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Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information

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OPENNESS OF COURTS CAN serve laudable purposes, not the least of which are transparency of government and court systems and access to justice, although accounts of the open court principle's meaning, breadth, and underlying purposes have expanded and shifted over time. Currently in Canada the adherence to the principle has meant presumptive access to almost all aspects of court cases, including access to personal information about parties and witnesses, encompassing not only information contained in court judgments, but also information contained in documents filed in court offices. Historically, notwithstanding this presumptive access, practical obscurity has protected much of this information, in that most people will not trouble themselves to physically attend court offices in order to review records filed there. While the practical obscurity generated by having to physically access court records made it difficult for the public to interact with and understand the law and legal outcomes by, for example, imposing a barrier to public access to court judgments, it also protected privacy by minimizing the likelihood of widespread public inspection of personal information about witnesses and litigants. Moving court records online makes those records more easily accessible and thereby undermines practical obscurity. This change offers the benefit of improving

LA PUBLICITÉ DES DÉBATS de nos tribunaux judiciaires peut servir des objectifs tout à fait louables, dont la transparence du gouvernement et du système judiciaire et l'accès à la justice ne sont pas les moindres, même si les analyses de la signification, de la portée et des objectifs sous-jacents du principe de la publicité des débats judiciaires n'ont cessé de croître et d'évoluer au fil du temps. À l'heure actuelle, au Canada, l'adhésion à ce principe implique un accès présumé à presque tous les éléments des décisions judiciaires, notamment l'accès aux renseignements personnels des parties et des témoins, ce qui englobe non seulement les renseignements contenus dans les décisions judiciaires mais également l'information figurant dans les documents consignés dans les greffes des tribunaux. De tout temps, nonobstant cet accès présumé, l'obscurité pratique a fait en sorte de protéger l'essentiel de cette information, dans la mesure où la plupart des gens ne feront pas l'effort de se déplacer physiquement pour consulter dans les greffes les dossiers qui y sont entreposés. Bien que cette obscurité pratique découlant de l'obligation de se déplacer pour accéder aux archives judiciaires ait pu, en quelque sorte, nuire à la compréhension qu'a le public de la loi et de l'issue des procédures judiciaires en imposant un certain obstacle à l'accès aux décisions judiciaires, elle a su du même coup protéger la vie privée

public access to law and legal reasoning, but in the online context, maintaining a default in favour of presumptive access could also have devastating effects on privacy. Unfettered online access removes the inconveniences and personal accountability associated with gaining physical access to paper records, not only opening up public access to court judgments, but also opening up sensitive personal information to the voyeuristic gaze of the public. We take the position that in this context, presumptive access to personal information about parties and witnesses jeopardizes the fundamental human right to privacy without substantially contributing to the underlying values of the open court principle: transparency and access to justice. Ultimately, we suggest that mechanisms to reintroduce friction into the process of gaining access to personal information ought to be taken to rebalance the public interest in open courts with the public interest in the protection of privacy.

des gens en minimisant le possibilité d'une inspection publique généralisée des renseignements personnels relatifs aux témoins et aux parties en litige. Le transfert de ces dossiers judiciaires sur un support en ligne les rend désormais aisément accessibles, ce qui diminue d'autant l'obscurité pratique. Ce changement offre certes l'avantage d'améliorer l'accès du public au droit et au raisonnement juridique, grâce à l'accès en ligne, cependant, le fait de maintenir ce défaut en faveur d'un accès présumé pourrait également entraîner des conséquences négatives sur la vie privée. En effet, un accès en ligne inconditionnel et illimité supprime, ce faisant, les inconvénients et la responsabilité personnelle associés à la nécessité de se déplacer physiquement pour accéder à des dossiers en version papier, non seulement en permettant l'accès aux décisions judiciaires mais en offrant qui plus est des renseignements personnels délicats au regard éventuellement voyeur du public. Nous sommes d'avis que, dans un tel contexte, l'accès présumé à des renseignements personnels au sujet des parties et des témoins compromet le droit fondamental de tout un chacun à sa vie privée, sans pour autant contribuer de façon importante aux valeurs qui sous-tendent le principe de la publicité des débats judiciaires, soit la transparence et l'accès à la justice. En dernier ressort, nous recommandons l'adoption de mesures rétablissant une forme de « difficulté » dans le cadre du processus d'obtention d'un accès aux renseignements personnels et ce, afin de rééquilibrer l'intérêt public à l'accès aux débats judiciaires avec l'intérêt public à la protection de la vie privée.

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INTRODUCTION

Although there is a long history of commitment to the open court principle throughout common and civil law systems, the principle has not been uniformly conceived of or applied over time. In this paper, we pay particular attention to one particular shift: although discussion of the open court principle initially focused on holding public officials involved in the legal process to public account, it has also been used to motivate presumptive openness with respect to personal information about parties and witnesses. As a result, unless restricted by explicit court order or in specific and identified types of proceedings (*e.g.* youth court), the public has access to any and all information revealed by or about parties and witnesses in court proceedings. This information can include, in addition to one's name, identifying and/or sensitive personal information such as addresses, names of children, financial information, social insurance number, and details about personal and professional life. Personal information can be found not only in court judgments, but also in numerous other kinds of documents filed with courts, including but not limited to: affidavits, at-

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tachments to affidavits (such as financial statements), and facta. The default of presumed accessibility continues even as documents forming part of court files move online, where the privacy of litigants and parties is no longer protected by the practical obscurity afforded by the requirement of physical access to paper documents.[1] Presumptive openness in an era of online publication could have devastating consequences for privacy, without substantially contributing to the fundamental underlying objective of the open court principle: that is, transparency and accountability of the justice system.

There can be no question about the sensitivity of the personal information revealed in court documents. Documentation in family law cases, for example, regularly includes names, addresses, telephone numbers, dates of birth of parties, details about children (*e.g.* names, ages, *etc.*), and financial account statements.[2] Personal injury cases also include significant information about the health and health care of litigants. In many cases, this information would be subject to protection if collected by other actors in other contexts. Banks, for example, are not at liberty to release sensitive financial information, and health care providers are required to protect personal health information. Furthermore, although the accountability requirements for public systems (including the Canadian health care and educational systems) clearly implicate information about members of the public who take part in those systems as patients or students, there is no default to openness with respect to personal information in these systems—individual health care and student educational records are not presumptively open to the public. Thus, in situations other than court proceedings where personal information is revealed, the default is to protect the privacy of the individuals involved.

This paper explores the justification for the default to openness[3] with respect to all aspects of court proceedings, including personal information regarding parties and witnesses. Our purpose is not to suggest specific

1 See Arminda Bradford Bepko, "Public Availability or Practical Obscurity: The Debate Over Public Access to Court Records on the Internet" (2004) 49 NYL Sch L Rev 967; Nancy S Marder, "From 'Practical Obscurity' to Web Disclosure: A New Understanding of Public Information" (2009) 59 Syracuse L Rev 441.

2 See Fareen Jamal, "Naming and Shaming in the Family Court", online: (April 2011) 36:2 Briefly Speaking 32 <www.issuu.com/ontariobarassociation/docs/brieflyapril2011>.

3 Note that while openness of court records is the default in many jurisdictions, including Canada and the US, this policy is not universal. See e.g. James B Jacobs & Elena Larrauri, "Are Criminal Convictions a Public Matter? The USA and Spain" (2012) 14:1 Punishment & Society 3.

solutions (which in the online context would necessarily involve collaboration with technology experts), but to highlight in detail the historical and contemporary parameters of the issue. We examine the impact of the turn towards online accessibility of court records (including judgments, documents filed with courts, *etc.*) that makes this issue even more pressing—increased access to information from online publication heightens the challenge of striking the right balance between the openness necessary to facilitate court accountability and transparency, and the privacy interests of parties and witnesses.[4] We trace some of the key developments in the conceptualization of the open court principle and examine the privacy impact of technological changes on access to court records. Ultimately, we argue that presumptive public access to court records containing parties' and witnesses' personal information has always undermined privacy without necessarily serving the underlying purposes of the open court principle, and that this is especially true in an era of online publication. We therefore recommend improvements to the confidentiality of parties' and witnesses' personal information in all court records made available online.

Part I provides a short historical overview of the open court principle, considering its stated underlying purposes, as well as its benefits and shortcomings. Part II first examines, more specifically, the aspect of the open court principle that defaults in favour of public accessibility of the personal information of parties and witnesses. It considers the stated relationship of this default to the open court principle itself, as well as the foundation upon which exceptions to that default are based. Part III specifically considers the impact of technological changes, including the online accessibility of court documents, on the privacy rights of witnesses and parties, questioning the consequences of a default in favour of public accessibility to parties' and witnesses' personal information in terms of the underlying purposes of the open court principle. The conclusion highlights the need for an alternative model for civil litigation: one that defaults in favour of confidentiality of the personal information of witnesses and parties. We explore whether such an approach more fairly and equitably achieves the underlying objectives of the open court principle: accountability and transparency that encourages public confidence in the justice system, without unnecessarily compromising the privacy interests of its participants.

4 See e.g. Kirk Makin, "Online Tribunal Evidence Leaves Citizens' Data Open to Abuse", *The Globe and Mail* (20 August 2008) A5, online: <www.theglobeandmail.com>.

I. THE OPEN COURT PRINCIPLE

A. Origins and Underlying Purposes

A commitment to the openness of courts is expressed in a variety of national and international legal instruments and decisions.[5] It has been suggested that the open court principle itself originates in the 1215 *Magna Carta*.[6] Although the vast majority of its provisions have been repealed, the *Magna Carta* is valorized as the foundation of democracy in England, particularly because it expressed the idea that royalty and non-royalty were equally subject to the law.[7] King John signed the *Magna Carta* to buy a short-lived peace in the realm by guaranteeing certain rights and liberties to "free men."[8] Chapters 39 and 40 are said to be specifically relevant to the open court principle:

> 39. No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.
>
> 40. To no one will we sell, to no one will we refuse or delay, right or justice.[9]

Others subsequently interpreted the *Magna Carta* in general and these chapters specifically as supporting the assertion of individual rights against the exercise of royal authority and universal application of the rule of law. As Blackstone put it in his *Commentaries of 1765*, referring to Sir Edmund Coke:

> A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administred [*sic*]

5 See The Right Honourable Beverly McLachlin, "Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003) 8:1 Deakin L Rev 1 at 2.

6 See Suzanne L Abram, "Problems of Contemporaneous Construction in State Constitutional Interpretation" (2000) 38 Brandeis LJ 613 at 614.

7 See Claire Breay & Julian Harrison, "Magna Carta: An Introduction", *British Library*, online: <www.bl.uk> (it has also been credited as a foundational symbolic document in the creation of other constitutions, including the American *Bill of Rights* and the United Nations *Universal Declaration of Human Rights, 1948*).

8 See *ibid* (notably, most of the population of England were not "free men" but rather "unfree" peasants to whom these rights and liberties did not apply).

9 Gerald Murphy, "The Magna Carta (The Great Charter)", *Constitution Society* (25 September 1995), online: <www.gutenberg.org>.

> therein. The emphatical [*sic*] words of *magna carta*, spoken in the person of the king, who in judgment of law (says sir Edward Coke) is ever present and repeating them in all his courts, are these; "*nulli vendemus*, *nulli negabimus*, *aut differemus rectum vel justitiam*: and therefore every subject," continues the same learned author, "for injury done to him *in bonis*, *in terris*, *vel persona*, by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of parliament wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows; or may know if he pleases: for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament.[10]

Blackstone's analysis connects three fundamental ideals of justice: (i) all individuals should have access to courts of justice as a means to resolve their disputes; (ii) courts should resolve those disputes by applying the same law to all without bias; and (iii) the law itself should be knowable by all individuals. Many, including Bentham,[11] have viewed courts as a means of serving these ideals, particularly the last two, by educating the public and disciplining the state.

Open courts educate the public about the court system by allowing them to see the functioning of the courts. Through access to the courts, the public gains familiarity with courts and court proceedings.[12] Open courts are also said to facilitate public participation in the "ritual of the trial," creating the sense among the public that they have an important role to play in calling the state to account. Indeed, courtrooms are designed as physical expressions of the relationship between the public and the ideals of justice.[13] Open

10 William Blackstone, *Commentaries On the Laws of England: Book The First* (Oxford: Clarendon Press, 1765) at 138, online: <www.gutenberg.org> [emphasis in original].

11 See John Bowring, ed, *The Works of Jeremy Bentham, Published Under the Superintendence of John Bowring*, 9th ed (Edinburgh, UK: Tait, 1843) at 493. See also Judith Resnik, "Bring Back Bentham: 'Open Courts', 'Terror Trials' and Public Sphere(s)" (2011) 4 L & Ethics Human Rights 4 at 5, online: <digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4877&context=fss_papers>.

12 See generally David A Harris, "The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System" (1993) 35 Ariz L Rev 785.

13 See Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Abingdon, UK: Routledge, 2011) at 10, 84; Judith Resnik, Dennis E Curtis & Allison Anna Tait, *Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere*, ed by Richard K Sherwin & Anne Wagner (New York: Springer Dordrecht Heidelberg, 2013) 515 at 515.

courts can build public investment[14] in the process of justice (particularly in criminal cases, where crimes are characterized as an offence against the community as a whole).[15] It has also been suggested that the open court principle could reduce crime by allowing the public to express disapproval of the acts of criminally convicted persons, and by promoting public discussion of important issues.[16] Canadian jurisprudence also closely connects the principle with constitutional rights to free expression and freedom of the media, which the Supreme Court of Canada has held to include "freedom to express new ideas and to put forward opinions about the functioning of public institutions."[17]

The very legitimacy of the legal system depends on "public acceptance of process and outcome,"[18] and the open court system promotes this acceptance by ensuring the accountability of the justice system. Canadian courts regularly state that the open court principle builds public confidence[19] in the integrity of the judicial system by allowing members of the public to hold judges to account.[20] For example, in *MacIntyre*, the Supreme Court of Canada, relying on the words of Bentham, noted that there is a strong public policy in favour of "openness" with respect to judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:

> 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 . . . . Publicity is the very soul of justice. It is the keenest spur to

14 Historically, however, only those able to attend court and literate members of the public were able to read newspaper reports and actually follow court proceedings. See McLachlin, *supra* note 5 at 2.

15 See Mulcahy, *supra* note 13 at 84.

16 *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 883, 120 DLR (4th) 12 [*Dagenais*]; *AB v Bragg Communications Inc*, 2010 NSSC 215 at paras 30–33, 293 NSR (2d) 222 [*Bragg* NSSC].

17 *Dagenais*, *supra* note 16 at 877.

18 Mulcahy, *supra* note 13 at 10, 84.

19 See Elizabeth F Judge, "Canada's Courts Online: Privacy, Public Access and Electronic Court Records" in Patrick A Molinari, ed, *Dialogues About Justice: The Public Legislators, Courts and the Media* (Montreal: Canadian Institute for the Administration of Justice, 2002) 1 at 11.

20 See *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175 at 185–86, 132 DLR (3d) 385 [*MacIntyre*]; *Adult Entertainment Assn of Canada v Ottawa (City)*, 10 MPLR (4th) 112 at para 17, 142 ACWS (3d) 338 [*Nuden*]; *Scott v Scott*, [1913] AC 417 at 463 (HL (Eng)) [*Scott*]; *R v Mentuck*, 2001 SCC 76 at para 53, [2001] 3 SCR 442 [*Mentuck*]; *AB v Bragg Communications Inc*, 2011 NSCA 26 at para 74, 322 NSR (2d) 1 [*Bragg* NSCA].

> exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.[21]

It is not just judges who are presumably held to account by the open court principle. The principle is also said to support positive results with respect to other justice system players and functions outside of the courtroom, including police officers and warrants.[22] The openness of trials has been held to be an expression of the judge's confidence that what happens in the courtroom is "beyond reproach."[23] Transparency in the processes of justice is not only thought to act as a "powerful disinfectant" for exposing and remedying abuses;[24] by acting in public view, the courts can demonstrate that fair trials (rather than show trials where conviction is a foregone conclusion) are still happening.[25]

The open court principle, therefore, can clearly be understood to be a means of assuring the public accountability of the court system and its key actors, particularly judges. Open courts, however, also put parties and witnesses on public view in ways that can compromise their privacy and dignity, without necessarily contributing to the underlying purposes of public transparency, accountability, and access to justice. Unless specifically determined otherwise (see Part II for a discussion of some of the Canadian exceptions to the open court principle), every aspect of their participation in the court process is available to the public: names and other identifying information, details of the court action, the substance of testimony, and details included in documents filed with the court.

Openness of the courts with respect to parties' and witnesses' personal information is said to increase the accountability of these participants in the justice process. Blackstone, for example, argues in his *Commentaries of 1752* that one positive consequence of this visibility is that it could aid in the discovery of truth in the context of examining witnesses: "[t]his open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk."[26]

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21 *MacIntyre*, *supra* note 20 at 183, citing Bowring, *supra* note 11 at 493.

22 See *ibid* at 183–84, 186–87; *Mentuck*, *supra* note 20 at para 51; *X v Y*, 2011 BCSC 943 at para 15, 338 DLR (4th) 156 [*X*].

23 *Loveridge v British Columbia*, 2005 BCSC 1068 at para 73, 52 BCLR (4th) 178 [*Loveridge*].

24 See *R v Shayler*, [2002] UKHL 11, [2003] 1 AC 247.

25 See *Mentuck*, *supra* note 20 at para 53.

26 Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1768) vol 3, ch 23 at 373, cited in *Edmonton Journal v The Attorney General for Alberta and the*

One claim is that witnesses will be more likely to be truthful if testimony is public; another claim is that additional witnesses (or information) could be prompted by public knowledge of what happens in the court. Others have claimed that open courts and the identification of the witnesses and parties therein could encourage plaintiffs to come forward to seek redress in the courts for similar issues. The public scrutiny supported by the open court principle has been said to produce positive results for parties and witnesses in both civil and criminal proceedings,[27] for example, by allowing accused persons who are acquitted[28] and defamed persons who win at trial[29] to vindicate their names and reputations in the public eye. At the same time, the open court principle is thought to increase public safety and the accountability of those involved in legal proceedings by subjecting them to public scrutiny.

Notwithstanding national and international legal protections for the open court principle, like many other fundamental rights and principles, it is not absolute.[30] Canadian courts have recognized that limiting public scrutiny can actually enhance justice in some cases by:

1. preventing juries from being influenced by outside sources (*e.g.*, to facilitate a fair hearing for an accused person);
2. encouraging witnesses to testify without fear of publicity consequences;
3. protecting vulnerable witnesses (*e.g.*, children or sexual assault complainants);
4. preserving the privacy of participants in the justice process;
5. reducing the stigma of conviction for young offenders, thereby increasing the possibility of rehabilitation;
6. encouraging reporting of sexual offences by reducing the fear of notoriety associated with becoming a complainant;
7. saving financial or emotional costs to justice system participants;
8. protecting national security;[31] and

Attorney General of Canada, [1989] 2 SCR 1326 at 1338, 64 DLR (4th) 577 [*Edmonton Journal* cited to SCR].

27 See e.g. *Bragg* NSSC, *supra* note 16 at para 25; *Nuden*, *supra* note 20; *B(A) v Stubbs* (1999), 44 OR (3d) 391, 175 DLR (4th) 370 [*B(A)* cited to OR]; *Edmonton Journal*, *supra* note 26; *Dagenais*, *supra* note 16; *Josipovicz v Whyte*, 2010 ONSC 2962, 189 ACWS (3d) 44 [*Josipovicz*]; *Davidge v Fairholm*, 2014 BCSC 2150, 247 ACWS (3d) 101 [*Davidge*]; *Loveridge*, *supra* note 23.

28 See *Mentuck*, *supra* note 20 at para 54.

29 See *Bragg* NSSC, *supra* note 16 at para 102.

30 See McLachlin, *supra* note 5 at 11.

31 See *Dagenais*, *supra* note 16 at 883–84.

9. protecting ongoing police investigations.[32]

Thus, notwithstanding the default in favour of openness and many sound arguments about its underlying purposes, it has long been recognized that, in some instances, justice can in fact be undermined by too much openness. In Canada, numerous limitations on the open court principle in statutory provisions, as well as through case-by-case mechanisms through which parties can seek restrictions, reflect this fact.

B. The Principle's Exceptions and Limitations

There are a variety of statute-based limitations on the open court principle in Canada. Some operate automatically in certain kinds of cases, while the applicability of others is determined on a case-by-case basis.

Even without a legislative provision that creates an exception to the open court principle, courts have common law and equitable powers to limit the principle of openness on a case-by-case basis. These include requests for publication bans, in camera proceedings, confidentiality or sealing orders, and anonymity/pseudonymity orders. The relevant case law sets out much of the key jurisprudential thinking on the importance, underlying purposes, and limitations of the open court principle. A party seeking an exception to the default of openness bears the burden of demonstrating that limiting openness is necessary in order to protect a countervailing interest of sufficient public importance. In many cases, the media are notified that applications for these kinds of orders will be made,[33] so the party seeking the limitation can often expect media representatives to attend the application hearing in order to oppose it on the basis of freedom of expression and freedom of the press.

A publication ban imposes limits on the distribution of some or all information relating to a court proceeding. In cases where a publication ban has been imposed, even though nothing can be distributed about the proceeding outside of the courtroom, members of the public may attend the hearing.[34] In contrast, orders that require proceedings to be held in camera prohibit members of the public from attending altogether. Confidentiality or sealing orders may be made to prevent certain kinds of material filed in

32 See *Mentuck*, *supra* note 20 at para 46.

33 See e.g. Alberta Provincial Court, *E-File Notice of Application for Publication Ban*, online: <www.albertacourts.ca>; British Columbia Supreme Court, *Publication Ban Notification Project*, online: <www.courts.gov.bc.ca>.

34 See e.g. *Canadian Broadcasting Corp v The Queen*, 2011 SCC 3 at para 13, [2011] 1 SCR 65 [*CBC*].

connection with court proceedings (*e.g.* documents produced in litigation that disclose trade secrets or exhibits filed in court) from becoming publicly accessible.[35] Anonymity/pseudonymity orders can permit a variety of justice system participants (*e.g.* parties and witnesses) to participate in a proceeding using a pseudonym (*e.g.* their initials), instead of having to use their real names. Unlike other kinds of exceptions to the open court principle, anonymity/pseudonymity orders preclude public access to identifying information about the justice system participant but do not, on their own, restrict public access to the hearing itself or to documents filed in connection with the proceeding (assuming identifying information is removed from those materials).[36]

Regardless of the mechanism chosen, the Supreme Court of Canada has stated[37] that any discretionary decisions affecting the openness of proceedings are to be analyzed according to the approach outlined in *Dagenais*[38] and *Mentuck*,[39] in light of the specific facts at issue in the particular case in which a limiting order is sought. In *Bragg*, where a teen girl sought a publication ban on the content of a Facebook page containing "sexualized cyberbullying," as well as the right to proceed with the case using a pseudonym, the Court articulated the test as follows:

> The inquiry is into whether . . . [the requested restriction] is necessary to protect an important legal interest and impairs free expression as little as possible. If alternative measures can just as effectively protect the interests engaged, the restriction is unjustified. If no such alternatives exist, the inquiry turns to whether the proper balance was struck between the open court principle and the privacy rights of the girl.[40]

The Court indicated that the legal interest impaired by publicity had to be demonstrated to be sufficiently compelling to warrant restricting the open court principle, and that while specific evidence of the harm that would arise from publicity is relevant, there may be circumstances in which such harm can be inferred objectively without the need to tender evidence.[41] In many other cases, however, Canadian courts have been very

35 See e.g. *Sierra Club of Canada v Canada*, 2002 SCC 41, [2002] 2 SCR 522.

36 See *AB v Bragg Communications Inc*, 2012 SCC 46 at para 28, [2012] 2 SCR 567 [*Bragg* SCC]; *T(S) v Stubbs*, [1998] 38 OR (3d) 788, 158 DLR (4th) 555 [*T(S)* cited to OR].

37 See *CBC*, *supra* note 34 at para 13.

38 *Supra* note 16.

39 *Supra* note 20.

40 *Bragg* SCC, *supra* note 36 at para 11.

41 See *ibid* at para 15.

clear that mere embarrassment or humiliation arising from the publicity associated with the proceedings will not be enough.[42]

The default toward openness in court proceedings is undoubtedly underlain by important democratic concerns, including the role of the media in drawing attention to the operations of courts as public institutions. It is not our intention to question the open court principle as a whole, but rather to focus on one aspect of the principle that raises particular concerns in an era of online publication—presumed public access to parties' and witnesses' personal information. As such, Part II focuses on that particular aspect of the open court principle and examines historical claims about the need for public access to parties' and witnesses' personal information. In it we suggest a need for further analysis of any assumed connection between *public* access to that information and the stated underlying purposes of the open court principle, even before turning to the concerning privacy effects of making this kind of information publicly available online, in Part III.

II. DEFAULT IN FAVOUR OF PUBLIC ACCESSIBILITY OF PARTIES' AND WITNESSES' PERSONAL INFORMATION

A. Underlying Purposes and Connections to the Open Court Principle

Because the open court principle, in tandem with media rights to freedom of expression, has been interpreted broadly to presumptively include all information relating to civil and criminal legal proceedings, parties' and witnesses' personal information is by definition presumed to be accessible. But how does public access to personal information actually contribute to the underlying objectives of the open court principle? After reviewing the literature and the Canadian case law on this point, we have identified five kinds of claims about the connection, all of which merit further analysis for reasons described below.

First, it could be claimed that open access to parties' and witnesses' personal information directly serves the open court principle's underlying objective of holding judicial and state authorities to account. If we know

42 See e.g. *B*(*A*), *supra* note 27 at 399; *Nuden*, *supra* note 20 at para 16; *Scott*, *supra* note 20 at 463; *Josipovicz*, *supra* note 27 at para 96. The courts seem particularly disposed to varying the "open court" rule for the protection of vulnerable parties including children. See The Society of Trust and Estate Practitioners, "Wealthy Beneficiaries Entitled to Anonymity", *STEP* (27 October 2014), online: <www.step.org>.

the party's or witness's identity, it may tell us something about the impartiality or lack of impartiality of the judge, as well as other state actors involved in the case. If, for example, a judge was determining the liability or guilt of a relative, or a Crown Attorney was prosecuting a close friend, knowing those parties' identities might indeed affect public perceptions of the fairness of the administration of justice. This would similarly be true if the party or witness were a public figure otherwise involved in the administration of justice. However, given that conflict of interest rules and regulations already govern the assignment of cases to judges and the decisions of lawyers (including Crown Attorneys) to take cases, it is difficult to see why the current default in favour of public access to all personal information of parties and witnesses is necessary in order to facilitate accountability and transparency (particularly in light of the privacy implications involved).

Second, it could and has been claimed that open access to witnesses' personal information could enhance the truth finding function of the open court principle by encouraging other witnesses to come forward[43] (perhaps to counter the truth of the account given by a particular witness). Suppose, for example, that X testifies that they personally witnessed the offender driving through a red light at a specific intersection on a particular date, but one of X's acquaintances knows that they were meeting with X in a different city at the very time the incident about which X is testifying occurred. In this situation, publicity relating to X's name might encourage the person with that information to come forward, thereby enhancing the truth finding process. Using similar logic, the court in *Carter* rejected a witness's request for total anonymity, finding that if "L.M. does not have to identify himself in court, the parties will not be able to test his evidence."[44]

Third, it could and has been claimed that open access to witnesses' and parties' personal information will enhance the truth finding process by pressuring them to speak the truth, knowing that their names and accounts will be open to public scrutiny.[45] Justice Wilson, in *Edmonton Jour-*

43 See e.g. *B(A)*, *supra* note 27 at para 36; *Edmonton Journal*, *supra* note 26 at 1358; *Josipovicz*, *supra* note 27 at para 84; *Dagenais*, *supra* note 16 at 883; *Loveridge*, *supra* note 23 at para 41.

44 *Carter v Canada (Attorney General)*, 2011 BCSC 1371 at para 73, 206 ACWS (3d) 303.

45 See e.g. *Nuden*, *supra* note 27 at para 8; *Dagenais*, *supra* note 16 at 883; *Loveridge*, *supra* note 23 at para 41; *B(A)*, *supra* note 27 at para 36; *Edmonton Journal*, *supra* note 26 at 1358; *Josipovicz*, *supra* note 27 at para 84; *Davidge*, *supra* note 27 at para 14.

nal, tied the second and third claims together as follows, quoting from Wigmore:

> [The ways in which openness of judicial proceedings] improve the quality of testimony is two-fold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.[46]

As noted above in *Carter*, total anonymity could indeed compromise the parties' ability to test a witness's evidence. Widespread publication of identifying and other personal information regarding witnesses might have the additional beneficial effect of eliciting relevant information from the broader public, thus enhancing the truth finding process. Whether and how frequently this outcome manifests, however, remains an empirical question. It is, nonetheless, evident that this particular benefit could occur only under very specific circumstances wherein an individual with information material to the case is *not* involved as a party and has *not* attended the court in person—but maintains a significant enough interest to learn about the case through other means, and is motivated enough to come forward with new information to contest existing testimony.

Whether, as is claimed in *Edmonton Journal*, open access to the personal information of parties and witnesses will lead to more truthful reporting is also an empirical question—and a complicated one at that. Experimental research has repeatedly demonstrated that identified informants provide more truthful reports than do anonymous informants.[47] However, the contrast we are talking about here is more complex, since parties and witnesses present in court for testimony are typically identified, and even if anonymous, typically give their evidence in full view of the

46 John Henry Wigmore, *Evidence in Trials at Common Law*, vol 6, rev by James H Chadburn (Boston: Little Brown, 1976) at 435–36 [emphasis omitted], cited with approval in *Edmonton Journal*, *supra* note 26 at 1358.

47 See Jacquelyn Burkell, "Anonymity in Behavioural Research; Not Being *Unnamed*, But Being *Unknown*" (2006) 3:1 U Ottawa L & Technology J at 189–203.

court, a condition which in and of itself tends to decrease false reports.[48] It remains an open question whether *future* identification or anonymity (*i.e.*, in media coverage and records open to the general public) has an influence on truthfulness—on this point there is no existing empirical evidence. We would suggest that to justify the intrusion on the privacy of witnesses and parties, there should at least be empirical studies carried out in order to determine whether the assumptions underlying this claim are actually borne out.

A fourth claim about the connection between open courts and disclosure of parties' personal information relates more to a kind of *quid pro quo*, almost punitive logic, that availing oneself of the court system imposes a certain burden of responsibility on a party. For example, in *Loveridge* the Court denied a plaintiff's request for a publication ban, noting:

> It is not apparent to me why a plaintiff commencing action in this Court should be seen as having a smaller obligation to the integrity of the process than does the Judge, the jury, the sheriff, the court clerk, counsel and other witnesses. By commencing action, a plaintiff commits himself or herself to various kinds of proper conduct, including the obligation to disclose information and the obligation to speak the truth. I can see no rationale for protecting a plaintiff by a publication ban from the risk of public opprobrium for breach of these obligations. Everyone else in the process is at that risk.[49]

We would suggest that it is at least worth questioning whether this punitive approach to presumptive public access to a plaintiff's information has a place in a justice system oriented toward facilitating access for resolution of disputes. Moreover, the underlying logic does not apply to those who are drawn into legal disputes against their will and/or who have no choice but to participate in court proceedings to access their fundamental rights.

The fifth claim appears to have, at best, a tangential connection to the underlying purposes of the open court principle. In *Bragg*, the Nova Scotia Court of Appeal suggested that a teen suing for sexualized cyberbullying might in fact benefit from publication of her name, as would the public at large:

> Should she be successful, one might expect that she will be lauded for her courage in defending her good name and rooting out on-line bullies who

48 *Ibid.*

49 *Loveridge*, *supra* note 23 at para 76. See also *Bragg* NSSC, *supra* note 16 at paras 22, 32; *Scott*, *supra* note 20 at 463.

> lurk in the bushes, behind a nameless IP address. The public will be much better informed as to what words constitute defamation, and alerted to the consequences of sharing information through social networking among "friends" on a 21st century bulletin board with a proven global reach.[50]

Notably, this extends the putative benefits of the open court and naming names beyond learning about law and legal processes, to using law to educate the public about other kinds of social problems. At the end of the day, however, the Supreme Court of Canada allowed the teen to proceed pseudonymously, emphasizing that the open court principle must sometimes give way to other pressing social values, including privacy.[51] As such, it seems clear that the idea that public education should be conducted on the backs of litigants who are only seeking to vindicate their rights should and has given way, in some cases, to the pressing social value of privacy.

Canadian courts are often quite strict in their protection of the open court principle, especially where the media is contesting an application for a publication ban or other form of confidentiality order. However, it is clear that public disclosure of parties' and witnesses' personal information remains a presumption, rather than an absolute rule. That presumption can be displaced by proof of serious competing values of public importance, and of the particular vulnerability of the party seeking the order. The balance between the competing values is resolved on a case-by-case basis, leading to somewhat unpredictable results. For example, Canadian courts have denied pseudonymity orders to adult entertainment performers;[52] plaintiffs alleging sexual assault in civil actions;[53] a plaintiff seeking damages for failed penile enlargement surgery in the absence of specific evidence of psychiatric harm flowing from disclosure of his identity;[54] and a plaintiff who feared reprisal if their sexual orientation was disclosed.[55] In contrast, courts have permitted parties to proceed pseudonymously where name disclosure posed a real threat of physical harm from organized crime;[56] where a teen plaintiff subjected to sexualized cyberbullying

50 *Bragg* NCSA, *supra* note 20 at para 102.

51 See *Bragg* SCC, *supra* note 36 at paras 11, 13.

52 See *Nuden*, *supra* note 20.

53 See Jane Doe, "What's In a Name? Who Benefits from the Publication Ban in Sexual Assault Trials" in Ian Kerr, Valerie Steeves & Carole Lucock, eds, *Lessons from the Identity Trial: Anonymity, Privacy and Identity In a Networked Society* (New York: Oxford University Press, 2009) 265.

54 See *B(A)*, *supra* note 27.

55 See *Josipovicz*, *supra* note 27.

56 See *X*, *supra* note 22.

faced a risk of emotional harm;[57] where name disclosure posed a real threat to the security of a witness and their family;[58] where there was specific evidence of a serious risk of psychological harm to the recipient of a failed penile enlargement surgery;[59] where non-disclosure could protect the identity of a police informant;[60] where non-disclosure would minimize the long term stigma attaching to a young offender;[61] and where non-disclosure was deemed necessary to protect the professional reputation of a physician in a judicial review proceeding that involved highly personal information about the doctor and patient and disclosure of names would undermine the very purpose of the proceeding.[62]

In some cases where pseudonymity orders are permitted (without any other form of restriction in terms of public access to the proceedings themselves), Canadian courts, including the Supreme Court of Canada, have referred to the names of the parties as only a "sliver of [the] information" available to the public about the case, suggesting that removing this information from the court record therefore impairs the open court principle very minimally.[63] This highlights the fact that names constitute only part, and not necessarily a critically important part, of the information about litigants and witnesses that is revealed in the course of a court proceeding.

It is possible to see from this overview that the reasons offered in favour of presumptive public access to parties' and witnesses' personal information merit closer inspection and analysis, even before getting to the question of whether that information should be made publicly available online, especially in view of the competing privacy interests at stake. Some of the reasons offered are based on assumptions about human behaviour that may or may not be borne out by empirical analysis, and most do not directly relate to the open court principle's original and fundamental objective of transparency and accountability of public authorities.

Perhaps this at least partially explains why, despite the presumption and its claimed benefits, Canadian public policy has consistently resisted moving toward what would perhaps be the ultimate forms of accountabil-

57 See *Bragg* SCC, *supra* note 36.

58 See *R v Pickton*, 2010 BCSC 1198, 89 WCB (2d) 582 [*Pickton*].

59 See *T(S)*, *supra* note 36.

60 See *MacIntyre*, *supra* note 20, Martland J, dissenting.

61 See *Re FN*, 2000 SCC 35, [2000] 1 SCR 880 [*FN*].

62 *VF v ST*, 2010 BCSC 1874, 196 ACWS (3d) 379.

63 *Bragg* SCC, *supra* note 36 at para 28, citing *FN*, *supra* note 61 at para 12; *BG et al v HMTQ in Right of BC*, 2004 BCCA 345, 242 DLR (4th) 665.

ity for witnesses and parties: televised trials and cameras in trial courts.[64] It may also help to account for the fact that the presumption has been reversed in several contexts where competing values of public importance were at stake.

B. Exceptions to Public Accessibility of Names

In addition to *ad hoc* situations in which courts are asked to exercise their discretion to prevent disclosure of a party's or witness's name, there are also various statutory regimes in Canada that specifically prohibit disclosure of personal information about certain vulnerable parties and witnesses. Here we highlight two prominent examples: *Criminal Code* restrictions with respect to the identities of sexual assault complainants,[65] and *Youth Criminal Justice Act* restrictions with respect to the identities of young offenders.[66] Our purposes in so doing are threefold: (i) to better understand the presumed relationship between disclosure of personal information and the open court principle more generally; (ii) to identify what it is about these two situations that has led legislatures to reverse the presumption of disclosure of parties' and/or witnesses' personal information; and (iii) to examine how courts asked to interpret and apply these provisions have resolved the dilemma between the powerful rhetoric of the open court principle and the presumption of non-disclosure of personal information in these cases.

1. *Publication Bans Re: Sexual Assault Complainants in Criminal Proceedings*

While the *Criminal Code* permits a judge to order exclusion of the public and (in respect of certain offences) a ban on publication of personal information about a victim or witness in any criminal case,[67] in the case of certain sexual offences, a judge must order non-disclosure of personal information about a complainant or witness who is under eighteen upon

64 See e.g. Edward Carter, "Supreme Court Oral Argument Video: A Review of Media Effects Research and Suggestions for Study" (2012) BYUL Rev 1719; James Linton, "Camera Access to Courtrooms: Canadian, US and Australian Experiences" (1993) 18:1 Can J Communication 15.

65 *Criminal Code*, RSC 1985, c C-46, s 486.

66 *Youth Criminal Justice Act*, SC 2002, c 1, s 101.

67 *Criminal Code*, *supra* note 65 at ss 486(1), 486.4. See e.g. *Pickton*, *supra* note 58.

request by that person or by the prosecutor.[68] In cases where a ban is optional, the *Criminal Code* requires judges to consider whether the order is necessary for the "proper administration of justice," having regard for a series of factors, including: the right to a fair and public hearing, whether the applicant faces "a real and substantial risk" of significant harm if their identity is disclosed, whether the order is necessary for the security of the applicant, societal interests in encouraging the reporting of offences, and whether effective alternatives are available.[69]

The Supreme Court of Canada in *Canadian Newspapers* found that the *Criminal Code* provisions relating to witnesses and complainants in sexual offence cases constituted a justifiable limit on freedom of expression (and the open court principle) in part because the provisions encouraged the reporting of sexual offences and furthered the goal of suppressing criminal activity:

> Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban . . . is to favour the suppression of crime and to improve the administration of justice.[70]

In addition, the Court noted that if the goal of suppressing criminal activity was to be achieved, particularly with respect to sexual assault (one of the most under-reported crimes), complainants had to be certain before coming forward with a complaint that their identities would be protected if requested.[71] Otherwise, the fear of humiliation and embarrassment that might arise from publication of their identities would deter victims of sexual assault from coming forward.[72] Further, the Court found that the provision struck an appropriate balance between open courts, free expression of the media, and privacy because:

> [It] applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a gen-

68 *Criminal Code*, *supra* note 65, s 486.4(2). Where child pornography offences are concerned, a judge is required to order non-disclosure of identifying information relating to anyone who is the subject of the content and to any witness who is under 18 (*ibid*, s 486.4(3)).

69 *Ibid*, s 486.5(7).

70 *Canadian Newspapers Co v Canada* (*Attorney General*), [1988] 2 SCR 122 at 30, 52 DLR (4th) 690 [*Canadian Newspapers*].

71 See *ibid* at 131–32. See also *R v Adams*, [1995] 4 SCR 707, 131 DLR (4th) 1.

72 See *Canadian Newspapers*, *supra* note 70 at 131–32. See also Doe, *supra* note 53 (for a different analysis of who benefits from publication bans with respect to sexual assault complainants' identities).

> eral ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public.[73]

In this case then, the statutory derogation from the presumption of openness depends upon the protection of a vulnerable group where affording that protection was found to further the justice system's goal of suppressing criminal activity by encouraging reporting of a highly unreported crime. As the Supreme Court of Canada put it more recently in *Bragg*, "[i]n the context of sexual assault, this Court has already recognized that protecting a victim's privacy encourages reporting."[74]

2. Publication Bans Re: Young Offenders

In Canada, the presumption of openness with respect to publishing personal information is also reversed in the context of youth who are criminally prosecuted, youth who are the victims of crimes committed by other youth, or youth who are witnesses in criminal proceedings against another youth, subject to limited exceptions.[75] The Supreme Court of Canada in *Re FN* concluded that this ban applied not just to media, but also prohibited courts from engaging in certain administrative practices, such as circulating to schools court dockets containing the names of youths charged.[76]

The reasons for reversing the presumption of openness in relation to minors appears to originate from the perspective that confidentiality is crucial to effective rehabilitation and treatment.[77] In *Re FN* the Court found that a ban on publishing identifying information about youth involved in criminal proceedings did not significantly compromise the open court principle:

> The youth courts are open to the public, and their proceedings are properly subject to public scrutiny. The confidentiality relates only to the "sliver

73 *Canadian Newspapers*, *supra* note 70 at 133.

74 *Bragg* SCC, *supra* note 36 at para 25.

75 For example, the names of convicted youth given adult sentences may be published, and there are a limited number of cases in which an application can be made to lift a publication ban with respect to criminally convicted youths in certain situations (*e.g.,* where the youth is thought to be a danger to society). See *Youth Criminal Justice Act*, *supra* note 66, s 110.

76 See *FN*, *supra* note 61.

77 See Emily Bazelon, "Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?" (1999) 18:1 Yale L & Pol'y Rev 155.

> of information" that identifies the alleged or convicted young offender as a person in trouble with the law.[78]

Moreover, the Court emphasized that confidentiality in these circumstances protected both the interests of the youth involved and broader societal interests in rehabilitation:

> Stigmatization or premature "labelling" of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy. In the long run, society is best protected by preventing recurrence. Lamer C.J., in *Dagenais* . . . pointed out in another context that non-publication is designed to "maximize the chances of rehabilitation for 'young offenders.'"[79]

Nonetheless, the ideal that society is better served by ensuring a measure of confidentiality for young offenders can be challenged when public safety considerations are brought to the fore.[80] That protection of young people's privacy is subject to countervailing public safety considerations is evident in Canada's *Youth Criminal Justice Act*, which provides that, on application, a court may lift the ban on publication if there is reason to believe the youth may be a danger to others or where publication of the information is necessary to apprehend the youth.[81]

In the case of young offenders then, the statutory reversal of the presumption of openness combines concerns for protecting the ability of members of a vulnerable group to rehabilitate, with the broader aim of societal protection. As with provisions relating to publication bans in cases of sexual assault, publication bans with respect to the personal information of young offenders are understood to acceptably compromise the open court principle in service of privacy and broader community objectives.

There are many good reasons for maintaining an open court principle in a democratic society, particularly in terms of improving transparency and accountability of public officials and the public justice system. Similarly, reasons can and have been offered for presumptive access to parties' and witnesses' personal information as a necessary component of maintaining an open court system. We have suggested above that there

78 *FN*, *supra* note 61 at para 12.

79 *Ibid* at para 14.

80 See Kristin Henning, "Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?" (2004) 79:2 NYUL Rev 520.

81 *Youth Criminal Justice Act*, *supra* note 66, s 110(4).

may be reasons to question the assumptions underlying this presumptive access, and have noted numerous examples of both exceptions to that presumption and statutory reversals of it in cases involving competing public rights and interests, including privacy. The movement toward online accessibility of court records brings these competing rights and interests, especially privacy interests, into ever-greater relief and strengthens the case for revisiting and limiting the presumption in favour of accessibility of parties' and witnesses' personal information. In so doing, one need not abandon public access to this kind of information or the possibility of any of the positive effects that *may* attach to such access. Instead, we suggest the possibility of reversing the presumption in the context of *online* records in an effort to maintain the same degree of friction in accessing this personal information as experienced by accessing paper records.

III. ONLINE PUBLICATION AND THE EROSION OF PRACTICAL OBSCURITY

A. Open Access in the Online Context

The history of "open access" is one of increasing and wider visibility. Originally, an "open court" was, quite literally, a court whose doors were open—both in the sense that any and all could seek redress within the court, and in the sense that all were free to attend the proceedings and witness the actions of the court and all parties. Nothing was "private"—even executions were carried out in full public view. At the same time, public witnesses to proceedings were limited to those who, for whatever reasons, were present at those proceedings and thus able to see and hear the proceedings as they commenced.

Over time, the open access principle has been extended to support public "view" of court proceedings without actual attendance. Media coverage provides details of (some) court proceedings to the general public, with a reach far beyond those who actually attend the courtroom, and unless expressly disallowed, media are allowed to attend and report on court proceedings. As noted above, in Canada, as in many other jurisdictions, the open court principle extends the right of public access or media coverage not only to court proceedings, but also to records and documents filed in connection with those proceedings.[82] The public can come to know about proceedings in court, therefore, by reviewing court

82 See *Edmonton Journal*, *supra* note 26 at 1338.

documents (transcripts, pleadings, submissions, judgments, *etc.*). Historically, these documents have been held in paper form at the courthouse, accessible to the public upon attendance at that location. Recently, and to an ever-increasing degree, paper court documents are giving way to electronic submissions and records. Electronic documents support alternative and broader forms of dissemination: Ontario Court of Justice daily court dockets, for example, are available online (www.ontariocourtdates.ca), providing a publicly accessible and searchable record of current court proceedings; the Canadian Legal Information Institute (CanLII) hosts court judgments, tribunal decisions, statutes, and regulations from all Canadian jurisdictions in a publicly accessible, searchable online database; and British Columbia's Court Services Online makes certain court files searchable electronically from the comfort of one's own home.[83] These developments can be viewed as a natural extension of open access principles, in that they enhance existing public access to court documents.

Although court documents contain information that is clearly private in nature, in the vast majority of cases these documents are deemed accessible to the public under the open court principle. As discussed above, there are very few statutory regimes that protect the personal information of parties and witnesses, and *ad hoc* requests for protection can impose significant financial burdens on the individuals seeking protection and are regularly refused by the courts unless significant competing public interests can be demonstrated. As is evident from Part II above, the open court principle, and specifically access to personal information included in court files, is routinely and vigorously defended as being "in the public interest." In particular, access to names and personal information regarding witnesses and litigants is defended as part of a general "right of access" and presumed to effect various positive outcomes (see above) vis-à-vis public engagement with the court system.

Online availability enhances public access to court documents, and in particular increases the visibility and availability of any personal information included in those documents. Examined through the lens of open access, online accessibility is a straightforward extension of an existing right. In the next section, we consider this change from a different perspective, examining the consequences of online availability for witness and party privacy. In particular, we examine two issues: (i) how does online availability change the accessibility of court information; and (ii) how is the

83 See "Welcome to Court Services Online", *British Columbia*, online: <gov.bc.ca/justice>.

personal information contained in court files used by the public, or how is it likely to be used?

B. Information Access in the Online Context

In 2004, Chris Anderson reflected on the fact that online access to entertainment allows for a virtually unlimited catalogue, raising new possibilities in retail by supporting sales of the "long tail":[84] books, music, movies, *etc*., that are not "hits"—but nonetheless have a small audience. Inherent in his discussion, and relevant for our purposes, is the reality that online distribution frees information and its accessibility from the tyrannies of the physical world: storage is inexpensive and virtually unlimited, and access is similarly unfettered by geographic and temporal constraints. When information is online, people with Internet access can view the information they want, where and when they want it, and they can access the obscure almost as easily as the popular. These realities change the accessibility of court information when that information is placed online. In the past, access to court documents required a visit to the specific court where the documents were held. Documents could only be viewed during the court office's opening hours, and those wishing to access the documents had to make those requests in person—thus accessing those documents fully anonymously was not possible. All this changes with online documents, since they can be viewed at any time, using any computer with an Internet connection, and typically anonymously and even invisibly. In other words, barriers or "friction" in online court document access are greatly reduced, if not eliminated, and as a result the personal information included in these documents is no longer protected by the "practical obscurity" inherent in access to paper documents.

Online documents are not only easier to view—they are easier to find. Access to paper records typically requires that one first identify the case number (or name) and the courthouse. Paper records can be cross-indexed according to a (small) number of identifiers (*e.g.*, case number and case name), thus providing alternate means of access. It is not possible, however, to index paper documents "on the fly" according to different criteria, nor is it possible to index paper documents according to specific aspects of content. Electronic documents, however, can be identified virtually in-

84 Chris Anderson, "The Long Tail", *Wired Magazine* (1 October 2004), online: <www.wired.com>.

stantaneously according to any number of criteria, and documents can be selected on the basis of content, as well as "header" or traditional identifying information. Thus, using full-text search, relevant documents can be identified that would not have been returned by searches using standard keyword or metadata based searching.[85] In addition, specific case files can be identified on the basis of partial information that does not include the traditional identifiers of case name and/or case number. These search techniques can be carried out by a search engine that is restricted to the specific database (*e.g.*, a search within the CanLII database). The power and reach of these techniques are even greater if court records are indexed by Internet search engines (*e.g.*, Google) on the basis of automated web mining.[86] If court document repositories are open to search engine web crawlers, the documents within those repositories will be returned in regular Internet searches and on the basis of document contents, and not simply title and case number.

People behave differently in the online environment, and these differences have implications for information access. When we interact face to face, we are necessarily identifiable. By contrast, online participants can be both anonymous and invisible. In 1983, Peter Steiner captured this environment in the famous New Yorker cartoon, with the caption: "[o]n the Internet, nobody knows you're a dog," highlighting the fact that online interaction occurs independent of physical presence. Disembodiment changes the nature of social interaction online.[87] Many have argued that the anonymity and invisibility of online interaction results in an "online disinhibition effect,"[88] which leads to increased interpersonal aggression. Offline social norms do not necessarily translate into the online environment, perhaps as a consequence of a sense of un-identifiability.[89] The impact on information-seeking can be positive: the Internet can, for example, be a valuable health information resource for those seeking information

85 See Ronald N Kostoff, "Expanded Information Retrieval Using Full-Text Searching" (2010) 36:1 J Information Science 104.

86 See Filippo Menczer, "Complementing Search Engines with Online Web Mining Agents" (2003) 35:2 Decision Support Systems 195.

87 See Seok Kang, "Disembodiment in Online Social Interaction: Impact of Online Chat on Social Support and Psychosocial Well-being" (2007) 10:3 Cyberpsychology & Behavior 475.

88 John Suler, "The Online Disinhibition Effect" (2004) 7:3 Cyberpsychology & Behavior 321.

89 See Noam Lapidot-Lefler & Azy Barak, "Effects of Anonymity, Invisibility, and Lack of Eye-contact on Toxic Online Disinhibition" 28:2 Computers in Human Behavior 434.

about stigmatized topics or conditions.[90] At the same time, online information seeking may be viewed as a "safe haven" for behaviours such as pornography use, which can be viewed as falling outside of social norms.[91] Hubert Dreyfus raises concerns that the "disembodied presence" supported by online interaction will limit our sense of the reality of the objects and people with which we interact, thereby reducing our understanding of the consequences of our own actions.[92] To extend Steiner's 1983 observation, a great deal of knowledge about us is missing online: when online, we have the feeling that no one can see us, no one knows what we are doing, and there are few consequences to our actions.

The unprecedented availability, searchability, and indexability of information, together with the psychological and social consequences of disembodiment, ensure that placing court information online is not a simple extension of existing public access to court proceedings. Instead, we argue, the move to online access represents a qualitative shift in openness, and one that raises new considerations with respect to the balancing of the open courts and privacy principles. While this qualitative shift does not mean that the personal information of parties and witnesses will *solely* be accessed for purposes inconsistent with the objectives of the open court principle, it does present additional reasons to seriously doubt any necessary connection between presumed access to that information and the goal of a transparent and accountable justice system that is respectful of legitimate privacy interests.

C. Value and Use of Personal Information in Court Documents

Online access to court records places parties' and witnesses' personal information that is contained in those records within relatively easy reach of those who, legally or illegally, seek to realize financial gain from that information. Although the privacy risks borne by the parties and witnesses whose personal information appears in the documents are not unique to the online context, the searchable and indexable nature of online information exacerbates these risks, by making the information easily accessible to those who

90 See RJW Cline & KM Haynes, "Consumer Health Information Seeking on the Internet: The State of the Art" (2001) 16:6 Health Education Research 671.

91 See Neil Selwyn, "A Safe Haven for Misbehaving? An Investigation of Online Misbehavior Among University Students" (2008) 26:4 Social Science Computer Rev 446 at 446.

92 See Hubert L Dreyfus, *On the Internet* (New York: Routledge, 2009) at 49–71.

would use it for reasons that are not only inconsistent with, but that actually undermine, the underlying purposes of the open court principle.

There is obvious potential commercial value in the personal information in court documents for marketing purposes: mining of identity and contact information from divorce proceedings, for example, could be valuable to a real estate agent who wants to identify potential clients. The Privacy Commissioner of Canada (OPC) has, however, ruled that this type of use is a contravention of PIPEDA,[93] in that the commercial use of personal information in the court record is unrelated to the original purposes of personal information collection and disclosure. According to the ruling, secondary commercial use of personal information included in court documents requires explicit and independent consent, and without such consent is precluded under PIPEDA.

The OPC ruling clearly precludes law-abiding commercial organizations within the OPC's jurisdiction from collecting and using, for their own purposes, the personal information included in court files. Regulatory frameworks may be insufficient, however, to stop all unanticipated and inappropriate uses of information contained in court files. A recent situation in Canada provides a telling example. CanLII "make[s] Canadian law accessible for free on the Internet."[94] Their website "provides access to court judgments, tribunal decisions, statutes and regulations from all Canadian jurisdictions."[95] This information is hosted online in a publicly accessible database, but by stipulation the contents of the database are not indexed on Google or any other search engine. Thus, individual judgments along with any personal information they contain are accessible to the general public through a search on CanLII, but these judgments are not returned as results from a search engine such as Google.

In 2005, the Judge's Technology Advisory Committee (JTAC) to the Canadian Judicial Council recognized the privacy dangers associated with online publication of judgments in its Model Policy for Court Records in Canada.[96]

93 See Office of the Privacy Commissioner of Canada, "PIPEDA Report of Findings #2015–002", *Office of the Privacy Commissioner of Canada*, online: <www.priv.gc.ca> [OPC, *Findings*]. See also Office of the Privacy Commissioner of Canada, "Interpretation Bulletin: Publicly Available Information", *Office of the Privacy Commissioner of Canada*, online: <www.priv.gc.ca>. As discussed below, this analysis was also supported in a recent Federal Court of Canada decision. See *AT v Globe24h.com*, 2017 FC 114, 275 ACWS (3d) 155 [*AT*]

94 Canadian Legal Information Institute, "About CanLII", *CanLII*, online: <www.canlii.org>.

95 *Ibid*.

96 See Canadian Judicial Council, "Model Policy for Access to Court Records in Canada", *Canadian Judicial Council* (2005), online: <www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf>.

The Model Policy states that it is "a good practice to prevent indexing and cache storage" when posting judgments on the Internet because indexation and cache storage "makes this information available even when the purpose of the search is not to find court records, as any judgment could be found unintentionally using popular search engines like Google or Yahoo."[97] The OPC has noted that Canadian courts, as well as CanLII and Société québecoise d'information juridique (SOQUIJ), broadly respect the Model Policy's restrictions on web indexing. As such, it is the OPC's position that Canadians can reasonably expect that while court decisions may be published online, personal information contained in those decisions will not be searchable on popular search engines, such as Google.[98] Notwithstanding these pronouncements, however, such indexing has occurred.

In 2014, a Romanian company called Globe24h[99] began using an automated text mining procedure to download judgments from CanLII into their own databases that are indexed by search engines, including Google. Although the company states that its "main goal is to make law accessible for free on the Internet,"[100] its business model suggests otherwise. Canadians who complained to Globe24h, after finding court judgments including their personal information indexed on the open web, were informed that timely and complete removal of their personal information from the Globe24h database and from search indexes was available for a fee.[101] Globe24h also offered to redact information free of charge, but required individuals requesting redaction to fill out a form containing very sensitive information. Although it had a removal process in line with Romanian data protection law, it complied with only 30 percent of removal requests received, claiming that insufficient information had been provided by the other 70 percent of people requesting removal.[102] Subsequently, a Canadian company[103] developed a "solution" to the problem. For a fee of $1,499, this company works with a "Romanian legal clerk" following the "appropriate legal route" to remove the information from the open

97 *Ibid*, s 4.6.1.

98 See OPC, *Findings*, *supra* note 93 at para 86.

99 See generally, Globe24h, "Search the Global Database of Public Records: Case Law, Notices and Clinical Trials", *Globe24h*, online: <www.globe24h.com>. Some time after the decision in *AT*, Globe24h.com and www.caselaw.ca ceased to be available online.

100 *Ibid*.

101 See Christine Dobby, "How Cyber Shame Scams are Playing on our Privacy Fears and Scaling Up", *Financial Post* (29 March 2014), online: <www.financialpost.com>.

102 See OPC, *Findings*, *supra* note 93, at paras 13–19.

103 See generally Reputation.ca, "Caselaw.Globe24h.com Removal", *Reputation.ca*, online: <www.reputation.ca>.

web.[104] Not surprisingly, consumers experience these responses as "extortion attempts."[105]

In a 2015 decision, the OPC determined that complaints against Globe24h were "well founded," but the company refused to implement the recommendation that "Globe24h delete from its servers the Canadian court and tribunal decisions that contain personal information and that it take the necessary steps to remove these decisions from search engine caches."[106] The situation is complicated by the fact that the judgments are posted to CanLII precisely to support open access to court information—and Globe24h argues that their use of the same information is consistent with this goal. CanLII has responded by requiring "Captcha" verification, which ensures files are being downloaded by a human being and not a software program. Further, in 2017, the Federal Court of Canada declared that the operator of Globe24h had violated PIPEDA and ordered him to, among other things, "remove all Canadian court and tribunal decisions containing personal information from Globe24h.com,"[107] take steps to remove those decisions from search engine caches, and to refrain from further copying and republishing of such information. Although it is not clear that the Court's order would have been enforceable in Romania, and we are not aware of any enforcement proceedings having taken place, as of the time of publication of this article, we were no longer able to access Globe24h.com online.

In 2015, a plaintiff sought to hold SOQUIJ (an online publisher of decisions from judicial and administrative courts in Québec) responsible in Québec Small Claims Court after Globe24h published a legal decision online that included his personal address.[108] Although SOQUIJ had established a policy to redact identifying information that is unnecessary to the case before publishing it online, this policy only applies to decisions published after 2010.[109] Those whose personal information is incorporated in a decision prior to 2010 must request redaction. Unfortunately, by the time the plaintiff requested redaction of his personal information and SOQUIJ sent the modified version to CanLII, Globe24h had already copied the case from CanLII's database and republished it. While this case was summarily dismissed, and the Federal Court's decision in *AT* may have

104 *Ibid*.

105 Dobby, *supra* note 101.

106 OPC, *Findings*, *supra* note 93.

107 *AT*, *supra* note 93 at para 104.

108 See *Thériault-Thibault c SOQUIJ*, 2016 QCCQ 3210 (CanLII).

109 See SOQUIJ, "Politique Sur le Caviardage" (17 April 2014), *SOQUIJ*, online: <www.soquij.qc.ca/documents/file/corpo_politiques/politique-sur-le-caviardage.pdf>.

been influential in ultimately rendering Globe24h.com inaccessible in Canada, the Globe24h situation highlights the downsides to presumptive access to witnesses' and parties' personal information, which are wholly inconsistent with the open court principle's objectives.

Identity theft presents an even more significant concern for those whose detailed personal information appears in online court documents. Many have raised the concern that the personal information included in court documents (*e.g.*, filings in divorce proceedings in family court) raises the risk of identity theft.[110] In one United States case, online court records were accessed by thieves who searched using randomly generated social insurance numbers. A "hit" allowed them access to the full online records, which included names, addresses, and birth dates: sufficient information to obtain credit cards in the names of those individuals.[111]

Each of these privacy risks exist because personal information is included in publicly accessible court documents, independent of the form of access provided to those documents. Thus, commercial organizations could potentially mine personal information from paper records, and Globe24h could potentially scan and upload judgments accessed in paper form. Online access to the records, however, exacerbates the risks and associated privacy concerns, by removing or greatly reducing practical barriers to information access and the costs associated with that access. Thus, online access to court documents that include witnesses' and litigants' personal information increases vulnerability to both legal and illegal mining and the re-use of this personal information. What about the use, however, by the general public? Does their use of online court documents and the personal information included in those documents produce benefits that offset the privacy costs of inappropriate use?

In the online environment, we have become a society of "searchers," regularly seeking information online for a wide variety of purposes, including (though of course not limited to) prurient interest, and a new form of "acceptable" voyeurism.[112] People commonly search for information online

110 See generally DR Jones, "Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records" (2013) 61:2 Drake L Rev 375.

111 See e.g. Bruce Cadwallader, "6 Suspected in ID Theft Via Court Web Site", *The Columbus Dispatch* (21 December 2007), online: <www.dispatch.com>; "Police: ID Thieves Lifted Personal Info from Court Web Site", *Ohio.com Akron Beacon Journal* (21 December 2007), online: <www.ohio.com>.

112 See generally Clay Calvert, *Voyeur Nation: Media, Privacy, and Peering in Modern Culture* (Boulder, CO: Westview Press, 2000) [Calvert, *Voyeur Nation*]; Mark Andrejevic, *Reality TV: The Work of Being Watched* (Lanham, MD: Rowman & Littlefield, 2004).

as a form of entertainment and a way to satisfy idle curiosity.[113] "Googling" people (oneself or others) has become standard practice:[114] a logical way, for example, to learn about a prospective date, or to know what they might learn about you through the same practice. "Lurking" in online social media profiles is equally widespread and culturally acceptable, and social network users regularly report accessing the profiles of others they know, and even those they do not know personally, simply to "see" likes, friends, pictures, or activities.[115] As early as 1996, the (in)famous "JenniCam," which represented the "telematic theatre of a real life,"[116] garnered as many as one million visitors per week.[117] The Internet is evidently a place where watching—even spying on—others is acceptable and a commonplace practice.[118]

In the larger social context, voyeurism is no longer viewed solely as a pathology—what might be termed "mediated voyeurism" is a pastime open to anyone with a computer or television and time to spare.[119] In *Voyeur Nation*, Clay Calvert defines this new form of voyeurism as "the consumption of revealing images and of information about others' apparently real and unguarded lives, often yet not always for the purposes of entertainment but frequently at the expense of privacy and discourse, through the means of the mass media and Internet."[120]

He posits a new cultural and potentially legal value—the voyeurism value—that celebrates and protects our right to watch others. This value,

113 See generally Soo Young Rieh, "On the Web at Home: Information Seeking and Web Searching in the Home Environment" (2004) 55:8 J American Society for Information Science & Technology 743.

114 See Thomas Nicolai et al, "The Self-Googling Phenomenon: Investigating the Performance of Personalized Information Resources", online: (2009) 14:12 First Monday <www.firstmonday.org>.

115 See e.g. Ira Wagman, "Log On, Goof Off, and Look Up: Facebook and the Rhythms of Canadian Internet Use" in Bart Beaty et al, eds, *How Canadians Communicate III: Contexts of Popular Culture* (Edmonton: Athabasca University Press, 2010) 55; Jacquelyn Burkell et al, "Facebook: Public Space, or Private Space?" (2014) 17:8 Information, Communication & Society 974.

116 See Barry Smith, "*Jennicam*, or the Telematic Theatre of a Real Life" (2005) 1:2 Intl J Performance Arts & Digital Media 91.

117 See "Jennifer Ringley", online: Wikipedia <www.wikipedia.org>; Jane Bailey, "Life in the Fishbowl: Feminist Interrogations of Webcamming" in Ian Kerr, Carole Lucock & Valerie Steeves, eds, *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (New York: Oxford University Press, 2009) 283.

118 See generally Burkell et al, *supra* note 115.

119 See Calvert, *Voyeur Nation*, *supra* note 112 at 23; Jonathan M Metzl, "Voyeur Nation? Changing Definitions of Voyeurism, 1950–2004" (2004) 12:2 Harvard Rev Psychiatry 127.

120 Calvert, *Voyeur Nation*, *supra* note 112 at 23.

however, is immediately and obviously in tension with privacy—a tension noted by others including Alan Westin, who explicitly identifies mass media and reality TV as "voyeuristic threats to privacy."[121]

We are obsessed with the intimate details of others' lives: not only the lives of celebrities, but the lives of everyday people. The rise of "reality TV" is testament to this fact, and analysis of reality programming suggests that the appeal lies in overtly voyeuristic characteristics, including a "fly on the wall perspective," where we can observe "private" settings and interactions that often involve nudity, and/or gossip.[122] Moreover, although audiences perceive a social stigma associated with watching reality TV, they persist in watching because it is enjoyable and a form of escapism.[123] It helps, of course, that reality TV can be consumed from the privacy of one's home, and even from the screen of one's computer.

This same focus on personal (and sensational) information is evident in mass media (*i.e.* television, radio, and print news), and in this context we can specifically examine public interest in coverage of justice issues, including trials. Media coverage of courtroom news offers the public a "disembodied" view of court proceedings, in some ways analogous to the view afforded to the public when allowed online access to court records. In this context, what interests the public? What do we want to know about courts and court proceedings? Empirical evidence suggests that the educational component of open courts, at least as reflected in media coverage of court proceedings, is modest at best,[124] although attention to high-profile court cases may promote public engagement in the form of interpersonal discussions about the legal system.[125] "Newsworthy" cases are not necessarily or even commonly "legally important" cases—instead, the public attends

121 Alan F Westin, "Social and Political Dimensions of Privacy" (2003) 59:2 J Social Issues 431 at 432.

122 See generally Lemi Baruh, "Publicized Intimacies on Reality Television: An Analysis of Voyeuristic Content and its Contribution to the Appeal of Reality Programming" (2009) 53:2 J Broadcasting & Electronic Media 190; June Deery, "Reality TV as Advertainment" (2004) 2:1 Popular Communication 1.

123 See Lisa K Lundy, Amanda M Ruth & Travis D Park, "Simply Irresistible: Reality TV Consumption Patterns" (2008) 56:2 Communication Q 208.

124 See e.g. Herbert M Kritzer, "The Impact of Bush v. Gore on Public Perceptions and Knowledge of Supreme Court" (2001) 85 Judicature 32.

125 See e.g. William J Brown, James J Duane & Benson P Fraser, "Media Coverage and Public Opinion of the OJ Simpson Trial: Implications for the Criminal Justice System" (1997) 2:2 Comm L & Pol'y 261.

to coverage of those cases that entertain rather than inform.[126] Selective coverage has potentially negative consequences for public understanding of the law and legal proceedings, and for public perspectives on criminal justice policy.[127] In *Tabloid Justice*, Fox and his co-authors examine news coverage of criminal justice matters. In general, the media have reflected and engaged public interest by covering cases "mostly as a means of entertainment and enhanced ratings rather than as vehicles for public education."[128] They characterize this coverage as "sensationalized",[129] focused on "status, personality, score-keeping and sex/violence titillation, rather than on legal rules, institutions, processes and context."[130] In general, sex-based cases tend to be over-reported in the media, particularly if those cases are sensational or unusual.[131] Families have difficulty protecting images of accidents and death from the public gaze.[132] Thus, public interest in court cases reflects a voyeuristic focus on highly personal and often salacious material. Moreover, as a public we are not entirely comfortable with our own voyeuristic position, and some reflections on media coverage of courtroom trials suggest public disquiet at the intrusive and sensationalist nature of the media's reporting of court proceedings.[133]

We would not discount the prospect that online access to court records can and will facilitate access to information that will serve the open court principle's underlying objectives by, for example, providing litigants with easier access to court files. However, we believe it is important to be cognizant of the privacy risks of general public access, particularly in

126 See Daya Kishan Thussu, *News as Entertainment: The Rise of Global Infotainment* (London, UK: Sage Publications, 2008).

127 See e.g. Sara Sun Beale, "The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness" (2006) 48:2 Wm & Mary L Rev 397.

128 Richard L Fox, Robert W Van Sickel & Thomas L Steiger, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy* (Boulder, CO: Lynne Rienner, 2001) at 55.

129 *Ibid* at 55.

130 *Ibid* at 1.

131 See Kenneth Dowler, "Sex, Lies, and Videotape: The Presentation of Sex Crime in Local Television News" (2006) 34:4 J Criminal Justice 383.

132 See Clay Calvert, "A Familial Privacy Right over Death Images: Critiquing the Internet-propelled Emergence of a Nascent Constitutional Right That Preserves Happy Memories and Emotions" (2013) 40:3 Hastings Const LQ 475; Clay Calvert "The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture" (2005–2006) 26:2 Loyola Los Angeles Entertainment L Rev 133.

133 See Ronald Goldfarb, *TV or Not TV: Television, Justice, and the Courts* (New York: New York University Press, 1998) at 1–8 (for a discussion of pre-television publicity of trials); J Anthony Lukas, "Big Trouble: Celebrity Trials and the Good Old Days that Never Were" (1998) 12 Media Studies J 46.

relation to the parties' and witnesses' personal information. Although we have no direct information on how and why members of the general public access and use personal information in court documents online, media coverage provides a reasonable model. The evidence strongly suggests that this coverage satisfies a voyeuristic rather than educational function. Extending this principle to the realm of online court documents, this would suggest that the personal details included in those documents would, similarly, be subject to a voyeuristic gaze.[134] From this perspective, the inclusion of personally identifiable and sensitive information in online court documents potentially places the voyeuristic value—rather than the open court principle—in tension with privacy. Moreover, the inclusion of personal information in online court documents raises particular and specific risks—including identity theft—for those whose information is exposed. In this section, we have argued that the exposure of personal information in online court documents heightens privacy concerns without advancing the goals of the open court principle—particularly education and public engagement. We therefore believe that in placing court documents online, we should take measures to enhance the privacy of parties and witnesses whose personal information is exposed in those documents.

CONCLUSION

Despite a core commitment to "open courts," the principle is not universally enforced,[135] the tension between open courts and privacy is widely acknowledged,[136] and privacy interests are carefully considered as justifi-

134 Indeed, some have speculated that free-for-all access to court records online may not only generate embarrassment and undermine privacy, but also facilitate witness-litigant bullying and nourish an intimidation industry. See Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context" (2011) 56:2 McGill LJ 289 at 301.

135 In fact, many democracies around the world, including many European countries (such as France and Spain), as well as Japan, take steps to anonymize cases to protect privacy. See e.g. Amanda Conley et al, "Sustaining Both Privacy and Open Justice in the Transition from Local to Online Access to Court Records: A Multidisciplinary Inquiry" (2012) 71:3 Md L Rev 773 at 840; Elena Larrauri, "Conviction Records in Spain: Obstacles to Reintegration of Offenders" (2011) 3:1 Eur J Probation 50, at 51–52, n11; Nicolas Vermeys, "Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-examine Our Fundamental Values" in Karim Benyehklef et al, eds, *eAccess to Justice* (Ottawa: University of Ottawa Press, 2016) 123.

136 Policy Center for Victims Issues, *Victim Privacy and the Open Court Principle*, by Jamie Cameron (Ottawa: Department of Justice Canada, 2003).

cation for requests to suppress names and other personal details in publicly available court documents. Nonetheless, this type of privacy protection remains the exception rather than the rule, and all aspects of court records, including identity and other personal information regarding parties and witnesses, remain presumptively open to the public. Justification for this position rests at least in part on the presumed positive effects of public access to this kind of information, although these presumptions merit further interrogation even without the additional complications introduced when court information is made accessible online. The default position is to treat online publication of court records as a simple extension of existing access under open court principles, and therefore to publish online the same information that would be available through paper records. In this paper, we posit an alternative position. We suggest that public access to court records that include personal information, particularly when that access is online, supports privacy violations and possibly the voyeurism value,[137] both of which are arguably unrelated (and even antithetical) to the open court principle and its underlying purposes. We describe a number of ways in which personal information contained in court documents can be used (legally or illegally) for financial gain at the expense of the personal privacy of the individuals involved, and suggest that public access to the personal information contained in these documents may be just as likely to satisfy idle and salacious curiosity about parties and action, as it is to provide deep insight into the functioning of the legal system (which could be gained, in most instances, without having access to personal information about the parties and witnesses involved). Although privacy risks are raised by all forms of public access to unredacted court documents, we maintain that the risks are heightened in the online environment that affords "frictionless" information access: anonymous, free of geographic and temporal constraints, and largely invisible. "Frictionless" access—coupled with the socially accepted voyeuristic gaze and the notion of information as entertainment—serve to increase the privacy risks of parties and witnesses whose personal information is exposed in online court documents, without substantially enhancing the goals of the open court principle.

In our opinion, parties and witnesses involved in court proceedings bear unwarranted privacy risks as a result of online access to court information,

137 Clay Calvert, "The Voyeurism Value in First Amendment Jurisprudence" (1999) 17:2 Cardozo Arts & Ent LJ 273.

and we agree with those who call for a greater level of privacy control for online access to court documents.[138] Fortunately, the online environment presents a number of options for providing some degree of privacy protection vis-à-vis court documents.[139] Hartzog and Stutzman[140] offer practical suggestions for "online obscurity," including restricting search visibility, protecting access to documents, and redacting identifying information. With respect to the latter, a number of bodies have recommended that sensitive personal information should be redacted from a variety of court records, including judgments.[141] Other proposed methods include: taking a two-tiered approach by retaining the status quo for local access, but posting only redacted versions online,[142] and developing systems that allow for differential access, so that (for example) parties and authorized court personnel would have full access, while members of the public would have no or limited access.[143] Differential access systems could incorporate formal request systems to allow for case-by-case access to otherwise restricted information for scholarly, journalistic, or statistical purposes.[144]

While these recommendations have had limited effect, and indeed some argue that they are antithetical to open access principles, we feel that measures such as these are appropriate, and indeed necessary, for online court records. New technologies may assist with the problem of limiting the disclosure of sensitive personal information in online documents. Indeed, while redacting this information from paper documents presents

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138 See Caren Myers Morrison, "Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records" 62:3 Vand L Rev 919.

139 See Conley et al, *supra* note 135 at 840.

140 Woodrow Hartzog & Frederic D Stutzman, "Obscurity by Design" (2013) 88:2 Wash L Rev 385.

141 For example, the Canadian Judicial Council recommended removal of personal data identifiers from judgments. See Judges' Technology Advisory Committee, *Use of Personal Information in Judgments and Recommended Protocol* (Ottawa: Canadian Judicial Council, March 2005), online: <www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_UseProtocol_2005_en.pdf>. In addition, security breach laws in a number of states may require some courts in the United States to rethink inclusion of personal information in court records. See Susan Jennen Larson, "Court Record Access Policies: Under Pressure from State Security Breach Laws?" *United States, National Center for State Courts* (Virginia: National Center for State Courts, 2006), online: <www.ncsc.org>.

142 See Conley et al, *supra* note 135 at 843.

143 See *ibid* at 844; Peter Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information" (2004) 79:1 Wash L Rev 307 at 322–23 [Winn, "Online Court Records"].

144 See Lynn Sudbeck, "Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence" (2005) 27:3 Justice System J 268 at 282–83.

a herculean task, with "born digital" documents (*e.g.*, e-filed court documents) this management can be quite straightforward.[145] It should be noted that our goal is not to preclude public access to the full information contained in court files—the open court principle demands that this information remain accessible. The object is simply to find new ways to ensure appropriate access and use,[146] by introducing appropriate "friction" into the process of accessing court records.[147] Reintroducing a level of friction may also have the beneficial effect of improving confidence in our public justice system. It may assist in preventing further development of a two-tiered system of justice by staunching the flow of generally economically advantaged actors into private alternative dispute resolution systems, while poor and middle classes are forced to forego accessing justice or face having intimate details of their lives made widely available online.[148]

It is important to note, as Chatterjee points out in her analysis of privacy in the family courts, that redacting personal information from court files will not necessarily protect the identity of parties.[149] Given the plethora of non-identifying but nonetheless personal information available in court files, and in the context of the vast range of public records available, re-identification of anonymized information is increasingly possible.[150] This should not, however, trouble us—because the goal is not anonymization of court records, which after all contain too much in the way of necessary and individual detail to support true anonymity. Instead, the goal should be simply to return a degree of practical obscurity to online court records, offering litigants and parties some version of the protection of their personal information that was afforded when the paper records were held in physical locations.[151] Given the potential for voyeuristic interest in and sensationalism around issues such as terrorism, drug use and addiction, and domestic violence, and the differential impact such

145 See generally Gregory M Silverman, "Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records Over the Internet" (2004) 79:1 Wash L Rev 175.

146 See Peter A Winn, "Judicial Information Management in an Electronic Age: Old Standards, New Challenges" (2009) 3:2 Fed Cts L Rev 135.

147 See generally William McGeveran, "The Law of Friction" (2013) 2013:1 U Chicago Legal F 12.

148 See Winn, *Online Court Records*, *supra* note 143 at 328–29.

149 See Sujoy Chatterjee, "Balancing Privacy and the Open Court Principle in Family Law: Does De-Identifying Case Law Protect Anonymity?" (2014) 23 Dal J Leg Stud 91.

150 Paul Ohm, "Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization" (2010) 57 UCLA L Rev 1701.

151 See Woodrow Hartzog & Frederic Stutzman, "The Case for Online Obscurity" (2013) 101:1 Cal L Rev 1.

publicity may have on Muslims,[152] the mentally ill,[153] the economically disadvantaged, and women,[154] future research should focus on whether mechanisms to protect privacy in court records could also improve access to justice for equality-seeking groups.

152 For example, a Concordia University graduate student who sued Transport Canada for his inclusion on the no-fly list was denied his request for anonymization, even as Transport Canada denied him access to evidence supporting their claim that he was an "immediate threat to aviation" security. See Adrian Humphreys, "First Man on Canada's No-fly List Denied Legal Funding for Court Fight", *The National Post* (4 January 2013), online: <www.nationalpost.com>.

153 For further discussion of the impacts of open access to personally identifying information about the mentally ill who appear in Canadian courts. See Ian Mackenzie, "The Open Court Principle and Mental Health Stigma: What's the Right Balance?" (6 January 2016), *Slaw*, online: <www.slaw.ca>.

154 See Safety Net Canada, *Canadian Legal Remedies for Technology-enabled Violence Against Women* (BC Society of Transition Houses: 2013) at 5–6, online: <www.bcsth.ca> (for further discussion of the potentially devastating impacts that public access to sensitive case file information can have on women experiencing domestic violence).