews. Non-profit law publishers, on the other hand, have usually grown from a need for continuing legal education of the bar. Their perspective tends to be focused on the production of "conventional texts" and materials "designed to collect and organize legal data, to expound legal rules."⁵ There is obviously a need for this

³Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: SSHRC, 1983) Supply & Services, Canada #CR 22-6/1983 65-66.

⁴M. L. Friedland, (in collaboration with Peter E. S. Jewett and Linda J. Jewett), *Access to the Law: A Study Conducted for the Law Reform Commission of Canada*. (Toronto: Carswell/Methuen, 1985) at 91-98.

⁵*Supra*, note 3 at 65.

material, but the continuing education focus tends to be on current issues and overviews of an area, rather than on a comprehensive reference text approach.

Commercial publishers do not, however, necessarily give the legal system what it "needs" in terms of publications. Rather, publishers are focused on what they believe the market will buy. The audience to which a publication is directed influences a number of factors including the form of publication, quality of print, type of binding, length of the book, etc. Further, legal publication is complicated through being divided by jurisdiction into larger markets for federal legal materials and the larger provinces' materials, on the one hand, and small markets for the less populated provinces, on the other hand. In addition, users of the various legal materials do not always demand the sources they should, leaving the less efficient aspects of search tools uncriticized as well as under-supported in the market-place. Participants in the education and articling system of legal training should at times place greater emphasis on skill and understanding in the use of legal literature, as well.

Law as a profession and indeed the operation of the legal system, is dependent on legal information. Good quality, fully indexed, appropriately supplemented legal materials are one cornerstone in the operation of a fair legal system.

Who Are They?

The largest commercial publisher--by the number of employees and by the number of its serial and monographic publications--seems to be Carswell Company Limited/Carswell Legal Publications, with approximately 300 employees.⁶ The company is owned by Associated Book Publishers (ABP), based in London, U.K. ABP was acquired by the International Thomson Organization Ltd. (ITOL) in 1987. In 1986, ABP reported 85 million pounds in revenue, with Carswell and Methuen contributing 20% of that revenue (17 million pounds) and showing a 3.4 million pounds profit.⁷ International Thomson Limited, a company with very large and diverse corporate holdings that include publishing and information (contributing 54% of revenue) "has concentrated on specialized publishing in the professional, business, financial services and educational areas."⁸

Canada Law Book Incorporated would seem to rank next with approximately 106 employees,⁹ and to be owned through a holding company by a group of individuals. Perhaps equally prolific, Butterworths of Canada Limited is owned by the British company, Butterworths Law Publishers Limited, which in turn is believed to be owned by a holding company, Reed International.

⁶D & B Canadian Duns Market Identifiers (D & B Canada Ltd.). Accessed as a Dialog database (Dialog Information Services Inc.).

⁷*Quill and Quire*: Canada's Book News Monthly (published by Key Publishers Company Ltd., Toronto), August, 1987 at 15.

⁸*Ibid.* at 15.

⁹*Ibid.*

Two other companies approach the market in a similar fashion, although differently from the forenoted publishers. Commerce Clearing House Canadian Limited, or CCH Canadian, is owned by the U.S. company of the same name.¹⁰ International Thomson Limited Richard De Boo Publishers, with some 65 employees,¹¹ is the other. Their market includes lawyers and other law-related people, but also encompasses business and corporate officials.

While these five are the major publishers of textual material, subject-oriented law reports and commercial legal journals, there are other commercial legal publishers. Western Legal Publications --a publisher of digests of law cases, particularly from Western Canada--and Emond Montgomery--a publisher of case books, are both now owned by Canada Law Book. Maritime Law Book Co. of Fredericton, New Brunswick, continues to focus on the publication of provincial law reports as well as reports of the federal courts. The Quebec market tends to be unique due to language and the different civil law tradition. Wilson and Lafleur as well as Yvon Blais seem to be principal commercial sources of secondary legal literature. The publication of legal material in both languages on topics of interest to all Canadians is not common.¹²

The role of larger companies like ITOL undoubtedly will be an important factor in the development of these commercial legal publishers, and their ability to produce cost-effective publications in the Canadian legal market-place. Corporate parents can bring investment, computer expertise, and staff expertise. The globalization of companies and corporate competition seems to be occurring in all areas. Legal literature prides itself on currency, as well as the integration of a multiplicity of sources. To provide this product in a competitive market-place will continue to require more, and better, internal computerization of publisher operations, as well as products utilizing new technology, for example.

In the years ahead, will competition intensify with the addition of new publications for Canadian law by American publishers? Will the Canada-US Free Trade Agreement have any effect on joint ventures or on integration of publishing companies?¹³

¹⁰See a brief description of the company history in *CCH Rapid Finder Index* (Don Mills, Ont.: CCH Canadian Ltd., 1988) at 5.

¹¹*Supra*, note 6.

¹²See The Honourable Jules Deschenes, "On Legal Separatism in Canada," (1978) 12 *Law Society of Upper Canada Gazette* 1 at 3-7 with regard to the reporting of Quebec cases, at that time, in specialized reports.

¹³The agreement does exempt cultural enterprises (including publishers) from "national treatment"--the other country's business people being treated by the law in the same fashion as that law treats the country's own business people. Second, the Canadian federal government's Book Publishing Policy (circa August, 1987) provides that a foreign company, acquiring indirect control of a Canadian publisher, must sell it to a Canadian within two years. The Free Trade Agreement indicates that the government could purchase cultural businesses at a fair price, independently assessed, if no other buyer was available.

What Do They Publish?

The triumvirate of Carswell, Canada Law Book, and Butterworths bring us many of the law report series, most of the search tools and texts, as well as some of the legal periodicals, CCH and De Boo, although each publish some monographs, focus their publishing on the frequently supplemented looseleaf services that bring together the statutes, regulations, and case summaries relevant to a subject, with commentary and forms, for one or several jurisdictions (eg. all provinces and the federal government, or in some cases, only one of those jurisdictions). The subjects addressed by these looseleaf formats are frequently statutory (eg. the subject's legal concepts are largely set and shaped by a statute), with case law fulfilling a necessary role of interpretation and the settlement of conceptual conflicts between different statute sections, or other law.

The subjects of these looseleafs are dominated by various forms of federal and provincial taxation, incorporation law, and labour law, including allied areas like occupational health and safety. These subjects appeal not only to lawyers, but to a larger market of accountants and company executives.

Over the last five to ten years, a number of the monographic publications of the other publishers have become looseleaf in format. Although not as frequently supplemented, the format allows for future supplementation as well as adaptation to major changes in the law of that area brought on by statute. It may also give the impression of occupying the market in that subject area with fairly current coverage (at least reasonably current given the economic/market realities of that publication).

At the same time, many new areas of law have sprung up--occupational health and safety, the Canadian Charter of Rights and Freedoms, employment equity, the expansion of human rights issues, environmental issues including toxic waste management and transportation, as well as others. The orientation of the publications is applied.

While commercial publishers are often involved in publishing law reports and search tools which assist in the use of law reports, statutes and regulations, Canadian publishers have not published annotated statute revisions, as American law publishers have done, except for specific statutes: the *Immigration Act*, for example, in book form. Whether this will change, as the amount and complexity of Canadian federal and provincial legislation increases, as well as the market size or the number of lawyers, will be interesting to see.¹⁴

The area of administrative board decisions is under-represented among commercial publications, relative to the number of boards. Those specialized boards which have a large constituency and whose decisions regularly have a large eco-

¹⁴It is interesting in this regard to note that York University Professor Mark Vale's study of Ontario legal research indicated the popularity of the detailed CLIC statute indices: *supra*, note 2 at 8. This may indicate a growing and recognized need for subject access to up-to-date statute revisions.

conomic impact or affect the rights of the constituency, are published: *Labour Relations Board Reports*, *Immigration Appeal Board Decisions*, and *Ontario Municipal Board Reports*, for example. These are the exception. An unpublished review of provincial administrative boards counted some 1,260 "law making" boards in the ten provinces and two territories.¹⁵ There would seem to be insufficient economic incentive to deal with the vast majority of this law.

Concerned with the field of secondary legal literature, *Law and Learning*, the Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, commented on the major law publishers in the following terms:

... Academic publications in law seem to hold no appeal for the 30,000 members of the practising bar. One publisher told us that print-runs of scholarly books would normally be only one to three per cent of the number of Canadian lawyers. In his words, 'Among law publishers, the practising bar is notorious for its reluctance to purchase any book that is not directly applicable to day-to-day activities.' While the potential market is therefore dismally small, the costs of production have risen rapidly in recent years, making unit costs of law books that are not practice-oriented almost prohibitive.

On the other hand, practice-oriented law books, such as law reports, apparently suffer from over-competition among existing publishers and a lack of rationalization of those publications not on the market. [The proliferation of specialized reporting services is noted, *inter alia*.]¹⁶

In reply, Mr. Gary Rodrigues, Executive Editor of Carswell Publications noted, in part:

... we are in a period of transition from the day of the generalist to the day of the specialist. This is a pattern, or a trend, that is apparent in the society at large and it is reflected in the legal profession. The new developments in law reporting and in the presentation of law reports is a reflection of the changing needs of the practitioner. I also believe very firmly that the effects of these new developments has been an improvement in the overall quality of reporting.¹⁷

¹⁵Under a Canadian Law Information Council Research Fellowship from 1987 through 1988, a survey of provincial administrative boards and other entities was attempted by the author of this article. Any board or other entity noted in the statutes of the ten provinces and two territories, which had powers provided by statute to make a rule or a decision that might impact a citizen's rights or property, was included. The boards listed did not include boards or officials where an official made a recommendation to another board or official, who was then empowered to make the decision. Where, however, the statute suggested that the decision was made by the official lower in the hierarchy, the first or original official (or board) was noted. Advisory boards such as Status of Women's Councils and Law Reform Commissions were also noted. A total of 1,777 references to boards and other entities was compiled. Of this total, 517 were advisory (eg. Status of Women, Law Reform, etc.) and 1,260 were considered "law making." Data was only compiled to approximately 1986.

¹⁶*Supra*, note 2 at 121-122.

¹⁷National Conference on Law and Learning, *Proceedings* (Dec. 1 and 2, 1983, Ottawa) at 107.

The dominant means by which the publishers produce legal materials is book form, of course. There is no reason why, as technology unfolds, other local electronic means, such as CD-ROM disks, accessed by a player and personal computer, may not be utilized by publishers to distribute their products, provided there is a sufficiently large market. Technology such as CD-ROM broadens the means of access to the information, as well as better integrating a variety of information on the same topic.

The new *West CD-ROM Libraries*, published by West Publishing of St. Paul, Minnesota, provide material on a subject, civil procedure, for example. Textual material on civil procedure, law cases on civil procedure, and the rules of procedure as well as relevant statutes and forms, are all combined on two CD-ROM disks. In addition to being able to page through the textual material via a microcomputer screen, the user may also "jump" from a textual passage in the book portion, to relevant statute sections (within a complete set of all relevant statutes for the subject), regulations, cases or forms, cited in the text. After reading the relevant section, or paging through the statute, the user may invoke a key and "jump" back to the same page of text where they began. This type of publication is expensive to prepare, particularly to code all of the links between text and statute, or regulation, or case.

This type of publication is a natural extension of traditional materials. It is used by one person at a time, costs a set amount no matter how frequent or infrequently it is used, and still requires up-dating as a textbook does. Accordingly, from the publishers' perspective, it has some natural economic appeal. It may be contrasted with the work of database vendors such as QL and Can/Law. (Can/Law is owned by one of the publishers, Canada Law Book...) Both systems contain databases that began, and continue, as published materials. There are, however, a number of databases on QL which do not have a print equivalent. The economics of selling service on a centralized database system is a little different from the publications business. The costs of providing a database system may be equivalent or even more expensive.¹⁸ Centralized databases are obviously a viable economic proposition, given the number of systems available. How their overhead and profits match up with more traditional legal publication methods (in paper or machine readable form) over a lengthy period of time, would be most interesting to see. As has been pointed out by Lorimer and Webber,¹⁹ centralized computer databases have a great potential to decentralize access and lower some information costs--one does not have to go to the local bar library, and one does not have a large capital outlay for a library--as well as quicker up-dating, because additions go to the one centralized database, accessed by all. On

¹⁸Colin Fong, "An Interview with Judith Sperling," 1988 (July-Aug., No. 87) *Australian Law Librarians' Group Newsletter* 128 at 129. Judith Sperling, Assistant General Manager and Deputy Managing Editor of CCH Australia Ltd., noted: "It is more expensive to provide information on-line than in print because virtually all of the most significant costs of producing a printed service are still incurred, e.g. collecting the information, explaining it, keying and checking. Only the paper and postage are saved, but in their place are very expensive computer costs."

¹⁹See Rowland Lorimer and Leigh Webber, *New Technologies and Access to Legal Information* (Ottawa: Canadian Law Information Council, 1987). A monograph in the CLIC series, *The Economics of Legal Information*.

the other hand, there are costs in terms of learning how to use the search strategies.

The Market Being Addressed

Who are the consumers of these products of the commercial publishers? These consumers form a market to which the commercial publishers direct their attention. Some critics, particularly critics of the more general search tools published, may feel that too often the publishers do not pay close enough attention. The need for new formats for old publications, for new publications and search tools, for better indexing, and for more frequent consolidation of supplements are the types of comments made.²⁰ Computer technology, properly organized and orchestrated, could provide many benefits, but it is expensive.

While there is a need for some risk taking, as well as well-thought out programs for improving publications, it must also be recognized that consumers need to be educated in terms of their use of legal research materials as well as their expectations. Research materials and finding law is only part of the problem. As *Operation Compulex*²¹, a study of the information needs of the Canadian practicing lawyer, noted in 1972: "... not all files require legal research ... Actual research is necessary for only some 20% of all matters referred to lawyers. Even where research is conducted, lawyers state that it is rarely required on an exhaustive basis to the extent that its problem areas adversely affect their work."

This is a generalization, of course. As the study goes on to point out, certain specialities require more research time than others.²² Further, of the average 20% of time spend on research, this time is broken into two components by that study:

- (1) Finding Law: 32% of research time;
- (2) Analysis to determine relevance: 68% of research time.

It is important to remember, particularly from the perspective of the purposes of secondary literature, that finding the law is only part of the research problem. The larger problem is determining whether the material is relevant. This would seem to be a good reason for the development of specialized textual treatments of law which would assist in focusing the lawyer's attention on relevant primary material.

The costs, particularly for editorial personnel, can be considerable, and there are, of course, financial thresholds above which publications cannot rise in price

²⁰See, for example only, "Dear Publisher," (1987) 12 *Canadian Association of Law Libraries Newsletter/Bulletin* 119-120.

²¹Canada Department of Justice. *Operation Compulex* (Ottawa: Dept. of Justice, 1972) at 25. Note that York University Professor Mark Vale has done a survey on legal research material and sources used by Ontario lawyers for the Canadian Law Information Council, in the summer of 1988.

²²*Supra*, note 20 at 52 and 65.

without undermining the base of subscribers that support them, given the limited number of subscribers in Canada.

In looking at the market which influences the way that Canadian legal publishers shape their products, the size of that market is the single most important factor. This factor assumes, of course, an ability to pay handsomely, relative to the costs of books in other fields, except perhaps the sciences. These relatively high prices also highlight the relative importance of information to active participants in the legal system.

One segment of this market which is not really obvious, is the public. In a philosophic or reflective sense, this is surprising. The public has, by legal presumption, a knowledge of the law and therefore a need to know, or to be able to determine, what the law is on a given topic. Overall the public does not seem to be well served. Public libraries, for example, find it difficult to provide legal information,²³ (as opposed to applied legal advice, which is the function of lawyers). The price of publications is high. Upkeep by supplements adds to the ongoing cost. The need for special staff training to put together the sources is yet another cost. These reasons are also undoubtedly major factors militating against individual purchase by the public. A major point is, however, readability. As in all professions, technical precision in meaning is ascribed to many legal words. Often too, some words are used, in differing legal contexts, with different meanings for each. The layperson, unschooled in terms of legal subjects and unused to the procedures, has great difficulty understanding the law, as well as updating the material with amendments and cases. Plain language use in law is currently under study by the Canadian Law Information Council (CLIC).

Judges and courthouses are an important segment of the legal publications marketplace. Smaller segments include law teachers (650 of them in 1983 in 20 law schools, civil and common law)²⁴ and lawyers in government (Crown attorneys or lawyers in agencies and government departments): in Ontario in 1981, for example, there were 1,098 lawyers or 7.3% of the total Ontario lawyer population.²⁵ Projecting this government lawyer figure for all of Canada, perhaps there are over 3,000 lawyers in government in Canada.

The single largest market segment is, of course, lawyers in private practice: some 34,200 in 1981. In 1979, there were 14,649 law offices in Canada.²⁶

²³Patricia Dewdney, Sam Coghlan, Christine Sue-Chan and Catherine S. Ross, "Legal Information Services in Ontario Public Libraries," (1988) 45 *Canadian Library Journal* 365. Also see: M. L. Friedland (in collaboration with Peter E. S. Jewett and Linda J. Jewett), *Access to the Law: A Study Conducted for the Law Reform Commission of Canada* (Toronto: Carswell/Meituen, 1975).

²⁴*Supra*, note 3 at 30.

²⁵See H. W. Arthurs, R. Weisman and F. H. Zemans, "Canadian Lawyers: A Peculiar Professionalism," in R. L. Abel and P.S.C. Lewis, eds., *Lawyers in Society*, vol. 1: *The Common Law World* (Berkeley: University of California Press, 1988) 128.

²⁶*Supra*, notes 21 and 25. Also see: Ann Foster, "Beauty and the Beast: the Lawyer and legal Information" in Colin Campbell, ed., *Data Processing and the Law* (London: Sweet & Maxwell, 1984) 52.

In looking at this market segment, there are a number of facts which could be speculatively applied to the last decade's trends in Canadian legal publishing. In particular, through the 1970's, the number of lawyers increased dramatically, at least doubling in size.²⁷ This undoubtedly helped to support an expansion of search tool publications in terms of their complexity, coverage and frequency, as well as the publication of new search tools, texts and new looseleaf publications.

The concept of the legal profession in private practice as one unified amalgam of interests, or one market for legal information is incorrect.²⁸ The continuing growth of specialization in practice is an important trend. The rise of the many subject specialized law reports published by Carswell and other publishers, is felt to be attributable to this trend in the profession.²⁹

The areas of specialization highlighted by a survey in 1980³⁰ included the following, (to note only some):

1. Commercial transactions
2. Corporate law
3. Negligence and damages
4. Criminal law
5. Civil litigation
6. Real property

Who would not add environmental law and labour issues (occupational health and safety, employment equity), to name two areas, to this list in the 1990's?

No person can hope to deal with all areas of law. Indeed it has been observed that all lawyers tend to practice in only a few areas.³¹ Further, specialization tends to go up with the size of the firm: the larger the firm, the greater the specialization. The growth, merger, and inter-provincial affiliation of law firms across Canada in the 1980's would signal further specialization.

As Canadian population size and the economy grow, the need for more lawyers will follow. Further, in an increasingly complex and inter-dependent world, regulation and law will undoubtedly also grow more complex and specialized. All of these developments will shape an interesting marketplace for Canada's commercial legal publishers through the year 2000.

²⁷Foster, note 26 at 52 and Arthurs, note 25 at 169. There seems to have been a 109.7% increase between 1971 and 1981.

²⁸*Supra*, notes 25 and 26. Foster, note 26 at 54-56 and Arthurs, note 25 at 151-158.

²⁹*Supra*, note 17.

³⁰*Supra*, notes 25 and 26. See Foster, note 26 at 55, but note that there was a low response rate at 51.

³¹*Supra*, notes 25 and 26; Foster, note 26 at 54.