# Open Courts, Open Data and Privacy

SPOW Workshop: Legal, Governance and Ethical Challenges in Open Data

Tilburg University (Delft), Netherlands

Teresa Scassa
Canada Research Chair in Information Law and Policy
University of Ottawa
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# Introduction

- Question: How do we balance the open court principle with privacy in a rapidly changing technological context?

- Answer:  It depends….
  - On the paradigm we adopt for thinking about court decisions
  - On the adequacy of legal frameworks to protect privacy
  - On constitutional frameworks and legal traditions

# Open Courts

- Open court principle: "Public access to the courts allows anyone who cares to know the opportunity to see 'that justice is administered in a non-arbitrary manner, according to the rule of law'". (Supreme Court of Canada)
  - Openness supports independence and impartiality through transparency
  - Openness may also
    - Support truthfulness of witnesses and parties
    - Expose conduct of police or other state officials
    - Makes law accessible and intelligible
- Principles of judicial independence are a factor in location of authority over drafting and publication of court decisions
- In Canada, the principle tends also to be applied to the administrative decision-making context

# Privacy is secondary and subsidiary to open courts

- General approach to privacy: anonymization, publication bans and sealing orders are available only where it can be demonstrated that they are "necessary in order to prevent a real and substantial risk to an important public interest", and where "the salutary effects . . . outweigh the deleterious effects on the rights and interests of the parties and the public". (*G. S. and K. S. v. Metroland Media Group et al.*, 2020 ONSC 5227)
- The "important public interest" has to be something other than privacy
- Onus is on individual to apply for any limitation on open courts principle

# Shifting attitudes:

- "in the face of changing societal values, a tension has developed between fidelity to the open court principle and the protection of individual privacy." *Carroll v. Natsis*, 2020 ONSC 3263
- In practical terms, may be a growing trend towards anonymization of court decisions (at the request of parties)
- But anonymization is still not automatic, and is not granted in all cases

# Traditional Paradigms: Openness v. Privacy

- Historically, privacy in court decisions was protected by
  1. court orders (creating limited exceptions to open court principle)
     - Publication bans
     - Sealing orders
     - Anonymization of proceedings
  2. special rules for special cases: family proceedings; young offenders; etc.
  3. technology (or lack thereof) – "practical obscurity"
  4. barriers to physical access, time and effort, legal literacy
  5. institutionalized media as intermediaries

# Technological change and disintermediation

- Disruption of established monopolistic business models for publishing decisions (e.g., rise of CanLII and court websites)
- Pressure to provide greater and more meaningful public access, particularly as access to justice concerns increase
- Disintermediation of communication of news/information

# Institutional responses to privacy concerns

- Technological limits on online publication and search functions
  - E.g. no indexing by search engines
- Licensing limitations
  - eg no scraping, no robots, non-commercial or personal reuse only
- Maintaining physical barriers to access to some materials
- Creating segmented technological access
- Slowly evolving changes in approach to open court principle
- Slowly evolving data minimization practices

# 3. Evolving Paradigms

- Conventional paradigm:
  - Court decisions as records/artefacts of judicial proceedings
    - Open courts principle
    - Transparency, accountable
- Emerging paradigms:
  - Court decisions as sources of personal data (financial, medical, criminal history, etc.)
  - Court decisions as text-based input data for AI analysis
    - Interest in broad access; as many useful data points as possible
    - Potential complex ethical and privacy issues

# Court decisions as sources of personal data *A.T. v. Globe24h.com*, 2017 FC 114

- Court decisions from CanLII and court websites scraped and hosted on Romanian website that was indexed by search engines
- Complaints to Privacy Commissioner that personal information was being collected, used and disclosed for commercial purposes without consent
  - Website charged money for removal of personal information
  - Website also had some paid advertising content
- Federal Court agreed with Commissioner that the site breached the *Personal Information Protection and Electronic Documents Act* and ordered the respondent:
  - To "remove all Canadian court and tribunal decisions containing personal information from Globe24h.com and take the necessary steps to remove these decisions from search engines caches"; and
  - To "refrain from further copying and republishing Canadian court and tribunal decisions containing personal information in a manner that contravenes the *Personal Information and Electronic Documents Act*, SC 2000, c 5"

# *A.T. v. Globe24h.com*, 2017 FC 114

- Case actually reveals
  - Power of technology
  - Shortcomings of legislative framework
  - Frailty of enforcement
  - Inadequacy of mild technological barriers

# Conclusion

- Need for a paradigm shift in how court decisions are understood
  - Not just public records of an event
  - But data-rich documents – including personal data
- Frameworks for balancing open courts with privacy must take into account the dual nature of court decisions
- Routine anonymization for the open publication of some categories of decisions?
- Are ‘data trust’ or data sharing models a potential solution for bulk use of court decisions?