

# REASONABLE EXPECTATION OF PRIVACY: APPLICATION TO PUBLISHING DECISIONS ONLINE

Carole Lucock

# Reasonable Expectation of Privacy

- What expectations of privacy do participants in the legal process have?
- How and to what extent has technology interfered with these expectations?

# Two Contexts

- Publication Bans/ Anonymity Orders
- Use of personal information in decisions not subject to anonymity orders

# Balancing the Benefits and Concerns of Online Availability

- Benefits of enhanced access – Open Court Principle realized
- Concerns – potential for inappropriate, illicit or unintended use
  - Broad distribution/publication of personal information (sometimes sensitive)
  - Data mining, profiling, I.D. theft
  - Re-Identification

# Protocol/Guidelines

- Canadian Judicial Council, “Use of Personal Information in Judgments and Recommended Protocol” (2005)
- Other Courts; e.g. British Columbia C.A., “Guidelines for Protecting Privacy Interests in Reasons for Judgment” (2004)

# CJC Guiding Principles

- Courts encouraged to publish all decisions on own websites and publicly accessible sites (CANLII)

# CJC Guiding Principles

Although there may be privacy concerns regarding publication – majority of CJC sub-committee of the view that:

- outweighed by benefits of facilitating open access to decisions
- Adverse impacts can be reduced by following guidelines in protocol

# CJC – Levels of Protection

- Personal Data Identifiers
- Publication Bans
- Discretionary Privacy Protection

# Personal Data Identifiers

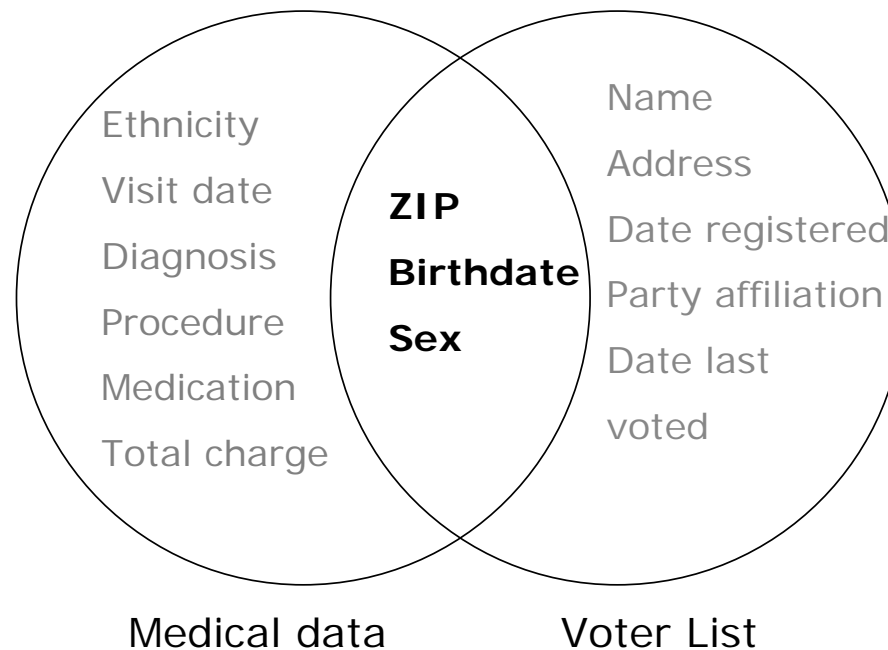
Elements of legal identity other than a name that are fundamental to an individual's right to privacy

- Generally, do not include in judgment
- If relevant, obscure (e.g. leave elements out of a number)

Examples:

- SIN/health/credit card numbers,
- financial account numbers (banks, investment),
- full birth date

# Publication Ban: Is the decision sufficiently anonymized?



L. Sweeney. *k*-anonymity: a model for protecting privacy. *International Journal on Uncertainty, Fuzziness and Knowledge-based Systems*, 10 (5), 2002; 557-570, Figure 1.

# Publication Bans

Removal/disguise of name is often insufficient to shield identity

Other identifying information:

- personal data (allows for direct or indirect contact)
- personal acquaintance information (names/personal data of persons organizations)

Use of both types - **high risk** of identity disclosure – should not be included

# Publication Bans

Other identifying information:

- Specific factual information (communities, accused/co-accused, persons acting in official capacity)
  - Increases risk of re-identification
  - Should be avoided unless risk of re-identification is minimal once personal data eliminated from judgment
  - may have little or no legal relevance whereas general factual information (age, district of residence) may be more relevant

# Publication Bans

Other identifying information:

- General factual information
- **Low risk** of identification **if** personal data and personal acquaintances removed.

# Publication Bans

## Additional Issues:

- Responsibility for sufficiently de-identifying judgment?
- Different methods by different publishers (e.g. Quicklaw, CanLII, Court websites).

# Discretionary Protection of Privacy Rights

Exceptional cases – egregious, sensational fact. Resort to only when:

- Harm to minor children or innocent third parties
- Ends of justice subverted by disclosure
- Information might be used for improper purposes

## Related Developments and Resources

- Handout in Binder
- CJC discussion paper on open courts
- CJC guidelines on access to court records
- Establishment of Canadian Centre for Court Technology