

Reasonable Expectation of Privacy: Application to Decisions on Line

Background, Broader Context and Resources

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A bedrock principle of our system of justice is the openness of our courts – their processes, their decisions and the basis for them. Electronic storage of and access to decisions and records greatly enhances the practical realization of this principle by enabling easier access to decisions and records, which, in a paper based system, were essentially inaccessible to many.

Electronic access to judicial decisions and court records has also raised issues that did not exist or were obscured in a world dominated by paper. In the paper-based world there was limited access to published decisions and court records were practically obscure.¹ In consequence, threats to individual privacy and security and the inappropriate use of information generated for legal proceedings were different in type and scale than they are in the emerging electronic, online environment.² Ready access to personal, intimate or sensitive information permits easier use of this information for illegitimate or unintended purposes such as identity theft, harassment, stalking, predatory behaviour, profile building and marketing.

Courts, organizations and government in many jurisdictions are beginning to address the issues raised in the electronic environment and have generated discussion papers, guidelines, model policies and protocols. In Canada, the Canadian Judicial Council (“CJC”), through its Judges Technology Advisory Committee, has been very active and has produced a number of key documents that describe the complexity of the issues and discuss the competing values and principles informing their resolution. These documents draw on the experience of Canadian Courts and the Courts of other jurisdictions and make suggestions that reflect Canadian jurisprudence, recognize the primacy of the open court principle, promote enhanced access through the use of technology, recognize that individual privacy is a fundamental value, and conclude that the right to an open court generally outweighs the right to privacy.

The workshop presentation concerns the use of personal information in judgments and draws heavily on the work of the CJC, in particular, a protocol concerning the use of

¹ “‘Practical obscurity’ has come to refer to the inaccessibility of individual pieces of information or documents created, filed and stored using traditional paper methods relative to the accessibility of information contained in or documents referred to in a computerized compilation. Practical obscurity has precluded the realization of openness to court records and to docket information, and to a certain extent to court hearings.” Judges Technology Advisory Committee, “Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy” (May 2003), Canadian Judicial Council, online: <http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf>, at para. 88.

² *Ibid.* at paras 40-67 convincingly demonstrates the inevitability of a transference from a paper-based system to an electronic one, stating at para. 44, “it is not a question of whether the electronic environment will dominate the administration of justice. It is a question of when.”

personal information in judgments.³ In addition to the protocol (which is included in the workshop materials), two other seminal pieces on the topic are: (1) “Electronic Filing, Access to Court Records and Privacy”⁴ and, (2) “Model Policy for Access to Court Records in Canada.”⁵ These documents contain a wealth of information and guidance, including reference to relevant jurisprudence, statutes and secondary materials.

Significant progress is being made towards establishing a Canadian Centre for Court Technology, which will address these and other issues related to the use of technology by the courts and other participants in the legal process.⁶ In early 2006, interim funding to explore a governance model and the benefits and cost of implementation for the Centre was approved by the F/P/T Deputy Ministers of Justice.⁷ Once established, the Centre promises to be an invaluable resource for judges across the country.

³ Judges Technology Advisory Committee, “Use of Personal Information in Judgments and Recommended Protocol” (March 2005), Canadian Judicial Council, online: http://www.cjc-ccm.gc.ca/cmslib/general/PIJ_Protocol_E.pdf.

⁴ *Supra*, note 1.

⁵ Judges Technology Advisory Committee, “Model Policy for Access to Court Records in Canada” (September 2005), Canadian Judicial Council, online: <http://www.cjc-ccm.gc.ca/cmslib/general/Model%20Policy-final-Sept2.pdf>.

⁶ Justice Fran Kitely and Professor Daniel Poulin, “Court Technology SCAN: Canadian Centre for Court Technology” Canadian Forum on Civil Justice Newsletter, Issue 9: Spring 2006, p.6, online: [http://www.cfcj-fcjc.org/issue_9/CFCJ%20\(eng\)%20spring%202006-Court.pdf](http://www.cfcj-fcjc.org/issue_9/CFCJ%20(eng)%20spring%202006-Court.pdf).

⁷ *Ibid.* at p.8 “Update”.