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## **Digital Court Records: A Diversity of Uses**

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### **Abstract**

This article addresses the topic of digital court records, focusing on their uses. Our empirical research on access to dockets in Quebec revealed an important diversity of uses that we present and discuss in this paper. The original function of court records is to leave an official trace of courts activities, in respect of the public character of justice and the principle of accountability of public institutions. However, our study identified many practical objects of digital dockets. There are used in judicial contexts, as a summary presenting all the steps of a case, but also in other professional or private contexts, to conduct a background check, for instance. This article presents the various situations where digital dockets are resorted to, revealing an important diversity of uses. In a perspective of access to justice, we discuss the role of digitization in this diversity, focusing on two important issues. The first one is the question of access to digital dockets by self-represented litigants. In this framework, we discuss the progress brought by digitization. The second issue is related to the sensitive character of the information contained in dockets. It raises privacy questions that we address, as well as a deep reflection on digital access.

### **Introduction**

Digitization of the justice sector in Canada contributes to its modernization and is part of a solution designed to address the issue of access to justice (Benyekhlef, 2016). Court records are now

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computerized and often even accessible online. This digitization has brought changes to the very way that dockets<sup>2</sup> are resorted to.

In Quebec, computerized court records are accessible free of charge through computer terminals in courthouses. They can also be consulted online for a fee, through the website of La société québécoise d'information juridique (SOQUIJ, loosely translated as Quebec Legal Information Society), requiring a paid subscription to their service. SOQUIJ is a company whose purpose is to “analyze, organize, enrich and publish the law in Quebec” (SOQUIJ, n.d.-a), which operates under the authority of the Quebec Minister of Justice. In 1982, SOQUIJ obtained the mandate to release civil and criminal dockets; at that time, computerized dockets were available at the courthouse, freely accessible through a computer terminal.<sup>3</sup> In 2004, SOQUIJ implemented their online consultation system, followed in 2006, by the integration of municipal court dockets into their consultation systems.<sup>4</sup>

Since 2016, our research team has been studying both docket systems (computer terminals in the courthouse and the online consultation system) from the perspective of access to justice.<sup>5</sup> Our interdisciplinary research team focuses on the knowledge required to ensure better access to court records by identifying the multidimensional barriers faced by actual and potential users (*Le Plumitif Accessible*, n.d.). To this end, we conducted an empirical study comprising observation of individuals using the consultation systems in the courthouse together with semi-structured interviews of

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<sup>2</sup> In the context of our research, the terms docket and court record are both used to refer to court dockets, which are court files containing the official summary of proceedings in a court of law.

<sup>3</sup> Print copies were also available in the courthouse, upon demand and for a fee.

<sup>4</sup> Out of 89 municipal courts in Quebec, Montreal is the only one not yet integrated in the docket consultation systems.

<sup>5</sup> Our project, named “*Le Plumitif Accessible*” (Accessible Court Records), is part of a 6-year SSHRC-funded research project titled “*ADAJ, Accès au Droit et à la Justice*” (Accessing Law and Justice) that unites 50 researchers from 9 universities and 60 partners around this important issue. There are 23 research hubs studying different aspect of access to the justice system, with the object of building a broad and actual vision of the law, and to develop alternative practices for overcoming the obstacles standing between litigants and justice (ADAJ, 2019).

users of the two systems. The data collected in this context shed light on many important issues regarding digital access to court records, such as practical difficulties, awareness and knowledge obstacles, privacy challenges, as well as inequalities among the actors of the justice system in facing these issues (Prom Tep et al., 2019). In addition, our research gave us a broad and clear understanding of the context surrounding digital dockets in Quebec. A further fine-grained qualitative analysis revealed different contexts of uses of dockets, including some that were unexpected. Dockets being public documents, our research has focused mainly on the question of access for all. But realizing that the dockets serve multiple purposes, and that there are more contexts in which they are consulted than we initially thought, we developed new interrogations and reflections around this subject. What are the uses of digital court records? In which contexts are they used, and by who? This paper aims to answer these questions and to discuss the results from the perspective of access to justice. Actual and potential uses do indeed have an impact on the global issues related to access to digital dockets and to the justice system in general. The discussion prompted by our results led us to rethink the role of the digitization of public records.

The first part of this article introduces the approach and methods used to collect and analyze the empirical data, followed by a presentation of our research findings, shedding light on the variety of uses made of court records. We first introduce the main use identified (i.e., by lawyers in the context of their work), and then describe uses made by litigants themselves, who were often self-represented citizens. We also describe uses that we initially did not expect, such as background checks made by employers or journalists. We conclude this first part by highlighting the great diversity of uses made of digital court records.

Part two of this article reflects on a number of questions arising from this diversity of uses. We argue that digitization has eliminated, at least in part, the practical obscurity of dockets (Blankley, 2004), with a resulting impact on the various contexts in which they are consulted. We discuss this point first from the perspective of self-represented litigants, and second in relation to the issue of the right to

privacy, highlighting the potential dangers related to computerized and online court records.

### **Uses of Digital Court Records**

The preliminary findings of our research on access to digital dockets prompted us to deepen our reflection on access to justice. We noticed a clear disparity in the use of and access to court records between law professionals and laypersons respectively (Prom Tep et al., 2019). To further pursue our preliminary reflections, we analyzed our data in more detail to elicit the themes that would emerge (Thomas, 2006). This approach revealed more categories of users than we originally considered (i.e., law professionals and laypersons), and a great variety of contexts in which court records are consulted. Empirical research provided our team concrete information on dockets in Quebec, leading us to raise relevant questions and discussions regarding access.

### **Methodology**

Our research project “Le Plumitif Accessible” was designed around the general question of access to digital dockets, aiming to identify obstacles and possible solutions, and to ensure better access for all. We used a qualitative approach to understand the operation of both consultation systems (computer terminals in courthouses and the online consultation system) and the users’ experiences (Denzin & Lincoln, 2008). We were interested in collecting data about the users, the purpose and mode of consultation, and the consultation experience itself, particularly regarding access. To obtain this information, we conducted *in situ* observations of people using the docket consultation system in the courthouse (Mace & Pétry, 2017; Poupart et al., 1997). We coupled our observations with semi-structured interviews with the users of both systems to understand their perception of digital dockets and the process of accessing them (Paillé, 1991; Savoie-Zajc, 1997). We planned two phases for our data collection: first, we started out with the computer terminals at the courthouse, and in the second phase we brought a laptop to the courthouse that could access the SOQUIJ online system. During both phases it was a challenge to find and interview users who were not

law professional. In total, we interviewed 19 people, of which only 3 were litigants. Since the latter were important subjects in our access to justice project, we then planned a third phase consisting of approaching organizations working directly with litigants. We conducted interviews with three community justice centre employees who work daily with litigants.

To obtain a vision of digital dockets and their access, which was well grounded in the data we had collected, we conducted a qualitative thematic analysis (Paillé, 1994). We proceeded, with the help of data analysis software named *NVivo*, to code our interviews and observations by themes, which enabled us to build a classification tree, producing different categories (such as “challenges,” “users,” and “use contexts”) (Mucchielli, 2009; Paillé, 1994). Detailed analysis of these categories revealed the great variety of uses on which this article is focused. Studying the different contexts in which digital dockets are employed raised interesting questions and discussions regarding access and digitization. Even though the main purpose of digital court records is ostensibly to serve the judicial context, our study showed that the context of each docket consultation can be different and unique.

### **Contexts of Uses of Digital Court Records**

As public records, the dockets’ objective is to leave an official trace of the acts taken by a court (Éducaloi, n.d.). Every litigant has such a record, and anyone should be able to consult them given the public nature of justice, and the rule of law that “refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws” (Secretary-General of the United Nations Security Council, 2004). Accountability of the justice system is thus fundamental in this context. In Quebec, access to public records is guaranteed by the *Act respecting access to documents held by public bodies and the protection of personal information* (1982). As researcher Beth Givens (2002) underlined in her presentation on public records and privacy during the twelfth annual conference on Computers, Freedom and Privacy, dockets are essentially “tools to keep government accountable” and to “monitor” it (p.2). However, dockets have a

more practical function in a judicial framework. These records provide important information about litigants that can be useful in the context of a judicial case.

### *Court Records as a Tool for Lawyers*

Dockets contain information such as “the names of the parties, the court case number, the date of each hearing, a list of legal documents placed in the court file and decisions of the judge” (Educaloi, n.d.). They constitute a history of a case, which explains why they are so often used by lawyers. It is common practice for lawyers to take a copy of their client’s docket for their file, and they can refer to it for any practical information they need regarding a trial, their client, or procedures related to a case (Kolish, 2005). A legal expert we interviewed in a community justice centre explained that for lawyers, dockets can serve as a compass to obtain their bearings, particularly when their client was previously represented by someone else: “people have a hard time explaining their legal issue. So, sometimes, by listening to their version, and by looking at the docket, we can match the two versions together to have a better understanding of the case” (Legal expert 1, personal communication, April 20, 2018).

There are also more technical contexts in which lawyers resort to dockets. For instance, a lawyer we interviewed in the courthouse told us that she would consult any “record she has a [sic] interest in, even though she’s not the attorney on the case” (Lawyer 5, personal communication, June 28, 2017). This could be a record belonging to an accomplice, partner, co-defendant, plaintiff, or any other actor whose judicial background could be useful to know about when representing her client. Furthermore, for lawyers, dates are particularly important information in the dockets since the law sometimes provides time limits for taking specific legal actions or for starting certain procedures.

In terms of access, our study showed that law professionals use both of the docket consultation systems. Law firms and organizations often pay the subscription to SOQUIJ so that their employees can access court records online. However, as expected, this is seldom the case for small law firms or organizations with fewer financial

resources. Lawyers who we met at the courthouse told us that when they go there for procedures, they often take the opportunity to print out for free any dockets they might need (Prom Tep, Millerand, Bahary, & Noreau, 2018). Digitization has improved the method of accessing dockets for lawyers, but neither system is perfect yet in terms of use (Prom Tep et al., 2019).

Even though digital dockets display public information to guarantee accountability of the courts and justice system, they are a working tool for law professionals and serve as landmarks within judicial frames. However, law professionals are not the only users of dockets. Some litigants represent themselves in justice, and in such a context, court records are necessary for them.

### *Court Records as a Tool for Self-Represented Litigants*

The number of litigants representing themselves in Quebec and across Canada continues to grow (Bernheim & Laniel, 2015; Birnbaum, Bala, & Bertrand, 2012). The cost related to lawyers is the main obstacle driving litigants to self-representation. Researchers also discussed some complex reasons, such as the empowerment aspect of self-representation, which can motivate litigants to go to court without a lawyer (Birnbaum et al., 2012).

Obtaining the experiences of self-represented litigants using dockets was a challenge given the difficulty in reaching non-law professionals during our data collection. Notwithstanding, the interviews we conducted with legal experts from two different community justice centres featured significant information related to litigants' use and access to court records. Details and comments contributed by some lawyers we interviewed at the court also help us understand the experience of self-represented litigants.

The use of dockets as a practical reference tool within judicial cases does not seem to be so self-evident among unrepresented litigants. Community justice centres, encountering many citizens facing justice without a lawyer, aim to help litigants in judicial situations by providing them with relevant information (Centre de Justice de Proximité du Grand Montréal [CJPGM], 2018). The legal experts we

interviewed explained that they are frequently obliged to assist litigants in accessing and using their dockets. They cited two types of situation: unrepresented litigants already in possession of their docket, and litigants without their dockets, who require legal experts to print their dockets for them during the meeting. In the first situation, the litigant had often been represented by a lawyer before, but could no longer afford one, and the lawyer had handed over all their documents, including their records; typically, the litigant is not even aware they possessed such records. Whenever legal experts in the centres meet self-representing litigants who don't have a copy of their dockets, they will print them through the SOQUIJ online system.

[W]e are going to say: “Ok, you don't remember your file number or you don't have the needed documents with you, so I'm going to look for your name, I'm going to print it, put it on the table, we're going to take a look at it together, [...] look, this is your file number and here you see the final divorce decision, it was pronounced that day.” So, when they arrive at the Court, they already know what they need. (Legal expert 1, personal communication, April 20, 2018)

This depiction from a legal expert in a community justice centre clearly illustrates the circumstances in which self-represented citizens access their records. Court records are important in a judicial context and, in almost every situation, unrepresented litigants will need assistance to understand the content of their court record and how to interpret it (Prom Tep et al., 2018). Court records are intended to help obtain one's bearing in a court case, but they do not appear to be very effective when not used by professionals. In fact, SOQUIJ directs its docket consultation services mainly at professionals who have the skills to read and understand the content<sup>6</sup> (SOQUIJ, n.d.-c). Our observations suggest that court records are not designed with citizens in mind, but rather for professionals. As one of our interviewees in a community justice centre explained, whether it be knowing what a docket is, how to access it and how to use it, “it is not a record made for a citizen, it is an internal record, aiming to serve the legal field”

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<sup>6</sup> They also have services aiming to reach law laypersons, where a consultant will deliver to the client the information needed. This information may be contained in the docket that the consultant will access, without giving access to the client (SOQUIJ, n.d.-b).

(Legal expert 2, personal communication, April 10, 2018). With the issue of accessibility in mind, we discuss, in the second part of this article, the need to consider self-represented citizens as appropriate users of dockets.

Law professionals interviewed about citizen access to court records also reported situations where citizens resort to using dockets outside a judicial context, most of the time to conduct background checks.

### *Background Checks and Other Uses*

Our research revealed many cases where contracts were the reason behind judicial background checks. Many citizens visit community justice centres to obtain their court records because of requests from their insurers, landlords, and other institutions (Prom Tep et al., 2018).

According to a legal expert we interviewed, insurance companies almost systematically request a copy of their client's court record. Since they just ask for a copy, it is difficult to know which information in the record interests them. Our interviewee guesses that they check for potential criminal records, since this information could allow them to "increase their insurance coverage" (*Legal expert 3*, personal communication, April 10, 2018). It is also common for citizens to obtain a copy of their record to present to their employer or their school. In some companies, a candidate's court records are directly accessed by the human resources department. Again, the assumption here is that staff consult these records to be aware of any potential civil or criminal infractions. For the same reason, landlords can be tempted to ask potential tenants for a copy of their court records. Citizens looking for an apartment may also check court records of potential landlords for evidence and the nature of previous disputes (Prom Tep et al., 2018).<sup>7</sup>

More surprisingly, these background checks are sometimes conducted in a private context. A lawyer told us about parents

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<sup>7</sup> Rental disputes are governed by a separate government agency called La Régie du Logement. They also have their own dockets, which are accessible online through their website. Searches cannot be made by name, but by postal address.

wishing to check the court records of their daughter’s partner to see if he had a criminal past. Other similar situations were mentioned during the interviews, where curiosity and anxiety were the main drivers behind accessing court records.

In the conduct of a more professional activity, journalists also make use of dockets. SOQUIJ qualifies court records as “investigation tools” for journalists and investigators (Gélinas, 2017). They use them to explore people’s judicial history, or to follow a judicial case (Gélinas, 2018). Professor Elizabeth Judge (2002), in an article about electronic court records, indicates the “important role” that the media play in terms of judicial information (p. 8). Journalists have the same public access as citizens, “but [act] as the people’s eyes” (Judge, 2002, p. 8). Access to court records is needed to disseminate public information.

#### *Diversification of the Contexts of Uses of Digital Court Records*

Lawyers and law experts we interviewed point out an evolving context in the use of digital court records:

But it wasn’t made for them at the beginning, it was to follow a case and all. The problem now is that there is an increasing number of instances, where organizations, use [dockets] to qualify a person, and I’m not so sure that the people requesting them actually understand them. (Legal expert 2, personal communication, April 10, 2018)

All these observations and information allow us to conclude that there is a greater diversity of uses and users of digital court records than we initially expected when studying digital dockets in Quebec. Why and how did it become so common to consult dockets outside a judicial context? One reason raised by lawyers and legal experts we interviewed is that the actual official document used for a background check is the “nominative criminal record extract” that anyone can request in a police office; however, it is not free, and actually pretty expensive.<sup>8</sup> On the other hand, accessing court records through computer terminals in courthouses or obtaining them through

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<sup>8</sup> In Quebec, prices vary from 50 to 100 dollars (Site officiel du gouvernement du Québec, n.d.).

community justice centres is free of charge. Online access through SOQUIJ entails subscription fees, but if used regularly and for different records, the cost may be lower than the charge for a single record extract in a police office. The practical aspects of online access result in people consulting dockets rather than travelling to police stations to obtain criminal record extracts. Dockets and criminal record extracts are two different kinds of documents that cannot be used interchangeably for any purpose (SOQUIJ, n.d.-c). Nevertheless, to get information about someone's judicial background, they are equivalent and in terms of access, digital dockets seem then to be better than criminal record extracts.

Can we then imply that digitization enhanced access to court records for all? What are the challenges related to the diversity of uses? These questions are part of the reflections we developed when understanding the various contexts of uses of court records, and all the actors involved in the matter of access.

#### *Diversity of Uses of Digital Court Records: Issues and Challenges*

Understanding the conditions of access to dockets, and the nature and importance of the barriers standing between litigants and court records, was the first objective of our research. When the broader picture of uses and users of dockets was revealed to us, it exposed two major issues. First, there is the question of inequalities in facing barriers to access dockets, between law professionals, other professionals, and litigants. It seems that the modernization process developed through digitization did not fully consider all actors concerned in accessing court records. We will deepen our reflection around this consideration by studying the case of self-represented litigants, a group that is especially in need of assistance in the justice frame (Cabral et al., 2012). Within a judicial context, they aspire to use an information tool that was initially designed for professionals, which creates difficulties even though the technology was developed to enhance access. The second issue that we pursue here is related to the great and unexpected variety of uses of digital court records. Digitization has enabled easier access to the public information contained in dockets, to serve, as we have seen, a diversity of

purposes. Consequently, it seems inevitable that we address the question of privacy and all the issues surrounding it.

### **The Case of Self-Represented Litigants**

As we mentioned above, self-represented litigants frequently need assistance when it comes to dockets. Whether this assistance means being made aware of the records' existence, how to access them, or how to interpret them, our research showed there are many difficulties faced by litigants. Despite the computerization of court records that is intended to enhance access, barriers remain. After reviewing these barriers, we will analyze the role of digitization on the framework of access to justice.

In his work on access to justice, law professor Trevor Farrow (2014) considers the question from the perspective of “those who use the system” (p. 957). Our research on court records, which brought self-represented litigants to our attention, naturally led us to adopt a similar approach. Literature on access to justice generally goes in the same direction (Cappelletti & Garth, 1978; Macdonald, 2005), and so it is our precise frame of research with ADAJ that aims to put the litigant in the heart of the justice system (ADAJ, 2019). The following section will describe the different levels of issues faced by self-represented litigants aiming to access dockets.

#### *Obstacles to Access to Digital Court Records*

First, there is the problem of awareness and knowledge regarding dockets. As our interviews revealed, many citizens are unaware that they can access their court records, and that this could be useful, sometimes even necessary, when going to court. These records contain precious information for litigants, such as the date of their next hearing, or their file number. The journey to find this data can be very difficult. Some people end up finding it after going to the courthouse and asking around, which is very time consuming. In community justice centres, legal experts usually provide court records to citizens, highlighting the needed information (e.g., a date, a decision, or a file number), since litigants are not able to identify it.

Second, once aware of the docket's existence, accessing it is not straightforward; our research widely documented the practical obstacles to accessing computerized court records (Prom Tep et al., 2018). As mentioned above, there are two ways to access court records. The costless option, through computer terminals in courthouses, implies among other things that the user must travel to access their records. Patricia Hughes (2013), the founding executive director of the Law Commission of Ontario, documented the access situation of people living in rural areas; she considers that “[g]eographic location, often coupled with other factors, [...] affects access to justice” (p. 15). She explains how having to travel to courthouses generates financial and practical preoccupations in addition to the judicial ones. Besides, once in the courthouse, having passed security checks at the entrance, citizens still have to find and use the terminals. Our research report details the many technical obstacles to overcome when using the consultation system in the courthouse: “unintuitive, inconvenient and not very effective” (Prom Tep et al., 2019, p. 228) are some of the descriptions of the system. To sum up, the system is not user-friendly for self-represented litigants who lack the familiarity possessed by law professionals. The other method of accessing dockets, through the SOQUIJ website, presents an obvious financial obstacle, since a paid subscription is required, though the online system appears to be more user-friendly (Prom Tep et al., 2019). Even though it overcomes the distance barrier, it requires access to the internet, which is less universal than we may think (Schetzer & Henderson, 2003). Patricia Hughes (2013) also highlights the existence of a computer literacy challenge, since basic computer skills are required to use both systems.

Last but not least, self-represented litigants face a law literacy issue when reading court records. “[I]ndividuals using information, however acquired, must be able to read it, understand it and apply it to their own situation. Each of these tasks requires an increasing level of literacy” (Hughes, 2013, p. 13). Indeed, the lawyers we interviewed in the community justice centres reported problems in reading the dockets. An attorney told us that she, even though accustomed to consulting these files, still finds it difficult to understand and interpret them. Abbreviations are used to refer to

accusations or decisions, and sometimes the abbreviation of a word can vary from one docket to another. Dates are not always in the same format, and references to laws can differ too (Kolish, 2005). One of the legal experts we interviewed also confirmed that it takes practice and knowledge in the law to fully and properly understand dockets : “It is confusing for attorneys. So, for a non-attorney, it is nonsense” (Legal expert 1, personal communication, April 20, 2018).

Accessing and using dockets is an important part of litigants’ larger task of self-representation before the justice system. The variety of barriers encountered in this activity highlight the need to provide assistance during their “court records journey.” Facilitating access at all levels — from practical access to interpretation — could be a real support for self-represented litigants. Digitization was a step in this direction, given that its objective, among other goals, was to improve access (Cabral et al., 2012).

### *Better Access to Court Records through Digitization*

The nature of access to justice is multidimensional and very complex. In his work, former McGill professor Trevor Macdonald (2005) highlighted the fact that difficulty in accessing justice is often closely related to a personal situation. Every situation is different: “there are as many obstacles to justice as there are citizens seeking to access it,” as we mentioned in a previous paper about access to justice (Prom Tep et al., 2019, p. 237). The digitization of court records was introduced as a way to overcome some of the access obstacles, such as geographical ones (Epineuse, 2016; Hughes, 2013). The ability to access court records online, through the SOQUIJ’s services, is an improvement in that sense, and it may have participated in the diversification of contexts of uses revealed in our research. However, other issues have to be considered, such as access to the internet, digital literacy, or the paid subscription. The last is important for unrepresented litigants, since financial issues are often the reason for their self-representation (Birnbaum et al., 2012). Our research showed that it is mostly law firms and private companies that use SOQUIJ’s services (Prom Tep et al., 2018). When asked about improving access to justice for unrepresented litigants, a lawyer in a

community justice centre stressed the need to remove the charges for online access.

Online court records, especially when displayed in a user-friendly interface and system, can indeed enhance access for some litigants, but not for all of them. This last statement may seem counter-intuitive; however, Bailey, Burkell, and Reynold (2013), in their article on technology and access to justice, talk about “technological determinism that uncritically equates technological innovation with progress” (p. 205). Technology is not a universal answer to the access issue. Research has shown that what can appear to be a solution for some citizens, such as online court records, can raise barriers for others (Bailey et al., 2013; Hughes, 2013; Vermeys, 2016).

The above implies that the need for reflection about access to justice is never finished. When designing solutions, all the factors possibly affecting access must be identified and considered. There is a need for constant dialogue between the public and institutions, and constant care for and awareness of the litigant’s experience (Cabral et al., 2012). In a symposium for the ADAJ project last June 2019, Chief Justice Wagner stressed the need to leave behind traditional paradigms where citizens are excluded, and to build “an adequate justice for all, not an exceptional justice for a few individuals”.<sup>9</sup> Digitization is a means of progress in terms of access to justice but it cannot be considered as a perfect solution. Aside from the inequalities they can bring to the question of access, digitization and the internet have also generated many privacy and security issues.

#### *Challenges of the Various Contexts of Uses of Digital Court Records*

The digitization of court records has played an important role in the evolution of their use. Before computerization, accessing them was even more arduous: the records were paper files in the courthouse, a fee was requested to consult them, and copies could be obtained for an extra cost. Digital access generated a wider public, an advantage in terms of access to justice, in addition to unexpected uses, including potential dangers regarding privacy. Court records comprise sensitive

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<sup>9</sup> Loosely translated from “Une justice adéquate pour tous, et non une justice exceptionnelle pour certains,” Grande Rencontre ADAJ, Montréal, June 14, 2019.

information such as full name, address, and social insurance number. Elizabeth Judge (2002) explains that the content of court records makes them a particular kind of public record, and this makes “finding the appropriate balance between access and privacy especially difficult” (p. 3). After reviewing the potential dangers that digital and online court records present, we shall discuss the existing tension between accessibility of public records and privacy.

### *The Risks with Open Digital Court Records*

The main danger with open and facilitated access to court records is the misuse of the information displayed. Whether used by an identity thief or to discriminate, ill-intentioned people can access sensitive information when consulting the dockets. However, federal and provincial laws make provision for the right to privacy and protection of personal information. In Canada, it is the *Privacy Act* that guarantees these rights (Privacy Act, R.S.C., c. P-21, 1985). The Quebec Charter of Human Rights and Freedoms, in its articles 4 and 5, recognizes such rights as well as a right to safeguard dignity, honour, and reputation (Charter of Human Rights and Freedoms, C-12, 1975). The Charter also addresses discrimination in the context of employment. To discriminate on the basis of criminal records is illegal, unless “the offence was [...] connected with the employment” and has not been pardoned (1975, sec. 18.2). In addition to the right to privacy, specific laws relate to access to public documents and protection of personal information (Act Respecting Access to Documents Held By Public Bodies and the Protection of Personal Information, 1982; Act Respecting the Protection of Personal Information in the Private Sector, 1993).

Nonetheless, court records are public, and, in principle, anyone should be able to consult them. As presented above, they are often used as a safeguard in closing contracts, and there is a high risk of discriminatory outcomes when decisions are based on these records. During our interviews, many lawyers expressed their worries regarding the interpretation of dockets or the consequences of potential errors that could appear in the document: “we don’t know how the person that consults [it] whether they are an insurer, tenant... how this person reads it and what they understand from it. It could be

detrimental to the litigant” (Legal expert 3, personal communication, April 10 2018). This refers to the law literacy and experience required to understand the written content of dockets. Aside from this, it is not rare to find typing errors within the text or to find records that are not up to date, which could be particularly problematic in the case of acquittals or dismissals. Beth Givens (2002), in her presentation on online public records, talks about the absence of “social forgiveness” (p. 4). Our interviews also revealed possible problems regarding people with the same name and/or birthday (Prom Tep et al., 2018). An attorney told us that this can be harmful, in the context of background checks, to people with common names In the words of Givens (2002): “There is no such thing as a perfect database. And there are no infallible users of data files” (p. 4).

Another “valid source of worry,” according to Nicolas Vermeys (2016), deputy director at the Université de Montréal’s Cyberjustice Laboratory, “is that private organizations such as data brokers, insurance companies, and banks could mine court records” (p. 130). Commercial interests in general could lead to exploitation of the data contained in the records. Givens (2002) explains:

Compiling public records information from several sources and merging them with commercial sector data files allows the data to be sifted and sorted in many different ways. Brand new records are created. The types of uses that can be made of these new records extend far beyond the original public policy reason for collecting them. (p. 4)

She provides an example where a US company organizing tours for singles accessed divorce files to obtain names and personal information to promote the tours (Givens, 2002, p. 4).

These privacy considerations, coupled with the litigants’ lack of knowledge regarding dockets, can create stressful situations for the litigants. The legal experts we interviewed told us about observing some litigants who became anxious when accessing their dockets online through SOQUIJ. An attorney from a community justice centre described a litigant’s reaction when he saw his name on the computer together with details of his judicial history:

[H]e told me that if I have access, certainly other people do too, and he asked, “[I]s it like Google, does it appear on Google?”; it created a lot of issues and anxiety for this person. I saw his distress. He was like, “[H]ow do I erase it?” (Legal expert 1, personal communication, April 20, 2018)

In general, people are worried when they learn that court records are public and accessible online. Even though this is the consequence of a transparent justice system, it can increase distrust towards it. A contradictory tension exists between trust in the justice system and trust in the docket consultation system. In her article about electronic court records, Elizabeth Judge (2002) distinguishes between users and subjects of the dockets: “we tend to appreciate public resources that reveal information about other people, but to criticize those resources when they reveal information about ourselves” (p. 6). All these dangers and issues must be taken into consideration when designing safe and effective access to court records.

#### *Public Access to Court Records and the Right to Privacy*

Many researchers consider that the delicate balance between public access and privacy is not a new issue in the context of access to justice (Givens, 2002; Hughes, 2013; Judge, 2002; Vermeys, 2016). Nevertheless, it is the potential availability of court records via the internet that has put the topic under the spotlight. Our study shows that having the records online means it is impossible to be aware of all the uses made of the dockets. Indeed, before internet access, people were required to explain to the clerk in the courthouse why they needed to access records, and it was thus easier to identify intentions and to prevent jeopardizing the right to privacy (Sudbeck, 2005). These circumstances amounted to “practical obscurity,” a term broadly used to describe a situation where public documents are accessible to all in principle, but there are obstacles in place that ensure it is not “too easy” to access the information. Kristen Blankley (2004) explains this phenomenon:

Prior to Internet publication, sensitive material contained in court documents was protected by the phenomenon of “practical obscurity.” [...] With this information (now) available at the click of a mouse, the government increases the risk of identity theft or other misuse of this sensitive information. (p. 413)

So, should we go back to paper files? As stressed above, widening access to court records is a matter of access to justice and accountability of the justice system. “The public policy reasons for making them available electronically are irrefutable — promoting easier access to government services as well as opening government practices to the public and fostering accountability,” notes Givens (2002, p. 5). Many actors could benefit from open access: lawyers, all litigants, the media, and any citizen interested in a case (Morman & Bock, 2004). The issue then is not whether to accept or reject computerization but deciding on which definition of public access is relevant in this digital context.

Defining effective public access requires choosing what information should be displayed and, moreover, which principles underlie these choices. A full-access approach recognizes the principle of equal access for all, removing any kind of practical obscurity, and promoting free online access (Deyling, 1999; Prom Tep et al., 2019). Other approaches consider the right to privacy as an important principle within the access issue, such as the hierarchized access approach which focuses on the purpose of dockets. In an article about computerized court records, our team studied the Australian system where “the docket is viewed as a judicial monitoring device or tracking tool” (Prom Tep et al., 2019, p. 236) and can be fully accessed only by actors involved in the case and partially accessed by the public. Altogether, there are many ways of conceiving public access, depending on the weight given to different principles. Nevertheless, there is a growing consensus among law scholars that a shift has occurred in the question of access to justice that puts the interest of the citizen at the heart of the issue. According to Elizabeth Judge (2002), many access systems are now designed considering “that privacy and personal information are interests that should be recognized, even where the source of the information is a ‘public’ document or can be viewed in public, so that transparency and private life can be balanced” (p. 7).

Our analysis points in the same direction. In community justice centres, the general policy emphasizes privacy and requires strong reasons for consulting another person’s record. Their objective is to support the litigant who needs to access their docket, but as an

employee told us “not to allow everyone to access data about someone else” (Legal expert 2, personal communication, April 10, 2018). Another attorney explained that there exists a professional conscience and moral framework that prevents law professionals from using the data contained in dockets in a harmful way; however, this is not the case for non-law professionals. So, in community justice centres, when people wish to consult someone else’s records outside of a judicial context, they are redirected to the courthouse.

Among the issues of equal access for all, the right to privacy, accountability of and trust in the justice system, modernization and effectiveness of public administration, there are many elements to consider on the subject of access to digital court records. Elizabeth Judge (2002) recommends careful progress in this context, one which avoids repeating the mistakes of other states that “went ‘e’” too fast, causing damaging consequences for citizens (p. 3).

## **Conclusion**

Court records are important to the subject of access to justice. Implemented under the principles of transparency of public administration and accountability of the justice system, they have proven to be necessary tools for anyone involved in a judicial case. It is thus important to be concerned about access to court records, especially as litigants are increasingly representing themselves in justice. Our inductive research, however, has revealed other uses of digital dockets that make us rethink our approach to the access question.

We noted that the digitization of court records has facilitated diversification in their use, and partially removed the practical obscurity surrounding them. Of the many uses being made of court records, some present high risks for discrimination and the right to privacy, and while these uses go beyond the main purpose of dockets, they represent an evolution which must be considered when designing digital access to the dockets. From the perspective of access to justice, there is a strong interest in understanding and classifying these different functions attributed to dockets, since they have a significant impact on access to computerized court records.

Even if court records are now accessible online, people seeking to access them face many obstacles. Law professionals expressed a need to improve the consultation systems and the way dockets are presented to make them more practical and effective in support of their work. Self-representing litigants face even bigger obstacles to court records; digitization has enhanced access, but not for everyone. The solution to the access problem is more complex than computerization. It must embrace all the possible barriers, all the potential users, and all the challenges related to court records. In other words, a multidimensional solution is needed and must be based on the actual purpose and role of dockets.

There are many issues to consider when working on better access to justice for all, as our study on the uses of digital court records clearly illustrates. Consequently, we conclude by stressing the need for a very careful and citizen-oriented approach when designing access to digital court records. The great diversity of uses presents challenges that are sometimes difficult to reconcile.

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