Promoting Privacy, Fairness, and the Open Court Principle in Immigration and Refugee Proceedings

Jon Khan & Sean Rehaag

COURT DECISIONS AND documents are becoming easier to access online, and this access provides many benefits. Access to legal data is a key driver of technological innovations that may advance access to justice. However, because court decisions and documents often contain personal information, increased access leads to serious privacy concerns.

The Federal Court has demonstrated leadership among Canadian courts in proactively grappling with these issues in considering increased electronic access to court records. To date, stakeholder consultations highlighted immigration and refugee proceedings as a concerning area for privacy risks. Some have called for severe restrictions on access to court documents in those proceedings, while others contend that the open court principle must always trump privacy.

We write this article to offer a case study of access to immigration and refugee law court documents — which we acknowledge is a hard case — to think through what fair access to court materials should look like as we enter the era of computational law. We suggest that debates too quickly accept irreconcilable tensions between privacy and the open court principle: stakeholders often just assert that one or the other should take precedence. Rather than a limited framework that focuses on privacy and openness as binary opposites, we argue for prioritizing fair access to court materials. This approach offers a way

LES DÉCISIONS DES tribunaux et les documents judiciaires sont de plus en plus facilement accessibles en ligne ce qui présente de nombreux avantages. L'accès aux données juridiques est l'un des facteurs clés de l'innovation technologique qui pourrait contribuer à l'avancement de l'accès à la justice. Cependant, puisque les décisions et les documents judiciaires contiennent souvent des informations confidentielles, l'accès accru à ces informations soulève de sérieuses questions en ce qui concerne le respect de la vie privée.

La Cour fédérale a fait preuve de leadership parmi les tribunaux canadiens en anticipant la question d'un meilleur accès électronique aux documents judiciaires. Jusqu'à présent, les consultations avec les intervenants et intervenantes (ci-après « intervenants ») avaient souligné les procédures d'immigration et de statut de réfugié comme étant des domaines préoccupants en ce qui concerne le respect de la vie privée. Certains et certaines réclament que des restrictions sévères à l'accès aux documents judiciaires soient mises en place dans les procédures de ces domaines. D'autres soutiennent que le principe de la publicité des débats doit toujours l'emporter sur la protection de la vie privée.

Nous avons rédigé cet article afin de présenter une étude de cas sur l'accès aux documents judiciaires relatifs au droit de l'immigration et de statut de réfugié, ce qui est difficile en soi, pour réfléchir sur ce à quoi devrait ressembler

out of the impasse between positions that rank either privacy or openness ahead of the other. It also ensures that access limits do not amplify information asymmetries that disadvantage refugees and other displaced people.

un accès équitable aux documents judiciaires à l'aube de l'ère du droit informatique. Nous avançons que les débats acceptent trop rapidement les tensions irréconciliables entre la protection de la vie privée et le principe de la publicité des débats : les intervenants se contentent souvent d'affirmer que l'un ou l'autre devrait être prioritaire. Au lieu d'accepter un cadre limité, qui se concentre sur la vie privée et la transparence comme étant des composantes opposées, nous argumentons pour donner priorité à un accès équitable aux documents judiciaires. Cette approche permet d'éviter les situations d'impasse des positions qui privilégient la protection de la vie privée ou la transparence. Elle garantit également que les limites d'accès ne vont pas empirer le manque d'information, désavantageant ainsi les réfugiés et tout autre groupe de personnes déplacées.

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Jon Khan[*] *& Sean Rehaag*[**]

I. INTRODUCTION

Court decisions and documents are increasingly easy to access.[1] Expanding

* Ph.D. Candidate at Osgoode Hall Law School, York University.

** Director of the Centre for Refugee Studies, Founding Director of the Refugee Law Laboratory, & Associate Professor at Osgoode Hall Law School, York University. This article draws on research supported by the Social Sciences and Humanities Research Council. The authors are grateful for the research assistance provided by Alexandra Verman. They are also grateful for the feedback provided on an earlier version of this research by Amy Salyzyn, Anne Ko, David Lepofsky, and Colin Lachance as well as anonymous reviewers at the *Ottawa Law Review*.

1 For some examples of greater access, see generally Jo Sherman, "Guidelines for Canadian Courts: Management of Requests for Bulk Access to Court Information by Commercial Entities" (April 2021), online: <cjc-ccm.ca/sites/default/files/documents/2021/Bulk%20Access%20to%20Court%20Info%20-%20Guidelines%202020-12_EN%20Final%20-%20One%20PDF.pdf> or Refugee Law Lab, "Bulk Legal Datasets", online: <refugeelab.ca/bulk-data>. For discussions of access to Canadian court decisions and documents, including historic inequity, see generally Wolfgang Alschner, "AI and Legal Analytics" in Florian Martin-Bariteau & Teresa Scassa, eds, *Artificial Intelligence and the Law in Canada* (Toronto: LexisNexis Canada 2021) 349 at 349; *Contra* Julie Sobowale, "Digging in: The ROSS Anti-trust Saga Against Westlaw Continues", *CBA National* (7 February 2018), online: <www.nationalmagazine.ca/en-ca/articles/legal-market/legal-tech/2022/digging-in> (Bulk access to Canadian decisions is limited, and individual access is still inadequate for access and privacy protection reasons); Addison Cameron-Huff, "Why Google Can't Build A Case Law Search Engine in Ontario" (11 February 2014), online: <www.cameronhuff.com/blog/ontario-case-law-private>; Anne A Ko, *A Legal Analysis of the Access to Court Record Policies of the Provincial and Territorial Courts of the Common Law Jurisdiction of Canada and Public Accessibility* (2016) [unpublished, archived at University of Toronto Faculty of Law Library] (In many cases, neither individual nor bulk access to paper or electronic court records is available).

access has numerous benefits for corporations,[2] lawyers,[3] judges,[4] law students,[5] academics,[6] and unrepresented litigants[7]—including increased fairness, transparency, accountability, efficiency, innovation, and access to justice.[8] Researchers, legal technology and publishing companies, governments, data-scientists, technology start-ups, and other stakeholders are seeking to leverage bulk access to courts' decisions, documents, and data.[9] At the same time, increasing accessibility generates pushback about privacy and new risks that expanded online access poses.[10] This includes

2 See generally Loom Analytics, "AI Driven Tools Have the Power to Transform Business Operations" (2023), online: <www.loomanalytics.com/aboutus>; Thomas Reuters Legal, "Westlaw Edge Canada Coming Soon" (8 July 2021), online (video): <www.youtube.com/watch?v=2Wpfg4XPxG0>; LexisNexis, "What is Legal Analytics" (11 November 2019), online: <www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/what-is-legal-analytics>; Blue J, "About Us", online: <www.bluej.com/about-us>; Alexi, "Alexi", online: <www.alexi.com/about>.

3 Lawyers already use tools included in the previous footnote, and they are also creating their own tools. See generally. Lenczner Slaght, "Data-Driven Decisions", online: <www.litigate.com/data-driven-decisions>.

4 Some courts may use these materials to derive benefits and insights, but judges and courts also benefit from scholarship about their decision-making that relies on court decisions and court documents. See e.g. Nicholas Keung, "Getting Refugee Decisions Appealed in Court 'The Luck of the Draw,' Study Shows", *Toronto Star* (21 September 2018), online: <www.thestar.com/news/immigration/getting-refugee-decisions-appealed-in-court-the-luck-of-the-draw-study-shows/article_f2eeb3b3-f649-503a-860c-976b1f1bcb95.html>.

5 Some law schools are attempting to use court decisions and documents to gain better understandings of Canada's legal system. See generally Data Science for Lawyers, "About" (8 May 2020), online: <www.datascienceforlawyers.org/about>; Queen's University, "Conflict Analytics Lab", online: <conflictanalytics.queenslaw.ca>.

6 Some academics use this empirical access to conduct legal research in an attempt to discover trends in Canada's legal system. See generally Michael Trebilcock & Albert H Yoon, "Equality Before the Law? Evaluating Criminal Case Outcomes in Canada" (2016) 53:2 Osgoode Hall LJ 587; Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1 [Rehaag, "The Luck of the Draw"]; Peter McCormick, "Structures of Judgment: How the Modern Supreme Court of Canada Organizes Its Reasons" (2009) 32:1 Dal LJ 35.

7 See generally NSRLP, "Welcome to the NSRLP!", online: <representingyourselfcanada.com>.

8 See generally Jena McGill & Amy Salyzyn, "Judging by the Numbers: Judicial Analytics, the Justice System and its Stakeholders" (2021) 44:1 Dal LJ 249.

9 See generally Sherman, *supra* note 1.

10 For some examples of pushback to electronic access in Canada and the US, see generally Jane Bailey & Jacquelyn Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016) 48:1 Ottawa L Rev 143 [Bailey & Burkell, "Revisiting"]; 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; Karen Eltis, *Courts, Litigants and the Digital Age*, 2nd ed (Toronto: Irwin Law, 2016); Woodrow Hartzog, "The Public

skepticism about the open court principle as a foundational constitutional norm, and calls to revisit and rein in its role.[11]

Many of these concerns are legitimate. Legal materials are replete with intensely personal information, and their public exposure may lead to significant harm. Accordingly, careful attention must be paid to privacy when thinking about the interaction between electronic access and the open court principle. Some concerns about sensitivity, privacy, and publicity arise regarding whether access occurs online or in-person. Others are specific to electronic access, and some occur primarily in scenarios where online information is aggregated or accumulated in bulk.

Unfortunately, governments are largely failing to address this issue. There is little legislative guidance when navigating the tension between fairness, privacy, and access. Governments invest insufficient money to pursue solutions.[12] As a result, Canadian courts and the Canadian Judicial Council have largely been on their own. They must satisfy Canada's constitutionalized open court principles while addressing ever-increasing privacy challenges in the face of rapidly changing technologies. Yet for various reasons (including resource constraints), most courts are unable to adequately address this complex issue. This situation has resulted in a poorly operating piecemeal regime for protecting privacy and accessing court records in Canada.[13]

Canada's Federal Court is trying to be an exception. Few courts have taken such a deliberate approach and demonstrated leadership in grappling with this issue. For example, the Court's most recent Strategic Plan prioritizes leveraging technology to become "a more accessible digital court."[14] The Court has also consulted stakeholders about increased electronic

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Information Fallacy" (2019) 99:2 BUL Rev 459; Laura W Morgan, "Preserving Practical Obscurity in Divorce Records in the Age of E-Filing and Online Access" (2019) 31:2 J Am Academy Matrimonial Lawyers 405.

11 See generally Jacquelyn Burkell & Jane Bailey, "Equality at Stake: Connecting the Privacy/Vulnerability Cycle to the Debate about Publicly Accessible Online Court Records" (2018) 4:1 Can J Comp & Contemporary L 67.

12 Such legislation is likely possible. Indeed, Parliament has addressed such issues in youth proceedings. See *Youth Criminal Justice Act*, SC 2002, c 1, s 110(1).

13 Ko, *supra* note 1 at 77.

14 Federal Court, "Federal Court Strategic Plan 2020-2025" (15 July 2020) at 4, online (pdf): <www.fct-cf.gc.ca/content/assets/pdf/base/2020-07-15%20Strategic%20Plan%202020-2025.pdf> [Federal Court, "Strategic Plan"].

access to court records,[15] including a particular focus on privacy in immigration and refugee proceedings.[16]

This article presents a case study of that consultation—specifically, what the consultation process revealed about current views on privacy, fairness, and the open court principle. While the consultation focused on immigration and refugee proceedings, our analysis and conclusions apply more broadly.

Our thesis is simple: conversations, consultations, and policies about increased access to court records, innovative technology, and the open court principle often get mired in a binary competition. Privacy is pitted against technology and the open court principle and *vice versa*, but this binary is unnecessary, unhelpful, and avoidable. Further, this binary debate has mostly excluded a key concept that all conversations about increased access to courts' decisions, documents, and data must include: maximizing individual and systemic fairness in Canadian legal processes.

New technologies, more deliberate processes, and greater equal access to court documents can simultaneously promote privacy, respect the open court principle, and improve the fairness of court processes. Instead of pursuing policies that prioritize either the open court principle *or* privacy, we advocate for paths that simultaneously maximize privacy, openness, and fairness. If courts embraced this nuanced, non-binary approach, they could enhance privacy interests without compromising the open court principle. That approach could avoid creating access regimes that asymmetrically block research and technology developments that could otherwise advance fairness for everyone—especially marginalized people. Regardless of what courts choose to do, any measures they implement to protect privacy must avoid amplifying existing unfairness in accessing court records and legal materials.

This paper has six parts. Part II addresses the case study—the Federal Court's Strategic Plan and Consultation, including calls to limit electronic access and to keep in place practical obscurity mechanisms. Part III discusses why it is time to realize the open court principle to enhance fairness at a deeper level. Part IV discusses why practical obscurity and practical friction (*i.e.* relying on obscure or impractical access to court records to protect privacy) are inadequate privacy protection solutions. Part V discusses opportunities and challenges in using technology to improve

15 *Ibid* at 15.

16 *Ibid*.

privacy protections and open courts. Part VI uses examples from immigration and refugee law—a hard case because of the important privacy stakes involved—to demonstrate why access to court records and judicial decisions is fundamental for individual and systemic fairness. Part VII sets out our conclusions, including recommendations about policies that can advance privacy, openness, and fairness.

II. THE CASE STUDY: THE FEDERAL COURT'S 2021–2025 STRATEGIC PLAN AND CONSULTATIONS

As it does every five years, the Federal Court released a strategic plan in 2020.[17] One major theme was clear: the COVID-19 pandemic stimulated the Court to innovate rapidly. In its strategic plan, the Court committed "to redouble its efforts to shift away from being a paper-based organisation" to enhance access to justice.[18] In the Court's words, "[t]here will be no going back."[19]

Because of this objective, the Federal Court's efforts offer a useful case study of the kinds of issues that may arise for courts and tribunals that consider increased electronic access to decisions, records, and data. Its consultations on the issue also showcase a telling example of the kinds of proposals that can ensue when stakeholders start with binary positions. Submissions were almost exclusively aimed at increasing or restricting access instead of also considering how to increase individual and systemic fairness.

A. The Federal Court's Strategic Plan: Become an Accessible Digital Court, Improve Public Service, and Increase Access to Justice

The Federal Court is pursuing two principal and related objectives over the next five years: (1) significantly increasing access to justice; and (2) enhancing the Court's ability to serve the public across Canada by "accelerating the Court's shift away from being a paper-based organization, towards being a more accessible digital court."[20] Once complete, the shift will

17 *Ibid* at 5.
18 *Ibid* at 2.
19 *Ibid*.
20 *Ibid* at 4.

enable the public and media to electronically access non-confidential court records and non-confidential portions of electronic hearings.[21]

However, the promise is potentially far bigger than merely electronic access. The Court sees this shift as essential to better achieving its stated goals of being more "impartial, equitable, accessible, responsive, timely,… efficient,"[22] proportional,[23] innovative,[24] consistent,[25] and diverse.[26] The Court also stated that it considers enhancing electronic access as part of ensuring compliance with constitutionally protected open court principles.[27] Finally, electronic access aligns with modern societal expectations instead of adhering to the traditional model; currently, anyone wanting to obtain filed documents must physically travel to registry offices and pay 40¢ per page to obtain a copy.[28] Such inaccessibility is no longer sustainable; as the Federal Court's Strategic Plan puts it, "[i]n 2020, this is unacceptable."[29]

We agree. All Canadian courts should take measures to move past antiquated and inefficient paper-based systems. They should embrace the efficiencies of going digital and the opportunities it offers for increased accessibility, transparency, and fairness. That said, we also agree with the Federal Court's call for caution on electronic access to some types of court documents because of privacy concerns, especially in immigration and refugee matters. Despite its overall commitment to embracing electronic

21 *Ibid*.
22 *Ibid* at 9.
23 *Ibid* at 16.
24 *Ibid* at 9.
25 *Ibid* at 18.
26 *Ibid* at 25.
27 *Ibid* at 14–15.
28 *Ibid* at 9, 14.
29 *Ibid* at 14. The Court is planning to conduct its shift in three phases:

1. The Federal Court will offer electronic access to all its public decisions, directions, and other communications. Federal Court judges are encouraged to write those documents without including confidential information that will need to be redacted later. *Ibid* at 15.
2. The Federal Court will then provide electronic access to all parties' and interveners' non-confidential legal submissions. This will encourage counsel and self-represented litigants to draft their submissions to exclude confidential information, especially when they can confidentially annex it. *Ibid* at 15.
3. Over a long-term period, the Federal Court will work with stakeholders to expand the scope of its electronic access initiative to include evidence and other documentation. *Ibid* at 15.

access, the Court clearly recognized that putting certain types of information online brings increased risks and that some caution is needed.[30]

B. The Federal Court's Consultation Revealed Divergent and Binary Views on Electronic Access to Court Records

The Federal Court embarked on this project by first undertaking a pilot project in Toronto,[31] which, as an aside, is a key principle of user- or people-centered design that other courts should also embrace.[32] The pilot project focused on immigrant proceedings and permitted any party to electronically file documents in 2018.[33] It then engaged in public consultation on electronic access from 2018-2021. Stakeholders unfortunately paid little attention to improving individual and systemic fairness. The consultations revealed the kind of binary views that we caution against:

- Some argued that anonymizing court records and decisions should be available from the outset. Yet others said too many anonymization requests could compromise the open court principle.[34]

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30 Special considerations, such as personal safety and privacy, "*may* justify a more cautious approach in making its files electronically accessible in certain limited types of cases. These include those involving (i) minors, (ii) refugee applicants, (iii) persons applying for immigration status, in certain circumstances, and (iv) self-represented litigants." *Ibid* at 15.

31 *Ibid* at 11.

32 For a thorough summary of user- or people-centered design in the legal system, see Jon Khan, "*The Life of a Reserve*": *How Might We Improve the Structure, Content, Accessibility, Length, and Timelines of Judicial Decisions* (2019) [unpublished, archived at University of Toronto Faculty of Law Library] at 64 [Khan, "Life of a Reserve"] ("With origins in ergonomics, engineering, computer science, and artificial intelligence, human-centered design depends on prototypes, experiments, and user-consultation throughout the design process.")

33 See Federal Court, "Notice to the Parties and the Profession Policy Project (Toronto Local Office Only): IMM E-Process" (4 July 2019) at 1, online (pdf): <www.fct-cf.gc.ca/content/assets/pdf/base/IMM%20e-process%20pilot%20Notice%20July%204-2019%20revision%20ENG%20FINAL.pdf >; Federal Court, "Strategic Plan", *supra* note 14 at 11.

34 At one end of the spectrum, the Canadian Association of Refugee Lawyers suggested that originating Notice of Applications should include anonymization requests so parties can maintain confidentiality at the start. Justice Diner, a Federal Court judge, agreed with such a proposal. However, he also said anonymity must be balanced with the open court principle. In other words, no blanket anonymity should not be available for all proceedings. At the other end of the spectrum, Chief Justice Crampton of the Federal Court noted the need to monitor anonymity requests. Otherwise, the open court principle could face a real issue if a high percentage of Federal Court decisions became anonymized. See Federal Court, "Bench and Bar Liaison Committee (Citizenship, Immigration & Refugee Law) Minutes" (12 April 2018), online (pdf): <www.fct-cf.gc.ca/Content/assets/pdf/base/

- Many argued that online access to court documents poses a risk for sensitive information being widely distributed online.[35] Yet others contended that online access must be widely available and subject to only limited exceptions.[36]
- Some stakeholders expressed heightened concerns about the privacy implications of allowing people to electronically access court records in judicial reviews of refugee, humanitarian and compassionate, pre-removal risk assessment, and other risk-based cases.[37] Fewer concerns were raised about online access to immigration and refugee court records for judicial reviews of visa officers, express entry, and other non-risk decisions.[38] Yet others rejected the view that immigration or refugee proceedings should generally be subjected to limited access. Instead, they proposed that parties seek anonymization where appropriate. In their view, the common law rarely permits departing from the open court principle.[39]

These divergent perspectives highlight a sense of tension between ideals of openness and privacy. Positions were framed primarily in opposition rather than recognizing both openness and privacy as relevant considerations for advancing and ensuring fair access to information.

The Canadian Bar Association (CBA) was specifically invited to provide a submission.[40] In its response, with which the Office of the Privacy

IMM%20Bar%20-%20April%2012-2018%20minutes%20FINAL%20ENG.PDF>; Federal Court, "Bench and Bar Liaison Committee (Citizenship, Immigration & Refugee Law) Teleconference" (4 June 2018), online (pdf): <www.fct-cf.gc.ca/Content/assets/pdf/base/imm/IMM%20Bar%20Liaison%2004-june-2018%20minutes%20draft%20v4%20(for%20circulation%20to%20Committee)%20ENG.pdf>.

35 The Chief Justice of the Federal Court, Legal Aid Ontario, and the Quebec Lawyers Association all noted potential risks but agreed. See Federal Court, "Bench and Bar Liaison Committee (Citizenship, Immigration & Refugee Law)" (9 May 2019), online (pdf): <www.fct-cf.gc.ca/Content/assets/pdf/base/imm/IMM%20Bar%20Liaison%209-may-2019%20minutes%20draft%20v4%20(for%20circulation%20and%20translation)%20ENG.pdf>.

36 See Letter from the Canadian Media Lawyers' Association to the Honourable Chief Justice Paul S Crampton (9 January 2020) at 1 ["CMLA Letter"] [on file with the authors].

37 See Federal Court, "Bench and Bar Liaison Committee (Citizenship, Immigration & Refugee Law)" (31 May 2019) at 2–3, online (pdf): <www.fct-cf.gc.ca/Content/assets/pdf/base/imm/IMM%20Bar%20Liaison%2031-may-2019%20minutes%20v4%20(for%20circulation%20to%20Committee)_Eng.pdf>.

38 *Ibid*.

39 "CMLA Letter", *supra* note 36.

40 See Canadian Bar Association, "Access to Documents on Federal Court Website" (December 2019), online (pdf): <www.cba.org/CMSPages/GetFile.aspx?guid=eed26a1c-5256-4c66-87d6-20c2c99afa84> [CBA, "Access to Documents"].

Commissioner of Canada generally agreed,[41] the CBA called for a reverse onus approach to accessing many Federal Court records electronically or in-person. It argued that this new approach is necessary because the previous "'practical obscurity' of paper-based records offers a form of privacy protection that will not exist with online access."[42] It suggested that Australia's Federal Court offers an exemplary approach for the Federal Court:

- Australia provides online access to files and does not distinguish between electronic or paper-based records. Access depends on the document's classification (non-restricted, restricted, or confidential).[43]
- Its docket search system is like the Federal Court of Canada's system. Anyone can access it.[44]
- Its online search portal contains non-restricted, restricted, and confidential documents.[45]
- Parties and non-parties can create accounts, but only parties can view documents online.[46]
- If non-parties want to access either restricted[47] or non-restricted documents,[48] they must use the access form and pay for access. No access rationale is required for non-restricted documents, but a rationale is helpful when seeking court leave to access restricted documents.[49]

Based partly on this Australian model, the CBA made eight recommendations to the Federal Court:

1. *Require online accounts and fees to access filed documents*: Registration — including uploading identification and full name and address — promotes

41 See Office of the Privacy Commissioner of Canada, "Submission of the Privacy Commissioner of Canada Concerning Online Access to Court Records" (July 2020) at 1 [OPC, "Submission Concerning Online Access to Court Records"] [on file with the authors].

42 CBA, "Access to Documents", *supra* note 40 at 2.

43 *Ibid*.

44 *Ibid*.

45 *Ibid* at 3.

46 *Ibid*.

47 *Ibid* ("documents not classified as non-restricted, including affidavits, exhibits, unsworn statements of evidence and subpoena material; and documents a court has designated as "confidential" or prohibited from disclosure to the type of requester in question").

48 *Ibid* ("originating application or cross claim; notice of address for service; pleading or particulars of a pleading or similar document; statement of agreed facts or an agreed statement of facts; interlocutory application; judgment or an order of the Court; notice of appeal or cross appeal; notice of discontinuance; notice of change of lawyer; notice of ceasing to act; reasons for judgment; and a transcript of a hearing heard in open court").

49 *Ibid* at 7.

accountability and enhances security. Non-parties should pay an access fee for documents to offset registry officers' time and potentially dissuade frivolous requests. Also, hierarchical access for media and non-party lawyers should be considered.[50]

2. *Provide online access of court records subject to limited exceptions*: All court records, unless designated confidential, should be accessible online. Immigration and refugee documents, or matters involving minors, should be designated as "restricted" documents.[51]
3. *Put the onus of protecting sensitive personal information on the Court and counsel*: Litigants should be informed about the consequences of court records being online, inherent risks, and steps needed to protect sensitive information. Counsel should consider the impact of online access when filing materials and take steps to protect their clients' privacy and confidentiality. In addition, the Court should be mindful of limiting personal information when preparing judgments and materials.[52]
4. *Use special considerations in the immigration context*: To reduce the risk of sharing highly sensitive information, the Court should use Australia's classification system of non-restricted, restricted, and confidential documents.[53] Non-parties could view a list of documents in the court file and access non-restricted documents upon request.[54] However, non-parties should only be allowed to access restricted documents after permission from the Court is obtained.[55] Requiring court "permission to access these items would protect against the potential unlawful use of this information overseas (e.g., foreign governments, agents of

50 *Ibid* at 4.

51 *Ibid* at 5–9.

52 *Ibid* at 5–6.

53 Even if this system is not used, the CBA still calls for certain documents never being online:

- no immigration files for interlocutory proceedings unless leave is granted (so only meritorious applications will receive scrutiny);
- no in camera proceedings or pre-removal risk assessment or overseas visa applications for refugee or humanitarian & compassionate protected persons; and
- no Certified Tribunal Records. *Ibid* at 8–9.

54 The CBA proposes these documents should be classified as non-restricted documents: "originating application (other than requests for mandamus or applications containing extensions of time); notice of address for service; certificate of service and notice of appearance; judgment, order, and direction of the Court; notice of discontinuance; notice of change of lawyer; notice of ceasing to act; and reasons for judgment." *Ibid* at 6–7.

55 The CBA proposes these documents would be restricted: pleadings, affidavits, exhibits, and Certified Tribunal Records. *Ibid* at 6.

persecution in a refugee context, fraudsters with financial and identity documents)."[56] The Court could consider two factors when examining access requests: non-party identity; and whether the rationale and declared use are consistent with section 2(b) of the *Charter*.[57]

5. *Give special protection to minors' information*: Information about minors requires special protection even when it is anonymized. Restricted minors' documents could include: pleadings, affidavits, exhibits, and other documents with sensitive information.[58]
6. *Implement comprehensive data security protocols*: Rigorous security protocols and storage on Canadian servers are imperative. Data mining is an ongoing problem. Court record data security and privacy rights should be equivalent to privacy legislation requirements. The Court also needs to have an updated privacy policy on its website with retention limits; mandatory breach recording and reporting procedures; and appropriate technological safeguards to prevent unauthorized access to overcome technological barriers. The Court should consult with the Office of the Privacy Commissioner on the best practices for data security of online records.[59]
7. *Limit searchability*: Documents should only be searchable through the Court website. Internet search engines or software designed for bulk online searching should not have access to court files. The Court should maintain its website's current search functionality (only allowing for searches by person's last name, corporation name, ship name, court file number, intellectual property name/number, and counsel of record). The Court website should not provide the ability to search by details, phrases, or words.[60]
8. *Avail more pilot projects*: Before full online access is provided, a pilot project should occur to evaluate the feasibility, effectiveness, cost, and the extent and type of non-party requests for immigration documents.[61]

The Canadian Media Lawyers Association (CMLA) also provided submissions. It applauded the Federal Court's efforts but it strongly objected to the CBA's proposal. The CMLA cautioned the Court to "be wary of fearmongering around how…technologies might be used as an excuse to place

56 *Ibid*.
57 *Ibid* at 8.
58 *Ibid* at 9.
59 *Ibid* at 9–10.
60 *Ibid* at 10.
61 *Ibid*.

limits on the open court principle,"[62] and it argued that the CBA's proposal would frustrate transparency.[63] The CMLA raised six reply points to the CBA's recommendations:

1. The CBA's calls to make balancing the starting point improperly reverse the burden and open court presumption. Presumptive public and media access—not balancing exercises—is the starting point for open courts. The open court principle "does not seek to find an equilibrium between competing interests."[64] Balancing exercises are only necessary if restrictions can prevent serious risks to the administration of justice because reasonably alternative measures will not prevent risks.[65]
2. Australia's court record access policy cannot work in Canada. Australia's open court principles rely on common law whereas Canada's open court principles are constitutionally guaranteed rights.[66]
3. Using pay-for-access models to discourage access to court "flies in the face of the purpose of the open court principle."[67]
4. Requiring applicants to explain why they are interested in court materials invites courts to "[engage] improperly in editorial decision making."[68]
5. Restricting access to individuals present in Canada unduly limits individuals with legitimate interests in Canadian court proceedings from accessing them.[69]
6. Instead of making certain records presumptively "restricted," courts should remind parties that filed documents are presumptively publicly available. If parties want to restrict access, they will bear the burden.[70]

The CBA and CMLA positions represent opposing sides in the debate over privacy and openness, and their positions are ultimately untenable. The former too easily sacrifices the open court principle for privacy. The latter fails to accommodate important privacy interests for open courts, particularly in the immigration and refugee law setting. Even worse, neither position meaningfully engages with fair access to court materials, which is a key issue that should drive conversations that include overwhelming power

62 "CMLA Letter", *supra* note 36 at 1, 6.
63 *Ibid* at 1.
64 *Ibid* at 2.
65 *Ibid*.
66 *Ibid* at 2–3.
67 *Ibid* at 3.
68 *Ibid* at 3–4.
69 *Ibid* at 4.
70 *Ibid* at 4–5.

imbalances and information asymmetries. As we discuss in Part VI, the legal system is full of information asymmetries and power imbalances that can compromise both individual and systemic fairness. For example, in the immigration and refugee law context, one party—the government—has far more access to information and power than any other party in the legal system. Accordingly, before resorting to either extreme position, courts and tribunals must explore options that simultaneously maximize privacy, openness, and fairness—and in so doing, they should be sensitive to imbalances in power and in access to information.

III. OPEN COURTS IN CANADA: NOW IS THE TIME FOR FAIR REALIZATION

The open court principle is said to be a "hallmark" of a democratic society[71] and is "deeply embedded in the common law tradition."[72] Historically speaking, however, courts were not so "open."[73] Unless you went in person to see and hear proceedings and decisions, United Kingdom courts in the 12th to 18th century were effectively closed to the public because the common law prioritized oral proceedings without reasoned decisions. In fact, for most of the common law's history (including in Canada), judges simply did not issue reasoned decisions in disputes.[74]

Today, Canada's courts and judges are far more transparent than their historical colleagues. Canadian judges offer published, reasoned, written decisions or audio recordings of unreported, reasoned, oral decisions in many disputes. As many courts have noted, including the Supreme Court of Canada, judicial decisions "are the primary mechanism by which judges account to the parties and to the public for the decisions they render."[75]

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71 *Canadian Broadcasting Corp v New Brunswick (AG)*, [1996] 3 SCR 480 at para 22 [*Canadian Broadcasting Corp* 1996], 16 DLR (4th) 506, citing *Re Southam Inc and R (No 1)*, [1983] 146 DLR (3d) 408 at 414, CCC (3d) 515 (ONCA).

72 *Canadian Broadcasting Corp* 1996, *supra* note 71 at para 21.

73 Of course, the early origins of the UK common law relied on tribal or community justice, so one would assume more people attended proceedings. See e.g. "Legal History: Origins of the Public Trial" (1960) 35:2 Ind LJ 251 at 251. Here, we are speaking more about the modern evolutions of courts from the 12th century on—*i.e.* after the Assize of Clarendon and the beginning of the English common law and professional judges. See e.g. Courts and Tribunals Judiciary, "Overview of the Judiciary", online: <www.judiciary.uk/about-the-judiciary/history-of-the-judiciary-in-england-and-wales/history-of-the-judiciary>.

74 See Mathilde Cohen, "When Judges Have Reasons Not to Give Reasons" (2015) 72:2 Wash & Lee L Rev 483 at 491.

75 See *R v Sheppard*, 2002 SCC 26 at para 15.

Nevertheless, as Part V will discuss, transparency remains elusive, and openness varies dramatically. For example, in many immigration and refugee law proceedings, judges do not offer any reasoned decisions; parties just get a decision that includes the result.[76] For example, judges denying leave for judicial review (required for most immigration and refugee law matters) do not typically issue reasoned decisions,[77] and reasons are not always provided even if judges grant leave and decide matters on the merits.[78] Notwithstanding this and other shortcomings, as we discuss below, Canada's judges and courts have become more open, transparent, accountable, and fair, and they should not retrench from this shift.

A. In 2022, You do not Have to be in Most Courtrooms for Them to be Partially Open

The shift from historical opacity to more openness and transparency appears partly tied to the constitutional right to access Canadian court records.[79] In Canada, open courts do not end when proceedings conclude,

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76 The same is likely true at other levels of courts and proceedings—in terms of sparse to almost no reasons—and for other courts who do not offer reasons when they deny leave—*e.g.* the Supreme Court of Canada. For a discussion of this phenomenon, see Philip Slayton, "Justice is in the Details", *Canadian Lawyer Magazine* (2 May 2011), online: <www.canadianlawyermag.com/author/philip-slayton/justice-is-in-the-details-1182>; Jean-Marc Leclerc, "Trust, not reasons, required in leave application process: A response to Philip Slayton", *Canadian Lawyer Magazine* (9 May 2011), online: <www.canadianlawyermag.com/article/trust-not-reasons-required-in-leave-application-process-1190>; Matthew Scott, "Leave Applications at the Supreme Court of Canada: Should Reasons be Provided?" (5 March 2019), online: <sasklawreview.ca/comment/leave-applications-at-the-supreme-court-of-canada-should-reasons-be-provided.php> (comment on the Supreme Court of Canada not providing reasons when rejecting a Leave to Appeal).

77 See Sean Rehaag, "The Luck of the Draw", *supra* note 6 at 7, 10.

78 See Sean Rehaag & Pierre-André Thériault, "Judgments v Reasons in Federal Court Refugee Claim Judicial Reviews: A Bad Precedent" (2022) 45:1 Dal LJ 1 at 24.

79 See *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175 at 189, 132 DLR (3d) 385 [*MacIntyre*] (unlike the United Kingdom, which historically took a more restricted approach, Canadian courts sought to foster broad access to court records. Justice Dickson suggested his holding was a clear departure from United Kingdom practices); see Dana Adams, "Access Denied?: Inconsistent Jurisprudence of the Open Court Principle and Media Access to Exhibits in Canadian Criminal Cases" (2011) 49:1 Alta Law Rev 177 at 184, citing Dean Jobb, *Media Law for Canadian Journalists* (Toronto: Emond Montgomery, 2006) at 237 (others seem to disagree and argue that the right of access to all facets of criminal and civil trials, "including pleadings, indictments, transcripts, rulings, and exhibits, dates back to a fourteenth century British statute, which 'granted "any subject" the right to access the "records of the King's Courts…for his necessary use and benefit"'"); see also DR Jones,

and access is not limited to the courtroom or the final proceeding:[80] "[a]ccess to exhibits is a corollary to the open court principle."[81] As a general matter, then, "[t]he 'open court' principle applies…to all documents filed with the courts."[82]

Such access is a basic tenet of Canada's legal system.[83] Openness—as the Supreme Court of Canada recently noted in its 2021 decision, *Canadian Broadcasting Corp v Manitoba*—is necessary to "maintain the legitimacy of the exercise of judicial power…by allowing the public to scrutinize this exercise in service of ensuring that justice is being dispensed fairly."[84] It

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"Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records" (2013) 61 Drake L Rev 375 at 376–77, 379.

80 *MacIntyre*, *supra* note 79 ("At every stage the rule should be one of public accessibility and concomitant judicial accountability….[C]urtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance.…Access [to court records] can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right" at 186–87, 189).

81 *Canadian Broadcasting Corp v The Queen*, 2011 SCC 3 at para 12 [*Canadian Broadcasting Corp* 2011]; for similar discussions, see also *Aboriginal Peoples Television Network v Alberta (AG)*, 2018 ABCA 133 at para 15; *Coltsfoot Publishing Ltd v Foster-Jacques*, 2012 NSCA 83 at paras 89, 94; *Global BC, A Division of Canwest Media Inc v British Columbia*, 2010 BCCA 169 at paras 78, 82; *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc*, 2001 SCC 51 at para 72; *R v Power*, 2015 SKCA 25 at para 16; *R v Baltovich*, [2008] OJ No 2307 at para 6, 232 CCC (3d) 445 (ONSC).

82 *Husky v Schad*, 2015 ONSC 460 at para 15.

83 *Singer v Canada (AG)*, 2011 FCA 3 at para 6. Perhaps the right to access is even constitutional, see e.g. Marc-Aurele Racicot, *The Open Courts Principle and the Internet: Transparency of the Judicial Process Promoted by the Use of Technology and a Solution for Reasoned Access to Court Records* (2007) (unpublished, archived at University of Alberta Education and Research Archive) at 31–41. Unfortunately, Canadian courts have inconsistently applied access to court records principles (see e.g. Adams, *supra* note 79; see also Ko, *supra* note 1). *Vickery v Nova Scotia (Prothonotary)*, [1991] 1 SCR 671, 64 CCC (3d) 65 [*Vickery*] (the decision still appears to offer too much persuasive value to some courts). As Ko notes, "*Vickery* continues to haunt the legal landscape via…[*Canadian Broadcasting Corp* 2011], through legal commentary mostly from privacy enthusiasts, and its influence can be found within some access to court record policies of certain common law jurisdictions in Canada" (see Ko, *supra* note 1 at 60). However, latter jurisprudence is clear that *Vickery*'s framework is subservient to the *Dagenais/Mentuck* framework (see *Canadian Broadcasting Corp* 2011, *supra* note 81 at para 14). Accordingly, we prefer the approach of decisions that accord with the *Dagenais/Mentuck* framework (see e.g. *R v Canadian Broadcasting Corporation*, 2010 ONCA 726 [*Canadian Broadcasting* ONCA]) versus decisions that seek to limit access (see e.g. *R v Wellwood*, 2011 BCSC 689 at para 36; *R v Panghali*, 2011 BCSC 422 at para 32). For the *Dagenais/Mentuck* framework, see *R v Mentuck*, 2001 SCC 76 at para 32, and for a thorough discussions of the framework, see Ko, *supra* note 1 at 36–46.

84 2021 SCC 33 at para 82.

is also central to democracy as the Supreme Court of Canada noted in *Sherman Estate v Donovan*,[85] another 2021 decision. But despite these holdings, leading *Charter* rights thinkers note that the evolution of technology and privacy in a modern world likely requires rethinking historic conceptions. Today's conceptions of privacy are qualitatively different from earlier versions—including conceptions from the era when open court principles were developed.[86] Technology has changed the game.

Regardless of where one lands in this debate, one most likely agrees that open courts and some version of open access to its records can aid democracy.[87] However, as the introduction suggested and as Part V will discuss, open access and open courts are also fundamental for individual and systemic fairness.

Consider this historical example. When electronic commercial legal publishing first became prominent,[88] some lawyers (*i.e.* those with big pockets)[89] could access and navigate well-populated electronic decision databases with efficient electronic tools to quickly find applicable decisions. On the other hand, their opponents (often representing marginalized people) could not afford such access, efficiency, or perhaps even accuracy. They had to go to libraries to manually look and note up cases in dusty books or use inferior search tools.[90] These access disparities affected lawyers' ability to form persuasive, accurate, and complete legal arguments. Such disparities are clearly unfair because they effectively compromise the principle of equality before the law.[91]

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85 2021 SCC 25 at para 1 [*Sherman Estate*].

86 See Centre for Refugees Studies, "CRS/RLL Seminar: Privacy and the Open Court Principle in Federal Court Refugee Judicial Reviews" (29 Nov 2021) at 01h:22m:10s, online (video): <www.youtube.com/watch?v=scHMbYcCrtw> (David Lepofsky noted such reflections in response to a draft version of this article).

87 See e.g. David S Ardia, "Court Transparency and the First Amendment" (2017) 38 Cardozo L Rev 835 [Ardia, "Court Transparency"].

88 For a thorough summary of this transition, see Robert C Berring, "Full-text Databases and Legal Research: Backing into the Future" (1986) 1:1 High Tech LJ 27.

89 Often, these parties represented governments or well-financed institutions.

90 For a great historical analysis of this reality, see Lawrence A Harper, "Legal Research, Technology and the Future" (1949) 24:3 J State Bar California 104.

91 For an example of how funding can affect litigation outcomes, see Michael Trebilcock & Albert Yoon, "Equality Before the Law? Evaluating Criminal Case Outcomes in Canada" (2016) 53 Osgoode Hall LJ 587. As we go on to note, the issue is not whether counsel has access to one good legal tool; the issue is whether counsel has access to multiple good legal tools. A fundamental aspect of ethical, efficient, and thorough legal research is redundancy. Clearly, lawyers working with paper-based research tools will not achieve the same levels of ethical, efficient, and redundant legal research. For seminal work on this issue,

Substantial investments were made to support open access legal databases in an attempt to address that historical unfairness. Investments like CanLII do provide better access to caselaw, but access continues to be unfair. As computational law technology develops,[92] lawyers who mainly do legal research in CanLII risk becoming akin to the lawyers who had to go to libraries while their opposition accessed electronic databases. Their opponents (once again, lawyers with access to bigger budgets because they mostly represent governments or well-financed institutions) will not solely rely on free tools. Rather, they will (and already do) use bespoke and off-the-shelf artificial intelligence and machine learning tools such as predictive analytics, large-scale precedent databases, and a host of other cutting-edge tools to support legal research and form legal arguments.[93]

Instead of increasing equality before the law, new legal technologies—and specifically inequitable access to them and their creation—are amplifying historic unfairness. As Part V notes, this unfairness is exacerbated when responses to privacy concerns result in limited, asymmetrical access to the court records, files, and data that are necessary to build this technology.

B. Sustaining Canada's Open Access Status Quo Will Compromise Better Protections for Privacy, Openness, Transparency, and Fairness

Some privacy advocates and scholars are understandably skeptical about using technology to improve access, privacy, and fairness. Instead of using technology to improve democratic access, they say courts should sustain status quo access. Courts should continue relying on practical obscurity or the practical friction caused by court access policies, court supervision,

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see Susan Nevelow Mart, "The Algorithm as a Human Artifact: Implications for Legal [Re] Search" (2017) 109:3 Law Libr J 387; see also Michael A Livermore et al, "Law Search in the Age of the Algorithm" (2020) 2020:5 Michigan State L Rev 1183.

92 Machine technology has already been used in criminal justice and it likely will be diffusely used in other venues (with both promise and perils), see Jens Ludwig & Sendhil Mullainathan, "Fragile Algorithms and Fallible Decision-Makers: Lessons from the Justice System" (2021) 35:4 J Econ Perspectives 71; see also Michael A Livermore & Daniel N Rockmore, *Law as Data: Computation, Text, & the Future of Legal Analysis* (Sante Fe, New Mexico: The Santa Fe Institute Press, 2019); Benjamin Alarie, "The Path of the Law: Toward Legal Singularity" (2016) 66:4 UTLJ 443.

93 See e.g. "From Dusty Tomes to Artificial Intelligence: The History and Future of Legal Research", online: <www.bluej.com/blog/from-dusty-tomes-to-artificial-intelligence-the-history-and-future-of-legal-research>.

and in-person access. However, sustaining the status quo is not compatible with open courts because the current access situation already puts basic fairness at risk by limiting equitable access.

Contrary to what some seem to assert, current access to Canadian legal data is surprisingly difficult. Non-electronic access to court records in most Canadian courts is neither easy, equitable, nor truly open. As a result of privacy considerations (and arguably technological ones), many courts require permission to access court files[94]—much like what the CBA is advocating for to the Federal Court. Such regimes are, ironically, privacy intrusive. If you want to access most Canadian courtrooms in-person, or published judicial and tribunal decisions, you do so anonymously. On the other hand, if you want to access court records in many Canadian courts—even though you could have heard the same decision live—access looks different.[95] You cannot anonymously view court files. Before you can gain access, you must provide your name and the basis for wanting to observe files from ostensibly "open" court proceedings.

As Part II noted, the CBA is calling for this reverse onus approach in the Federal Court's consultation for electronic access. The CBA is also clear that if this reverse onus approach applies to electronic records, it should also apply to paper ones. In other words, the CBA is asking the Federal Court to *regress* its current openness.[96] As the CMLA suggested in its response to the CBA, such approaches put reverse onus burdens on parties seeking access to court records[97] as well as a temporary sealing order on the file (a point we will discuss more). Instead of abiding by

94 Many scholars seem to ignore this point and discuss the ease of access as if you can just walk into a Canadian courthouse, walk up to the counter, and start rifling through the court file. Some scholars even suggest it is as easy as a free Google search. See e.g. Courtney Retter & Shaheen Shariff, "A Delicate Balance: Defining the Line between Open Civil Proceedings and the Protection of Children in the Online Digital Era Canadian Journal of Law and Technology" (2010) 10:2 CJLT 231 at 236–37. That reality simply does not exist in Canada, even for most judicial decisions, let alone for other court materials. See e.g. Heather Douglas, "Show me the Pleading: Show me the Evidence" (24 August 2016), online: <www.slaw.ca/2016/08/24/show-me-the-pleading-show-me-the-evidence>.

95 British Columbia requires any non-party who wishes to view court documents that is not available online to make an account and submit a formal request to the presiding judge to access the records through its pay for use service. See Supreme Court of British Columbia, "Policy on Access to the Court Record" (2022), online (pdf): <www.bccourts.ca/supreme_court/media/BCSC_Court_Record_Access_Policy.pdf>; British Columbia, "Access court records", online: <www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/access-court-records>.

96 CBA, "Access to Documents", *supra* note 40 at 2–9.

97 "CMLA Letter", *supra* note 36 at 5.

open court principles—where litigants must justify their court file being closed—such regimes effectively flip the onus onto anyone seeking access to court records.

Aside from vague invocations of courts' supervisory jurisdiction,[98] no legal principle we are aware of seems to justify this flipping of the initial onus. As well, no new technology or technological risk justifies the Federal Court incorporating this approach in its access process. It has not previously supported or implemented such a reverse onus process to access court files (except where one tries to access audio recordings of proceedings).[99]

Unlike many Canadian section 96 and appellate courts, the Federal Court's filed documents are presumptively accessible without proceeding through an administrative supervisory process (unless documents are subject to a specific sealing order).[100] The Federal Court's open regime distinguishes it from many superior and appellate courts and makes it one of the most open Canadian courts.[101] Considering the Federal Court's role in reviewing government action, this access and transparency makes sense and must persist.

Whether the CBA's recommendation is (or would be) constitutional is debatable. Constitutional challenges to courts' reverse onus access policies have seldom occurred, so judicial commentary is limited.[102] However, the British Columbia Court of Appeal faced a constitutional challenge to its access policy in the 2020 decision, *R v Moazami*.[103] There, the Court held the reverse onus access policy was constitutional. Instead of violating the requestors' rights, British Columbia's access process is "a simple administrative mechanism that invokes the court's well-established supervisory role over its own records."[104] The process requires that individuals seeking access fill out the Access Request Form and submit it. Next, the Registrar acts on behalf of the Chief Justice and asks parties for their positions

98 For the appellate view and a thorough discussion on this topic, see e.g. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 12.

99 Federal Court, "Notice to the Profession: Pilot Project for Access to Digital Audio Recordings of Federal Court Proceedings" (6 February 2015), online (pdf): <www.fct-cf.gc.ca/content/assets/pdf/base/DARS%20Notice%20feb-6-2015%20(ENG).pdf>; Federal Court, "Policy on Public and Media Access" (last modified 29 March 2023), online: <www.fct-cf.gc.ca/en/pages/media/policy-on-public-and-media-access>.

100 Federal Court, "Policy on Public and Media Access", *supra* note 99.

101 See Appendix A.

102 For one of the only reported decisions where such a point was alluded, see *R v CBC et al*, 2013 ONCJ 164 at paras 8–11.

103 2020 BCCA 350 [*Moazami*].

104 *Ibid* at para 10.

on the access request. If parties cannot resolve the access issue at this informal stage, a hearing before a judge can occur. If parties still cannot resolve the access issue, the parties opposing access would then bring a formal application, and the court would make a final determination on access rights.[105]

The Court held that its process was like other provincial superior courts and courts of appeal with access policies, and it rejected an argument like the one we just presented.[106] The Court insisted that its access policy is not like a "*de facto* sealing order" because the open court principle does not require "[u]nfettered public access to court records," but rather, that access is "subject to supervision by the court."[107]

If the British Columbia Court of Appeal is right, courts can establish administrative access processes through which "*Charter* rights are exercised and the interests competing with openness are properly weighed in a judicial determination."[108] We agree that competing interests must be weighed. However, the Access Policy is not simply a procedural administrative mechanism. As mentioned, it exposes everyone seeking access to an onerous supervisory process that they would not be subject to if they were to walk anonymously into almost any Canadian courtroom.[109] Additionally, as the CMLA noted in its response to the CBA's submission, such requirements invite courts to engage in potentially unconstitutional gatekeeping.[110]

If the distinction lies in the difference between live and recorded evidence, the argument is still unconvincing. As Part IV will discuss, if material is too sensitive to be physically reviewed out of court, then perhaps the material is also too sensitive to be in open court where individuals can anonymously attend and possibly even report the case. Perhaps it should not be in an open court file in the first place, or perhaps the parties should have sought a publication ban. Put another way, the administrative process seems to be less about access and more about how parties might use the

105 *Ibid* at paras 29–32.

106 *Ibid* at para 51.

107 *Ibid* at paras 53, 56–57.

108 *Ibid* at para 72.

109 This point remains even when courts require identification to enter in high profile or secure courtrooms, presumably for security purposes. Courts, however, are mostly not keeping record of who enters—at least that has not been the experience of at least one of us in entering multiple courtrooms where they had to show identification.

110 "CMLA Letter", *supra* note 36 at 4; see also *Canadian Broadcasting* ONCA, *supra* note 83 at para 50.

material—*e.g.*, in a privacy-compromising or nefarious way. If that is the goal, better solutions are available.

C. The "Technology" Revolution has Altered What is Required and Possible for Better Privacy, Fairness, Openness, and Transparency

The CBA's position, and others like it, are misplaced: better technology should not lessen the right to access open courts and their records. Accessing records is a corollary to accessing proceedings—not subsidiary to them. Courts must do everything to ensure this reality while also promoting privacy and ensuring individual and systemic fairness. As David Ardia notes, courts are "the most insular branch of…government, and public access provides an important source of information…to understand how the government exercises power across a broad range of societal activities."[111] The constitutional requirement of open courts should motivate all courts to do what the Federal Court is considering: use technology to bring about the open court principle's fuller realization. Notwithstanding its current views, the CBA's prior comments on this issue in 2004 aptly captured this point, were prescient, and remain persuasive:

> Electronic access to court records may be a controversial and developing issue, but information now publicly accessible through the paper medium should not become less so as a result of the development of policy and regulations affecting electronic access. *It would be ironic indeed, and likely unconstitutional, if proposed changes resulted in a system less transparent than that we have now.*[112]

The technological revolution that courts are now finally starting to participate in should not reduce transparency, access, or fairness. Nor should it further erode the limited privacy individuals already experience in Canadian courts. Instead, technological developments should encourage courts to revisit what are fair privacy protections and "what is required for adequate judicial transparency."[113] Concepts like practical obscurity, practices like

111 Ardia, "Court Transparency", *supra* note 87 at 842.

112 Canadian Bar Association, "Submission on the Discussion Paper: *Open Courts, Electronic Access to Court Records, and Privacy*" (April 2004) at 4, online (pdf): <www.cba.org/CMSPages/GetFile.aspx?guid=7569f214-b1a3-406c-8c9c-998e007018 36> [emphasis in original].

113 See Hon TS Ellis, "Sealing, Judicial Transparency, and Judicial Independence" (2008) 53:5 Vill L Rev 939 at 941.

British Columbia's reverse onus Access Policy, and similar proposals (like the CBA's suggestions to the Federal Court) do not provide adequate transparency, fairness, or accountability. Administrative efficiency, or bare judicial requirements, are not the only relevant factors.[114] Better technological solutions and mechanisms are possible and should be pursued.

IV. PRIVACY AND COURT DOCUMENTS: THE INHERENT LIMITS OF PRACTICAL OBSCURITY

We recognize that practical obscurity has persisted for years and has accomplished some of the goals of protecting individual privacy. However, that accomplishment came with costs, including potentially reducing individual and systemic fairness.

The British Columbia Access Policy discussed above exemplifies practical obscurity by injecting what practical obscurity advocates call "friction" into the access process.[115] Practical obscurity is premised on the idea that individuals are ultimately lazy; that they will lack the time or money to follow through with an onerous access process; or that they will not even discover the access process and subsequently not access records and information at all.[116] Instead, academics, scholars, advocates, and activists should welcome increased attention to what goes on in courts.[117] In many

114 To its credit, the British Columbia Access Policy appears to be administratively efficient. At least in British Columbia, the balance generally tilts in favour of those who request access (over a five-year period, 69% access to requested records; 27% to some requested records; 0% for no access to requested records, and 4% for no record of outcomes), see *Moazami*, *supra* note 103 at 109–10). However, *actual* overall efficiency is unknown. In some courts, access has been largely poor. See Jesse McLean, "Ontario Reviewing Access to Criminal Court Records", *Toronto Star* (17 September 2013), online: <www.thestar.com/news/canada/2013/09/17/ontario_reviewing_access_to_criminal_court_records.html>.

115 For a thorough discussion of the history of practical obscurity, including the government's reliance on it to shield records from public oversight, see Patrick C File, "A History of Practical Obscurity: Clarifying and Contemplating the Twentieth Century Roots of a Digital Age Concept of Privacy" (2017) 6:1/2 U Baltimore J Media L & Ethics 4. See also David S Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017) 2017:4 U Ill L Rev 1385 at 1385 [Ardia, "Loss of Practical Obscurity"].

116 OPC, "Submission Concerning Online Access to Court Records", *supra* note 41 at 2–3. See also File, *supra* note 115 at 17 (this point arose during one of the first pieces of litigation that mentioned practical obscurity).

117 Some seem to suggest that more people watching creates new problems. See e.g. Retter & Shariff, *supra* note 94 at 232–33.

ways, what open courts can bring is better democratic participation and better accountability for courts and judges.[118]

Current calls for continued practical obscurity and practical friction overlook comprehensive targeted upstream mechanisms to protect privacy and open access—solutions which, as Parts IV and V will suggest, could advance access with minimal compromise to privacy. If privacy and potential threats are truly as severe as some fear (and of course, some are), then courts can do far better than practical obscurity or practical friction.[119] Continuing to use these limited methods to protect privacy will likely perpetuate flawed and weak privacy protections.[120]

Practical obscurity has never promised to keep individuals' information private. Rather, it just promised individuals the likely expectation that their documents and records will remain relatively obscure.[121] Put plainly, practical obscurity and practical friction are not a tailored or targeted privacy solution. They are blunt tools that rely on inefficiency and laziness to protect some of the most personal and sensitive details of peoples' lives. Courts and governments can and should do much better than such limited techniques in 2023, especially as electronic access becomes more widespread, demanded, and inequitable. As Part V will note, increased open access could help—not hinder—better-tailored privacy protections.

A. The Logic, Doctrine, and Promise of Practical Obscurity and Practical Friction are Tenuous and Unsound

Consider this reality: one, ten, or 50 people can anonymously watch a court proceeding, hear and see filed evidence, and then report about the case they saw. So why does a problem arise when more people want to view the records outside the courtroom?[122] As Part III suggested, if the

118 Ko, *supra* note 1 at 14, 16.

119 Scholars in this area use terms like "barrier." We employ the term "friction" here as a catch-all term for supervisory access, mechanisms that slow down, or weed out individuals seeking access. See e.g. Bailey & Burkell, "Revisiting", *supra* note 10 ("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" at 144).

120 For a thorough analysis of such flaws, see Racicot, *supra* note 83 at 57–78.

121 See e.g Daniel J Solove, "Access and Aggregation: Public Records, Privacy and the Constitution" (2002) 86 Minn L Rev 1137 at 1141; David S Ardia & Anne Klinefelter, "Privacy and Court Records: An Empirical Study" (2015) 30:3 BTLJ 1807 at 1832.

122 See e.g. Racicot, *supra* note 83 at 78; Gregory M Silverman, "Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the

intuition is that 1 million people potentially electronically accessing the file is problematic, then courts should also take pause about allowing the 10–60 people in the courtroom to hear and access the parts of the court file that are mentioned or visible — especially because any of them could easily circulate the information to 1 million people with a single tweet.

As Part III also suggested, the actual risk does not appear to be people viewing the records, but rather an increased likelihood of misuse or otherwise using accessed information to invade litigants' privacy more efficiently. Of course, we recognize that information in court records can be used in myriad ways as that information proliferates outside the courtroom — something that better access to court decisions and court documents facilitates. Unfortunately, practical obscurity does not solve this problem. In other words, the doctrine's starting point and promise appear faulty. Attending a proceeding or using an access policy to gain access to court records can allow individuals to efficiently proliferate information without leaving the courtroom or courthouse[123] (*e.g.* the recent live-tweeting of a witness's testimony in a sexual assault trial involving a celebrity, which included intimate and highly personal details).[124]

In terms of doctrine, advocates and scholars who reach for practical obscurity seem to overlook the importance of overall systemic accountability and the ways in which promoting practical obscurity entrenches

Internet" (2004) 79:1 Wash L Rev 175 at 220.

123 The potential for further use and proliferation with electronic documents does raise distinct risks. See e.g. Centre for Refugees Studies, *supra* note 86 at 00h:38m:12s (Professor Amy Salyzyn noted these points in response to a draft version of this paper). However, in other ways, the difference between electronic and print records is overhyped because of the ease of transformation. If governments or courts do not distribute or publish printed documents, other entities can and will. As the British Columbia Information and Privacy Commissioner noted 15 years ago, "[t]he ease of paper-to-electronic transformation suggests that the practical obscurity that is often considered to be a feature of paper records is less meaningful than many observers have contended." Office of the Information & Privacy Commissioner for British Columbia, *Sale of Provincial Government Computer Tapes Containing Personal Information*, Investigation Report F06-01 (Victoria: Office of the Information & Privacy Commissioner for British Columbia, 31 March 2006) at paras 4, 58. To understand how information rapidly leave courts during live proceedings, see e.g. Tamara A Small & Kate Puddister, "Play-by-Play Justice: Tweeting Criminal Trials in the Digital Age" (2020) 35:1 CJLS 1.

124 See Alyshah Sanmati Hasham, "The sexual assault trial of Hedley frontman Jacob Hoggard continues this morning with testimony from witnesses linked to the first complainant to testify. Here is my story from her testimony: www.thestar.com/news/gta/2022/05/06/sexual-assault-trial-continues-friday-for-hedley-lead-singer-jacob-hoggard.html" (16 May 2022), online: <twitter.com/alysanmati/status/1526204599480512512?s=20&t=9bW1qGFA7J16knykoBij0Q>.

unfairness. To be clear, we disagree with the notion that individuals must sacrifice their privacy to access Canadian courts.[125] As David Lepofsky notes, privacy is not an all-or-nothing principle: all of your privacy should not be gone because some of it is gone.[126]

But public courts are not private places, nor are they meant to be.[127] In fact, opacity under the guise of privacy may work to shield discriminatory decision-makers from accountability and heighten existing inequalities in the legal system rather than improving fair access in the interest of justice. Indeed, scrutiny and transparency of the entire litigation process are fundamental to increasing individual and systemic fairness. Such transparency requires democratic access to judicial decisions, court records, and other court data, especially in contexts where judges do not issue reasons.[128] As we have discussed, if the sensitivity of certain information is the true concern here, that concern should animate user-centred reforms of legal practices and processes, and information disclosure. Decision-making on this issue should be tailored to enhance fairness for parties who face the greatest risks from potential information exposure.

Privacy and openness advocates alike are best served by designing our system in the interest of fair access. Ensuring openness in individual cases provides accountability that encourages better individual and overall outcomes. Beyond systemic accountability, fair access also promotes broader systemic efficiency, improvement, and fairness[129] by facilitating the development of tools that improve lawyers' and judges' work.[130] If access does not become fairer, such development and much needed innovation could be stymied.

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125 See e.g. *MediaQMI inc v Kamel*, 2021 SCC 23 at para 52; *Sherman Estate*, *supra* note 85 at para 58.

126 Centre for Refugees Studies, *supra* note 86 at 01h:20m:37s (David Lepofsky made this comment in response to a draft version of this article).

127 Daniel Henry, "Electronic Public Access – An Idea Whose Time Has Come" in Yves-Marie Morissette, Wade MacLauchlan & Monique Ouellette, eds, *Open justice: La transparence dans le système judiciare* (Montréal: Les Éditions Thémis, 1994) 389 at 423–24.

128 See generally Sean Rehaag, "'I Simply Do Not Believe…': A Case Study of Credibility Determinations in Canadian Refugee Adjudication" (2017) 38 Windsor Rev Leg Soc Issues 378 [Rehaag, "I Simply Do Not Believe"]; Rehaag, "The Luck of the Draw", *supra* note 6.

129 See generally Julie C Turner, "Changes in the Courthouse–Electronic Records, Filings and Court Dockets: Goals, Issues, and the Road Ahead" (2002) 21:4 Leg Reference Service Q 275 (discusses some outstanding efficiency benefits).

130 See generally Kristen Bell et al, "The Recon Approach: A New Direction for Machine Learning in Criminal Law" (2021) 36:2 BTLJ 821; Ludwig & Mullainathan, *supra* note 92.

As others have noted, "courts are among the most information-rich institutions in society…,"[131] yet Canada has a massive legal data deficit.[132] This reality is especially true in the immigration and refugee determination sector, where existing research suggests that non-citizens experience radical unfairness.[133] More access to information in court records could unlock a far greater understanding of our legal system and opportunities for improvement, including in these sensitive and significant areas of the law.

B. Practical Obscurity and Practical Friction Promote Inequitable, Uneven Access

As Marc-Aurèle Racicot notes, "[p]ractical obscurity doesn't protect privacy as much [as] it protects privileged access."[134] The earlier-discussed CBA proposal showcases this point. The CBA proposal would keep some court documents obscure from people (non-lawyers and non-media) who are deemed less trustworthy, presumably because they lack a professional code of ethics. For example, any lawyer would have greater access than the rest of the public, even if they were not involved in the file.[135] Accepting the CBA proposal would further entrench the currently unfair Canadian reality: we already have radically inequitable access to court documents, especially judicial decisions where corporate monopolies have accumulated incredible detail about Canada's legal system.[136] As David Lepofsky notes, this access is even worse for many individuals who cannot physically attend court or easily access paper-based documents.[137] As we note in Part VI, members of equality-seeking communities are often also stuck

131 Lynn M LoPucki, "Court-System Transparency" (2009) 94:2 Iowa L Rev 481 at 510.

132 Khan, "Life of a Reserve", *supra* note 32 at 2.

133 Rehaag, "I Simply Do Not Believe", *supra* note 128 at 42–43, 54, 59, 64; Rehaag, "The Luck of the Draw", *supra* note 6 at 30–31, 35–36.

134 Racicot, *supra* note 83 at 74.

135 CBA, "Access to Documents", *supra* note 40 at 7.

136 See generally Sobowale, *supra* note 1; Alschner, *supra* note 1; Cameron-Huff, *supra* note 1; Ko, *supra* note 1.

137 See M David Lepofsky, "Equal Access to Canada's Judicial System for Persons with Disabilities—A Time for Reform" (1995) NJCL 183 ("the term 'access' in the disability context tends to conjure up only issues of physical access to facilities….However, the term 'access' for persons with disabilities has come to take on a far broader connotation. It refers to the opportunity both to enter a facility and to make full and equal use of that facility, free from arbitrary barriers, whether physical, administrative, organizational, attitudinal or otherwise" at 187).

in legal processes where this further inequality of access, increased corresponding privacy risks, and decreased transparency are clearly apparent.

In contrast to current opacities, electronic access to court records "makes it possible for the benefits of court transparency to be widely dispersed throughout society."[138] Current inequities must be remedied. As one United States Court noted, "[i]t would be an odd result indeed were we to declare that our courtrooms must be open, but that…[records of what occurred there] may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?"[139]

C. Practical Friction and Practical Obscurity Often Rely on Unsubstantiated Fears

Jurisprudence about limitations to the constitutionalized open court principle is clear. Courts cannot rely on supposition: they must issue limitations based on "convincing evidence."[140] Yet Canadian conversations and policies often rely on American examples, one-off cases where something egregious or untoward occurred, or a vague slippery-slope argument against broader electronic access.[141] Generalizing from a handful of examples to preclude access, however, is a flawed approach, especially because paper records have been abused.

Practical obscurity and practical friction do not actually work to keep sensitive information that is often extraneous to the dispute out of the court file. In most cases, much of the information and evidence that is filed in court is never relied on by parties or is irrelevant to the final dispute.[142] Some of that information is *also* sensitive and privacy-invading. The very process of information collection may be traumatizing and insensitive. These problems are left untreated by practical obscurity and practical friction, and as Part V notes, practical obscurity may actually impede solutions.

138 Ardia, "Court Transparency", *supra* note 87 at 917.

139 *United States v Antar*, 38 F (3d) 1348 at 1360 (3rd Cir 1994).

140 *Canadian Broadcasting* ONCA, *supra* note 83 at para 20.

141 See e.g. CBA, "Access to Documents", *supra* note 40 at 2 (the statement, "[o]nline access creates a risk of nefarious uses such as fraud, data mining, identity theft, stalking, harassment, discrimination, persecution and other abuses," is overly vague and should be better particularized); Bailey & Burkell, "Revisiting", *supra* note 10 at 173 (individuals frequently raise the Globe 24h incident where a company mined CanLII decisions and created its own repository that linked decisions to Google, but this capture only happened once).

142 See e.g. CIAJ, "Easy Reading is Damn Hard Writing – With Host Caroline Mandell" (3 December 2020) at 00h:38m:44s, 00h:42m:00s, online (podcast): <podcasts.apple.com/ca/podcast/ciaj-in-all-fairness-icaj-en-toute-justice>.

Anonymization and de-identification of personal information in judicial decisions and court records are useful starting points. However, those practices still do not keep other sensitive information out, and they have limits, especially as technology that could allow for de-anonymization continues to develop.[143] Lawyers often practice "defensive litigation"—partly because lawyers seem to not know what evidence is truly required or meaningful in many proceedings and partly because of the limitations of the adversarial system. This practice results in information overload. Like doctors who order too many unnecessary medical tests,[144] lawyers often include far more evidence than necessary. In many disputes, lawyers seem to be throwing everything but the kitchen sink at the courts. This trend has likely proliferated over the last 40 years as suggested by the increasing length of trials and judicial decisions.[145] We assume that judges then likely lack the time to go back and carefully edit decisions to remove extraneous personal information from copious amounts of irrelevant evidence. As it stands, parties have no right to review the court file and cull personal and sensitive information they filed but did not use (or that the judge did not use), and this results in the unused sensitive information being left on the record permanently.[146]

Ironically, despite the increasing size of court records and court decisions, information that would likely be useful to a wider range of

143 We agree with the practical obscurity and privacy scholars and advocates who call for less personal information in judicial decisions and for anonymizing party/witness names unless a compelling reason exists for naming them. See generally Bailey & Burkell, "Revisiting", *supra* note 10 at 171.

144 A commonly reported side effect of doctors safeguarding themselves from litigation is "defensive medicine," in which doctors often perform tests and procedures that lead to unnecessary treatment and hospitalization to safeguard from possible mistakes and potential outliers. See M Sonal Sekhar & N Vyas, "Defensive Medicine: A Bane to Healthcare" (2013) 3:2 Annals Medical & Health Sciences Research 295.

145 See generally Khan, "Life of a Reserve", *supra* note 32, Part II; Kevin LaRoche, M Laurentius Marais & David Salter, "The Length of Civil Trials and Time to Judgment in Canada: A Case for Time-Limited Trials" (2021) 99:2 Can Bar Rev 286; Evan Rosevear & Andrew McDougall, "Cut to the Chase Counsellor: Patterns of Judicial Writing at the Supreme Court of Canada 1970–2015" at 1–2 (Paper delivered at Canadian Political Science Association Annual Conference, Regina, 31 May 2018) [unpublished] online: <www.cpsa-acsp.ca/documents/conference/2018/856.McDougall.Rosevear.pdf>; Xavier Beauchamp-Tremblay & Antoine Dusséaux, "Not Your Grandparents' Civil Law: Decisions Are Getting Longer. Why and What Does It Mean in France and Québec?" (20 June 2019), online: <www.slaw.ca/2019/06/20/not-your-grandparents-civil-law-decisions-are-getting-longer-why-and-what-does-it-mean-in-france-and-quebec/>.

146 Other jurisdictions have sought to limit this information from the outset. See e.g. Jones, *supra* note 79 at 414.

stakeholders is also often *missing* from court decisions and files—such as socioeconomic data necessary for robust systemic analysis. However, if the kitchen sink information never made it into the court file to begin with, privacy risks would immediately diminish. As D.R. Jones notes, "[n]ot placing personal information in public records eliminates later inappropriate exposure....Many courts have not considered the need to rethink the nature and purpose of filings."[147]

If courts and reformers rethought the nature and purpose of filings—which open, democratic access could promote, and Part V will now discuss—then lawyers could be more targeted in their materials. Everyone would benefit: time would be saved, privacy would be better protected, and efficiency and fairness would increase. Of course, for this to happen, increased use of technology and open access (rather than reliance on practical obscurity, practical friction, and limited access) are fundamental.

V. TECHNOLOGICAL DEVELOPMENTS: OPPORTUNITIES AND CHALLENGES TO IMPROVE PRIVACY, FAIRNESS, OPENNESS, AND TRANSPARENCY

The idea that privacy must be balanced against accountability creates a false binary where privacy is pitted against openness.[148] Such framings seem to suggest that technology is inherently privacy-invading instead of privacy-promoting.[149] This determinism is false,[150] and shedding it is fundamental to improving privacy, fairness, openness, and transparency.[151]

147 *Ibid* at 421.

148 Silverman, *supra* note 122 at 176.

149 See generally Jennifer Chandler, "Personal Privacy Versus National Security" in Ian Kerr, Valerie Steeves & Carole Lucock, eds, *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (New York: Oxford University Press, 2009) 121; Information and Privacy Commissioner of Ontario, *The Unintended Consequences of Privacy Paternalism*, by Ann Cavoukian, Alexander Dix & Khaled El Emam (Toronto: Information and Privacy Commissioner of Ontario, 2014), online: <www.ipc.on.ca/wp-content/uploads/2016/08/The-Unintended-Consequences-of-Privacy-Paternalism.pdf>.

150 Silverman, *supra* note 122 at 176, 179, 181.

151 For a discussion of how technological determinism can lead to warped outcomes, including in research and access to research data, see Jon Khan, "CRISPR, Like any Other Technology: Shedding Determinism & Reviving Athens" (2023) 19:1 CJLT 173.

A. Examining Interdisciplinary Models for Improving Access

Other fields are dealing with similar challenges and opportunities around access and privacy. For example, the medical and scientific communities already recognize the vital importance of using technology and big data (*i.e.* a very large set of patient records) to improve individual and systemic outcomes.[152] While much work remains, experts and practitioners in those communities have studied how to maximize privacy and create data-driven solutions.[153]

Courts and reformers should examine the medical and scientific communities' efforts, and learn from their mistakes and successes. Court and medical records share overlaps and present similar challenges and opportunities.[154] For example, because of flaws in how medical records were originally built and implemented, they are often clunky, unwieldy, not useful, and not privacy-promoting. System end users, privacy, and research potential were often ignored when medical records and record-keeping systems were developed.[155] The same is likely true about most legal records. Yet, despite their flaws, medical and court records often contain troves of information that researchers and administrators can (and should) employ to improve outcomes. Efforts are currently underway to improve medical

152 See e.g. TEDx Talks, "How Machine Learning Enhances Healthcare | Marzyeh Ghassemi | TEDxUofTSalon" (19 February 2021), online (video): <www.youtube.com/watch?v=zpcOjNtd-70>; Dianne Daniel, "Machine Learning Makes Progress in Care at Ontario Hospitals", *Canadian Healthcare Technology* (29 October 2020), online: <www.canhealth.com/2020/10/29/machine-learning-makes-progress-in-care-at-ontario-hospitals-2>.

153 Many of the same hurdles and challenges persist in the medical and scientific communities where researchers seek greater bulk access but face obstacles because of "privacy risks" and an access maze of restrictions that tends to altogether obstruct access or promote inequitable access. See Ontario Genomics, "Call for an Ontario Health Data Ecosystem" (2015) at 1 [on file with the authors]; Council of Canadian Academies, *Accessing Health and Health-Related Data in Canada: The Expert Panel on Timely Access to Health and Social Data for Health Research and Health System Innovation* (Ottawa: Council of Canadian Academies, 21 March 2015), online (pdf): <cca-reports.ca/wp-content/uploads/2018/10/healthdatafullreporten.pdf>.

154 Khan, "Life of a Reserve", *supra* note 32 at 86–89.

155 For a thorough summary of the medical record's progress, including the electronic medical record's shortcomings, see Gregory Schmidt, "Evolution of the Medical Record: Milestones" (27 March 2019), online: <www.gregoryschmidt.ca/writing/the-role-of-design-in-ehrs>. See also Fred Schulte & Erika Fry, "Death by 1000 Clicks: Where Electronic Health Records Went Wrong", *Kaiser Health News* (18 March 2019), online: <khn.org/news/death-by-a-thousand-clicks/>; Amalio Telenti, Steven R Steinhubl & Eric J Topol, "Digital Medicine: Rethinking the Medical Record" (2018) 391 Lancet 1013; Raj M Ratwani, "Electronic Health Records and Improved Patient Care: Opportunities for Applied Psychology" (2017) 26:4 Current Directions in Psychological Science 359.

records, including issuing design challenges to make them more digestible and easier to use.[156] Canadian courts could pursue similar challenges and collaborations.

Other jurisdictions are innovating court records and its systems to make them more user-friendly for self-represented litigants, or to digitize them entirely.[157] These redesigns hold a great deal of promise. If court records and record-keeping systems were deliberately designed, records and documents could be automatically tagged as structured data (*e.g.*, by using XML standards or another markup language).[158] Such structured data is promising for protecting privacy: if personal and sensitive information is tagged, then courts and lawyers could protect it far better than Canadian courts, lawyers, and judges currently do.[159]

Better-designed court records also offer great promise for improving efficiency, fairness, and privacy. Researchers and court officials could see how properly tagged information travels through the litigation process and how it was used—*e.g.* to address the previously mentioned problem of "defensive litigation." Our intuition is that observing filed documents moving through the litigation process may show that much of the parties' filed material never gets relied on or examined either by them, the opposing party, or the court. Such documents often contain troves of personal, sensitive, and, at times, harmful information. But if no one ever uses or

156 See "Health Design Challenge" (last visited 23 February 2023), online: <healthdesign.devpost.com>. See also Kimber Streams, "Is 'Nightingale' the Future of User-Friendly Medical Records?", *The Verge* (28 January 2013), online: <www.theverge.com/2013/1/28/3925734/is-nightingale-the-future-of-user-friendly-medical-records>.

157 See e.g. "MassAccess" (last visited 23 February 2023), online: <courtformsonline.org>; Quinten Steenhuis & David Colarusso, "Digital Curb Cuts: Towards an Inclusive Open Forms Ecosystem" (2021) 54 Akron L Rev 773. Estonia offers a fascinating example of a more complex system redesign. See Anett Numa, "Artificial Intelligence as the New Reality of E-Justice" (27 April 2020), online: <e-estonia.com/artificial-intelligence-as-the-new-reality-of-e-justice>.

158 Silverman, *supra* note 122 ("[b]y tagging all the information contained in a court document, it is possible to dispense with documents altogether—through dissolving them into structured information. After all, a document is only a particular view of the information that it contains. Rather than being restricted to one particular view of that data, using structured information one could select or create a view of the data optimized for the task to which that data is relevant. Imagine, for example, being able to display simultaneously the conflicting factual claims contained in a plaintiff's complaint and a defendant's answer, or an argument and its critique culled from one side's memorandum in support of a motion and the other side's memorandum in opposition. Such tailored views of case data as well as traditional documentary views could easily be created if we filed structured information with the courts rather than documents—electronic or paper" at 198).

159 *Ibid* at 206, 211.

mentions these documents, instead of adding a layer of privacy protection for irrelevant, personal, or sensitive information, why not reform the upstream intake of that information and keep it out of courts?

B. Canadian Discourse on Accessing Court Records and Privacy Should Become More Nuanced, Comprehensive, Equitable, and Diverse

The Canadian Judicial Council—specifically its Judges Technology Advisory Committee—has sporadically worked on these issues and offered occasional guidance, but their approach is unfortunately lacking.[160] To understand the opportunities and challenges of using more technology in courts' records, decisions, and data, a more comprehensive framework is needed, such as what Micah Altman et al proposed.[161]

In reviewing such proposals, one will quickly see that technical privacy, computing, and security experts advocate for specificity in discussing privacy and access as well as prototyping and testing solutions. Instead of just lumping privacy into risks or challenges, courts could rely on a more

160 This list addresses most of the Canadian Judicial Council's work on this subject: Judges Technology Advisory Committee, *Open Access to Courts, Electronic Access to Court Records, and Privacy* (Ottawa: CJC, May 2003), online: <publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-75-2003E.pdf>; Judges Technology Advisory Committee, *Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy*, by Lisa M Austin & Frédéric Pelletier (Ottawa: CJC, January 2005), online: <cjc-ccm.ca/cmslib/general/news_pub_techissues_Synthesis_2005_en.pdf>; Judges' Technology Advisory Committee, *Use of Personal Information in Judgements and Recommend Protocol* (Ottawa: CJC, March 2005), online: <publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-74-2005E.pdf> [CJC, *Use of Personal Information*]; Judges Technology Advisory Committee, *Model Policy for Access to Court Records in Canada* (Ottawa: CJC, September 2005), online: <cjc-ccm.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf>; Canadian Judicial Council, *Model Definition of Judicial Information*, by Martin Felsky (Ottawa: CJC, September 2020), online: <cjc-ccm.ca/sites/default/files/documents/2021/Model%20def%20of%20jud%20info%20report_EN_approved%202020-09.pdf>; Sherman, *supra* note 1; Canadian Judicial Council, *Blueprint for the Security of Court Information*, 6th ed, by Martin Felsky (Ottawa: CJC, April 2021), online: <cjc-ccm.ca/sites/default/files/documents/2021/Blueprint%206th%20edition%202021-02-11_Final_EN.pdf>.

161 See generally Micah Altman et al, "Towards a Modern Approach to Privacy-Aware |Government Data Releases" (2015) 30:3 BTLJ 1967.

detailed catalogue and framework of privacy controls,[162] privacy threats,[163] privacy harms,[164] privacy vulnerabilities,[165] and data utility.[166] Instead of looking at privacy issues in isolation or at select points in time (such as when decisions are published), courts could examine a more "lifecycle" approach to the analysis and protection of data, including at and throughout data collection,[167] transformation,[168] retention,[169] access/release,[170] and post access.[171]

Some of this work has also already occurred in the United States, and Canadian courts would be remiss to ignore it. The United States Federal Court has provided electronic access for over three decades, and many state courts have grappled with similar challenges in that period.[172] As a result, the U.S. discussion on these issues is rich, including areas where problems most frequently occur. For example, David Ardia and Ann Klinefelter empirically reviewed existing United States court records to identify categories of sensitive information, actual examples of problems, and where personal information is most likely to appear.[173] In other words, they

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162 *Ibid* at 2016–17 (procedural, technical, educational, economic, or legal methods or mechanisms to enhance privacy and confidentiality—*e.g.* targeted interventions like privacy education, encryption, authorized users, data suppression, criminal penalties).

163 *Ibid* at 2012 (potential adverse circumstances or events that could cause harm to occur due to including data in a specific collection, storage, management, or release—*e.g.* government surveillance, leaving a storage key on a bus or losing it, natural disasters).

164 *Ibid* (harm could be experienced through injuries resulting from embarrassment, loss of reputation, employability, or insurability, imprisonment, or death because of a privacy threat being realized).

165 *Ibid* at 2012–13 ("characteristics that increase the likelihood that threats will be realized").

166 *Ibid* at 2013 (the analyses supported by data; using privacy controls, like data suppression, can diminish the data's practical utility).

167 *Ibid* at 2015 (collecting, ingesting, acquiring, receiving, or accepting data).

168 *Ibid* (processing data before non-transient storage, including structural transformations like encryption or data reduction).

169 *Ibid* (non-transient storage, including third-party storage).

170 *Ibid* access to data by third parties, including access to transformed data, subsets, aggregates, and derivatives like model results or visualizations).

171 *Ibid* (availability and operations on data and subsets passed on to third parties, including any subsequent downstream access).

172 Ardia & Klinefelter, *supra* note 121 at 1811.

173 Almost half of the United States' State Courts had online access to records in some form since 2001. See Laura W Morgan, "Strengthening the Lock on the Bedroom Door: The Case against Access to Divorce Court Records on Line" (2001) 17:1 J Am Academy Matrimonial Lawyers 45 at 61. The Federal Court started providing access to online information in 1990. Ardia, "Loss of Practical Obscurity", *supra* note 115 at 1397. See also Peter W Martin, "Online Access to Court Records — From Documents to Data, Particulars to Patterns"

identified with some specificity where the privacy risks are the greatest, rather than just guessing.[174]

Unfortunately, Canadian efforts, policies, conversations, and consultations have not fully recognized these points. Accordingly, we see at least four problems with current Canadian debates and guidelines on privacy risks, the open court principle, and modern technological developments:

1. **The public discussion has not been sufficiently technical or specific.** Some excellent work has occurred, but these issues are significant enough to require more than just a few academics and jurists hypothesizing or surmising about potential worst-case outcomes. Instead, the conversation needs to be about precise threats and controls throughout the data's lifecycle. As Altman et al note, we have a long way to go in terms of aligning privacy concerns with technological advances.[175]

2. **Pilot projects must be more iterative and deliberative.** Instead of surmising worst-case outcomes, courts should try to clearly identify modern threats and controls. For example, if the Federal Court or any court has decided to take advantage of modern anonymization techniques, it could try to replicate previous re-identification efforts.[176] This process would be akin to what technology experts call "red-teaming," where system designers try to break or invade the security mechanism they created—in other words, to try re-identify a party in a de-identified document.

3. **The set of voices to date have been too narrow.** Protecting privacy from a technological perspective cannot be limited to the same few historic voices who typically participate in these discussions and consultations.[177] More diversity from the legal and techno-

(2008) 53:5 Vill L Rev 855 at 860. Empirical study of concerns and risks has also occurred. Ardia & Klinefelter, *supra* note 121.

174 See generally Ardia & Klinefelter, *supra* note 121. See also Amanda Conley et al, "Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry" (2012) 71:3 Md L Rev 772.

175 Altman et al, *supra* note 161 ("[a]ddressing privacy risks requires a sophisticated approach, and the privacy protections currently used in government releases of data do not take advantage of advances in data privacy research or the nuances these provide in dealing with different kinds of data and closely matching privacy controls to the intended uses, threats, and vulnerabilities of a release" at 2071).

176 See generally Paul Ohm, "Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization" (2010) 57:6 UCLA L Rev 1701.

177 See e.g. Austin & Pelletier, *supra* note 160 at 26.

logical community is imperative, especially for more equitable, diverse, and democratic access to courts and their records.

4. **Maximizing solutions have often been ignored because of oppositional viewpoints.**
   Rather than expanding the range of potential solutions, the Canadian debate has been stymied by blanket opposition and binary thinking.

These points are not meant to disparage or suggest that the Canadian Judicial Council or individual court work was flawed.[178] Some limitations are very difficult to overcome, courts are consistently underfunded, and administrative practices often limit their ability to do more.[179] We argue the Federal Court's Strategic Plan and consultation evidences the vacuum within which these discussions often operate. David Ardia's comments about the United States context apply with equal force here: our "current framework for dealing with sensitive information in court records is broken."[180] Redesigning this framework should be a top priority.

VI. PRIVACY AND OPEN COURTS IN IMMIGRATION AND REFUGEE LAW

Immigration and refugee law court proceedings are a challenging context when it comes to protecting privacy, respecting the open court principle, and ensuring fairness in access to court materials. Privacy concerns in this area are especially acute. However, this is also an area where the open court principle is especially important because informational asymmetries and other power imbalances are extreme: one party—the government—will always have access to all the information, while other parties, researchers, media, and others generally must rely on the open court principle to access similar information.

As a result, immigration and refugee law offers a helpful context for examining whether electronic access to court documents could better maximize privacy, fairness, and openness. As we will now argue, an appreciation for technological potential for addressing current challenges could

178 However, scholars and lawyers allege that some of the work has been one-sided and inconsistent with existing Supreme Court of Canada jurisprudence on access.

179 See Jon Khan, "Our Justice System Needs to be More than a 'Zoom Court'", *The Globe and Mail* (1 July 2020), online: <www.theglobeandmail.com/opinion/article-our-justice-system-needs-to-be-more-than-a-zoom-court/>.

180 Ardia, "Loss of Practical Obscurity", *supra* note 115 at 1452.

point to better ways to resolve these tensions. Improved electronic access to court documents is possible in the immigration and refugee law context, and more generally in the criminal and civil systems.[181]

A. The Privacy Issues are Real and Significant

One of the main challenges is the seriousness of the privacy interests that may arise in immigration and refugee law court materials. For example, many court decisions and court files involving refugee claims, pre-removal risk assessments, or humanitarian and compassionate applications for permanent residence contain granular information. This information is often personal, sensitive, and potentially harmful to the parties in these proceedings. Parties provide information about their sexual orientation, HIV status (and other stigmatized medical conditions), political or religious views, experiences of sexual violence or intimate partner violence, and the like.[182]

More generally, immigration and refugee law proceedings often involve sensitive information that could facilitate identity theft, such as dates of birth, places of residence, or reproductions of identity documents.[183] Data aggregators could use this information for any number of commercial purposes difficult to foresee, including predatory ones.

Aside from risks of identity theft and other predatory practices, disclosing this information may also pose risks to physical safety. For example, court decisions or documents about refugee claims involving political dissidents may disclose information about identifiable third parties (family members, friends, or colleagues). Authorities in the claimant's country of origin could use the information to target them or their family, including directing operatives from the country of origin operating on Canadian soil.[184] Authorities may also use similar information against a party if the individual

181 The criminal law context sees many of the same information asymmetries and power imbalances, given that the government is always a party to criminal proceedings. However, there are also many situations in civil law proceedings with information asymmetries and power imbalances (*e.g.* large institutional parties versus marginalized parties).

182 See e.g. Canadian Council for Refugees, "Anonymity and confidentiality before the Federal Court Notice to NGOs and lawyers" (May 2019), online: <ccrweb.ca/sites/ccrweb.ca/files/anonymity-confidentiality-federal-court-notice.pdf>.

183 See *ibid*.

184 For a discussion on this issue in the U.S. context, see Hon Robert Hinkle et al, "Panel Two: Should There Be Remote Public Access to Court Filings in Immigration Cases?" (2010) 79:1 Fordham L Rev 25.

returns to their country of origin. The risks may be so serious that such information availability could even lead to a *sur place* refugee claim.[185]

Such sensitive information may cause many immigration and refugee court decisions and documents to be regularly eligible for exclusion from the constitutional guarantee of open courts. The Supreme Court of Canada recently articulated that eligibility exception.[186] The Federal Court could rely on the eligibility exception to limit access to some information in immigration and refugee files. In other words, the Federal Court can exclude information from open access whenever it involves "core aspects of individuals' personal lives that bear on their dignity…," such that "because of its highly sensitive character, its dissemination would occasion an affront to [an individual's] dignity…."[187]

But many of these risks are not new. They would apply even if the Federal Court had not questioned whether it should provide increased electronic access to court materials. In 2012, for example, the Canadian Council for Refugees passed the following resolution:

> Whereas:
>
> 1. Proceedings at the IRB involving refugees and refugee claimants are held in private by operation of law;
> 2. Disclosure of information regarding refugees can place applicants, their family members and associates at risk;
> 3. The information contained in judicial review records routinely includes protected private information;
>
> Therefore be it resolved:
>
> that the CCR call on the Federal Court to adopt a practice of identifying refugee claimants by initials only and to take other appropriate measures to preserve confidentiality of private information for applicants seeking leave for judicial review of all immigration matters concerning risk to persons, including decisions by the Refugee Protection Division, Refugee Appeal Decision, the Immigration Division, and Minister's delegates.[188]

185 See e.g. Immigration and Refugee Board of Canada Legal Services, *Interpretation of Convention Refugee and Person in Need of Protection in the Case Law* (Ottawa: Immigration and Refugee Board, 31 December 2020) at ch 5.

186 *Sherman Estate*, *supra* note 85 at para 3 (and see *Sherman Estate* generally).

187 *Ibid* at para 33.

188 Canadian Council for Refugees, "Privacy at the Federal Court" (June 2012), online: <ccrweb.ca/en/res/privacy-federal-court>.

While risks are not new, we recognize the danger of their amplification if additional Federal Court materials are available online—particularly if the additional information is systematically collected by search indices, data aggregators, or foreign governments. However, as we will now discuss, the immigration and refugee law context also demonstrates why providing increased access to decisions and court records is particularly important for fairness.

B. The Information Asymmetries and Power Imbalances Are Extraordinary

One key factor that separates immigration and refugee law from many other legal areas is extraordinary power imbalances. In immigration and refugee law cases, non-citizens who frequently experience marginalization along multiple vectors (*e.g.* status, race, class, disability) are confronted by the federal government's overwhelming power and resources. This major imbalance is manifested in these key takeaways:

1. the government sets and frequently changes the rules for first instance immigration and refugee law decision-making (including giving its delegates wide decision-making discretion);[189]
2. the government sets the rules for how the Federal Court exercises oversight over that decision-making (including establishing more procedural constraints on that oversight versus other areas of administrative law);[190]
3. the government decides if the Federal Court receives adequate resources to exercise oversight (including generally providing sufficient resources);[191]
4. the government decides how much legal aid funding non-citizens receive and how much funding to provide to legal aid lawyers (including generally not providing enough funding);[192] and
5. the government appoints judges who exercise initial and appellate oversight.[193]

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189 See generally *Immigration and Refugee Protection Act*, SC 2001, c 27.

190 See generally *Federal Courts Act*, RSC, 1985, c F-7.

191 Courts Administration Service, "Annual Report 2021-2022" (last modified 25 October 2022), online: <www.cas-satj.gc.ca/en/publications/ar/2021-22/ar-2021-22.shtml>.

192 Government of Canada, "Legal Aid Program" (last modified 1 August 2023), online: <www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html#:~:text=Canada%27s%20financial%20support%20to%20provinces,provide%20direct%20legal%20aid%20services>.

193 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, Appendix II, No 5.

Despite these power imbalances, the Federal Court has taken many measures to try to create fair processes, including at times by reaching constitutional norms. However, any changes to policies and practices must remain sensitive to these five points.

One of the most pernicious power imbalances in this area is "information asymmetries."[194] Because the government is a party to all immigration and refugee law proceedings, the Department of Justice has generated a complete collection of all immigration and refugee law court materials. In stark contrast, lawyers and advocates for non-citizens, researchers, and the media mostly rely on information that the Federal Court makes available online (directly or through third-party publishers). Where information is not available online, individuals can exercise their constitutional right under the open court principle to access court records. But that right currently runs through an inconvenient and inaccessible paper-based process: it typically involves fees per page, one generally needs to know about the information in the first place to know what to seek out, and the resulting paper-based information is not in an accessible format for individuals who rely on assistive technologies or who seek to do large-scale research.

The historic approach to stay applications in the Federal Court showcases this problem at work, including the unfairness it creates. Until recently, Federal Court removal stay decisions were generally unpublished orders, but Department of Justice lawyers had access to all stay orders (published or unpublished). This allowed them to choose which orders to bring to a judge's attention—*e.g.* unpublished court orders that denied stays in analogous circumstances. In contrast, lawyers for non-citizens subject to removal had no ability to search for analogous positive stay decisions. For one party to have easy access to all the relevant case law while the other side does not is manifestly unfair, and it flies in the face of equality before the law. The immigration law bar has long complained about this reality,[195] and the Federal Court recognized the unfairness when it began

194 For a discussion on the problems of information asymmetry and how it leads to poor legal regulation and likely unfair, inefficient legal outcomes, see generally Gillian K Hadfield, *Rules for Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (New York: Oxford University Press, 2017) at Part III.

195 Bench and Canadian Bar Association Liaison Committee, "Minutes of Meeting" (3 November 2006) at 3, online (pdf): <www.fct-cf.gc.ca/Content/assets/pdf/base/ABC-CBA-2006-11.pdf>.

publishing the decisions.[196] The Court now provides stay of removal decisions to CanLII for publication to correct the information asymmetry.[197] Similarly, the Federal Court recently moved towards publishing all decisions on the merits so that everyone can access them.[198]

This question of fair access to court materials is especially important for bulk access. While the Federal Court's website does not facilitate bulk access, the website's terms of reference currently do not prohibit scraping (*i.e.* automatically retrieving unstructured data from a website and store them in a structured format), at least for non-commercial reproduction.[199] This has allowed researchers—including Refugee Law Lab researchers—to amass full datasets of Federal Court decisions and online dockets. However, changes to the terms of service to prohibit scraping, without providing other means of bulk access, would result in only the government and third-party publishers having bulk access. If that outcome occurs, both the government and third-party publishers will no doubt leverage their privileged access to advance their interests and develop their own proprietary datasets, tools, and resources.

Here is one example of such leverage. The Department of Justice recently explored opportunities to leverage artificial intelligence to assist with litigation.[200] Building such technologies, however, require bulk access to court records, decisions, and data, and underlying administrative tribunal data. As mentioned previously, only the Department of Justice has full bulk access to court decisions and records as well as the underlying tribunal materials.[201] The Federal Court does not make bulk access to decisions

196 Bench & Bar Liaison Committee (Citizenship, Immigration and Refugee Law), "Minutes of Meeting" (4 June 2018), online (pdf): <www.fct-cf.gc.ca/Content/assets/pdf/base/imm/IMM%20Bar%20Liaison%2004-june-2018%20minutes%20draft%20v4%20(for%20circulation%20to%20Committee)%20ENG.pdf>.

197 For a discussion of the evolution of the Federal Court's practice in this area, see generally Rehaag & Thériault, *supra* note 78 at 1.

198 *Ibid*.

199 See Federal Court, "Important Notices" (last modified 6 November 2020), online: <www.fct-cf.gc.ca/en/pages/important-notices>.

200 See Petra Molnar & Lex Gill, "Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada's Immigration and Refugee System" (2018) at 15, online (pdf): <citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf>.

201 The Department of Justice has access to materials that it created (*i.e.* pleadings of its own cases). However, it also has information in case files generated by non-citizen parties, by the Immigration and Refugee Board, and by the Court. Much of that information is likely in currently inconvenient formats for artificial intelligence technologies. However, as the Court moves towards electronic records, these documents will be increasingly amenable to similar artificial intelligence technologies.

conveniently available on its website, and court records are not available electronically at all. The Immigration and Refugee Board generally does not make proceeding materials publicly available other than a small proportion of decisions published exclusively by third-parties, such as CanLII, who prohibit bulk access (*i.e.* using programmatic means to bulk download or scrape decisions and content).[202]

Thus, while the Department of Justice could leverage this data to create technologies that assist them in their work, non-citizens' lawyers cannot. They lack the comprehensive data needed to create similar competing technologies or the likely resources to bring legal challenges to the tools created by the government. Again, this manifest unfairness flies in the face of equality before the law.

C. Courts Must Exercise Oversight and Ensure Access in the Interest of Fairness

These realities raise two points that should guide the Federal Court and other courts in similar situations of technological development, power imbalances, and information asymmetries.

First, courts — especially the Federal Court in immigration and refugee law proceedings, and all other courts in most provincial and federal criminal law proceedings — should recognize that they often exercise oversight of government decision-making that involves both power imbalances and information asymmetries. Whatever measures courts take to protect important privacy interests must not exacerbate existing imbalances or asymmetries. The issue is not just balancing individual privacy against constitutional imperatives related to the open court principle; courts must also consider how policies can enhance the fairness of its processes — especially in a world where data and technology will increasingly inform and shape litigation and legal reform.[203]

Second, courts should be mindful of how access to their materials might enhance the quality of counsel, which is itself a key element of fairness. Making pleadings more easily available would allow researchers and regulators to examine more closely (and in a timelier way) problematic

202 See e.g. Alschner, *supra* note 1 at 360; LexisNexis, "General Terms and Conditions — Canada" (1 August 2023) at term 2.2, online: <www.lexisnexis.ca/en-ca/terms/online-products.page>; Thomson Reuters, "Terms of Use", online: <legal.thomsonreuters.com/en/legal-notices/terms-of-use>.

203 Livermore & Rockmore, *supra* note 92; Alarie, *supra* note 92.

patterns in counsel quality.[204] Easy access to pleadings in many files would also help new or inexperienced lawyers prepare strong materials by drawing on precedents. Making pleadings available in bulk may also allow for developing technologies that would identify ghost counsel.[205] Through using machine learning technologies, tools could be developed to reduce the amount of time lawyers need to prepare pleadings or to help improve those pleadings.[206]

Some research (focusing on information and privacy asymmetries in United States criminal law) suggests that litigation information asymmetries mostly—if not almost always—benefit powerful litigants and promote unfairness.[207] Consider how many legal technology tools are aimed at corporations, governments, or individuals with the ability to pay for their use or generation. Such tools are rarely (if ever) designed for vulnerable litigants. Vulnerable litigants also often cannot use the tools that were developed for more powerful actors—or even challenge the underlying assumptions about the tools when deployed (because the data, as mentioned, is accessible asymmetrically).[208] Canadian courts must avoid such outcomes as they enter the new era of litigation paired with emerging technologies such as machine learning and artificial intelligence—technologies the Federal Court has indicated an interest in.[209]

In thinking about the impact of electronic access to court records and these two points, we encourage the Federal Court and all other Canadian courts to distinguish between commercial and non-commercial access.[210]

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204 For a recent discussion of quality of counsel concerns in the refugee law field, see Craig Damian Smith, Sean Rehaag & Trevor CW Farrow, "Access to Justice for Refugees: How Legal Aid and Quality of Counsel Impact Fairness and Efficiency in Canada's Asylum System" (2021), online: *Social Science Research Network* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3980954>.

205 For more on this concept, see e.g. Jona Goldschmidt, "Ghosting: The Courts' Views on Ghostwriting Ethics Are Wildly Divergent. It's Time to Find Uniformity and Enhance Access to Justice" (2018) 102:3 Judicature 37, online: <judicature.duke.edu/articles/ghosting-the-courts-views-on-ghostwriting-ethics-are-wildly-divergent-its-time-to-find-uniformity-and-enhance-access-to-justice>.

206 See generally Harry Surden, "Machine Learning and Law" (2014) 89:1 Wash L Rev 87.

207 See Rebecca Wexler, "Privacy Asymmetries: Access to Data in Criminal Defense Investigations" (2021) 68:1 UCLA L Rev 212.

208 *Ibid* at 248–50.

209 Federal Court, "Strategic Plan", *supra* note 14 at 16.

210 This recognition must, however, be nuanced. Commercial entities can use legal data for innovation and to improve access to justice. See e.g. Centre for Refugee Studies, *supra* note 86 at 00h:38m:12s (Professor Amy Salyzyn noted these points in response to a draft version of this paper).

We recognize the real concerns about commercial data miners accessing court materials in bulk. However, as we suggested in Part IV, one way to address surveillance capitalism is by increasing democratic, open access to public data for non-commercial uses, including for use in research that could help support new technologies, processes, or designs to limit the amount of personal or sensitive information that ends up in court files to begin with. Additionally, courts and parties alike have largely benefited from scholarly research involving court records.[211] Courts must also ensure that measures taken to enhance privacy do not unduly prevent academic researchers from accessing full datasets of decisions and online court dockets. Courts should also explore opportunities to provide academic researchers access to bulk datasets of other documents—perhaps subject to data-sharing agreements with appropriate privacy and data security protections. This point is particularly important for areas of decision-making that are the least transparent, *i.e.* where one cannot understand decision-making by looking at reasons for decisions because the reasons were not published. In such cases, courts should grant academic access—*e.g.* the Federal Court should grant researcher access in cases where judges deny leave.

Finally, we agree with the Federal Court's decision to proceed more cautiously with immigration and refugee law cases than with other cases—essentially to try out the system with cases that are less sensitive to begin with.[212] However, we think the Federal Court should aim to move towards more access to immigration and refugee law court materials within a reasonable timeframe. With sufficient notice, judges, parties, and the Immigration and Refugee Board can adjust their practices in anticipation of materials becoming publicly available; given the time and capacity, other protections can be adopted. Non-citizens' lawyers can also take other proactive measures, including seeking confidentiality orders, where appropriate. Proceeding cautiously with the expectation of eventually moving to increased access to enhance fairness is the right approach.

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211 See generally Trebilcock & Yoon, *supra* note 6; Rehaag, "The Luck of the Draw", *supra* note 6; McCormick, *supra* note 6; Berring, *supra* note 88.

212 Federal Court, "Strategic Plan", *supra* note 14 at 15. Other researchers affiliated with the Refugee Law Lab have cautioned against using border control contexts as high-risk laboratories for technological developments. See generally Petra Molnar, "Technological Testing Grounds: Migration Management Experiments and Reflections from the Ground Up" (2020), online (pdf): <edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf>. We agree. Testing should occur in low to no-risk environments—*e.g.* simulated beta tests.

VII. CONCLUSION

Throughout this article, we argued that efforts to update and improve electronic access to court information in Canada are ultimately frustrated by a persistent and unnecessary framework that positions privacy and openness as binary opposites. If these are false, counterproductive binary tensions between privacy and openness remain and we suggest that even well-intentioned attempts to reform access may nevertheless end up reproducing the same inequalities, inefficiencies, and irregularities.

Advocates for the status quo have championed privacy tools like practical obscurity or practical friction to reconcile the seeming opposition between privacy and the open court principle. However, their approach represents a failure to seize an opportunity to design better systems for managing and accessing legal information and court records that are consistent with the broader goals of efficiency, fairness, accountability, and equity. These failures have particular weight in the context of immigration and refugee law, or any proceeding involving such radical information asymmetries and power imbalances—*e.g.* criminal law. Innovative, user-centred solutions to ensure genuine transparency and access to justice are imperative.

As part of our effort to intervene in this flawed, binary framework, we wish to close this article with 13 recommendations to inform policy and program development. We hope that other Canadian courts, policymakers, scholars, and stakeholders will look to the Federal Court's recent attempts at improving electronic access to court materials. The time has come to embrace digital access and to do away with the outdated privacy/openness dichotomy. Access programs should be developed with a focus on fairness. The goal should be developing tailored, targeted solutions to overcome the inequalities and opacities of our inaccessible court system.

To this end, we offer these 13 recommendations to help maximize privacy, openness, and fairness as courts seek to enhance fair electronic access:

1. **Pilot projects with managed risk.** Rather than jumping into the deep end by attempting to provide full access to everything in one shot, courts should initiate pilot projects for expanded online access. They should start in areas with fewer privacy risks and adopt a stepwise approach with detailed timelines for a full rollout. Gradual approaches, with testing and stakeholder feedback, will result in incremental increases in openness while providing opportunities to adjust for privacy and fairness impacts that arise. Proactive efforts should be made to seek feedback from stakeholders with lived experience, especially from marginalized stakeholder groups.

2. **Focus on court-produced materials first.** Courts should prioritize the online availability of court-produced materials, such as decisions, orders, and court dockets. Once those are available, attention should turn to providing access to originating applications, pleadings, and underlying administrative decisions.[213] Though these materials are only a fraction of what is involved in a legal proceeding, courts are well-positioned to start there. These materials are also the ones for which potential information asymmetries have the most significant fairness implications. Courts can then consult stakeholders about access to other materials.
3. **Shift general practice towards electronic accessibility.** Courts, decision-makers, and lawyers should all start shifting their general patterns of practice in anticipation of expanded online document availability and develop rigorous internal privacy standards accordingly.[214] Designing and updating these standards early and often, with privacy and an expectation of access as active and ongoing concerns, will help ensure that fairness is always front of mind. Such standards will give stakeholders time to adjust their practices iteratively and to learn best practices from one another.
4. **Augment the availability of court materials.** Existing availability of court materials should be maintained, including the ability to access paper materials. The Federal Court, and any court with similar website access terms, should maintain current permissive website terms of use that do not prohibit bulk access to court decisions and online court dockets, and that allow reproduction for non-commercial use. Courts without such policies should pursue creating them. This reflects a commitment to ensuring that discussions about electronic access do not lead to backslides in terms of fair access.
5. **Adopt programmatic de-identification policies.** Courts and administrative tribunals should systematically de-identify some legal documents and decisions on a go-forward basis. The aim should be to

213 When the Federal Court denies leave, access to pleadings and underlying decisions is imperative. Without access to these documents, the decision-making process is entirely non-transparent.

214 Courts could incorporate privacy into more general practices by relying on principles such as privacy by design and conducting far more prototyping and iterating of solutions, rather than static solutions. See generally Ann Cavoukian, *Privacy by Design: The 7 Foundational Principles* (Toronto: Information & Privacy Commissioner of Ontario, 2011), online (pdf): <www.ipc.on.ca/wp-content/uploads/resources/7foundationalprinciples.pdf>. See also Woodrow Hartzog & Frederic Stutzman, "Obscurity by Design" (2013) 88:2 Wash L Rev 385; Nicolas Vermeys, "Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-examine Our Fundamental Values" in Karim Benyekhlef et al, eds, *eAccess to Justice* (Ottawa: University of Ottawa Press, 2016) 123.

minimize the exposure of sensitive personal information in certain cases.[215] Reducing identifying materials through programmatic anonymization could allow fair access to be expanded without compromising privacy for vulnerable parties and stakeholders.

6. **Minimize unnecessary disclosure.** By the same principle, fair access can be facilitated if unnecessary private information never makes it into decisions to begin with. Judges and underlying administrative decision-makers should work and write with privacy in mind. They should take steps to minimize extraneous disclosures in their decisions. They could avoid using party or third-party names and other identifying details that may pose risks to privacy or that may be used to justify unfair limits on access.[216]
7. **Consider privacy issues in providing legal services.** All lawyers should minimize the unnecessary disclosure of private information in their materials, and they should scrutinize materials expected to be publicly available. Where appropriate, lawyers should consider pursuing confidentiality orders. These mechanisms advance fairness by providing represented parties with knowledge and agency when it comes to what information is being made public. Such mechanisms also offer parties with opportunities to protect themselves without sacrificing

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215 For example, the Federal Court should pursue further de-identification of materials in immigration and refugee proceedings. It should start with published decisions and online court dockets and then move to other key documents. In doing so, the Federal Court should embrace the Canadian Council for Refugees' call to replace the names of parties with initials. The policy aim would not be to prevent all possible subsequent de-anonymization but to mitigate some privacy concerns. To maintain transparency in the rare cases where the media or other public interest necessitates knowing a party's identity, a mechanism to de-anonymize should be available. The recent Amanda Todd British Columbia Supreme Court decision showcases such an example where it was paramount to some parties that the public knew the parties' identities. See generally *R v Coban*, 2022 BCSC 14. There, the mother of a deceased victim of cyberbullying successfully applied to lift the publication ban on the trial. See Mike Hager, "B.C. Judge Allows Amanda Todd's Name to be Made Public as her Accused Tormentor Heads to Trial", *The Globe and Mail* (10 January 2022), online: <www.theglobeandmail.com/canada/british-columbia/article-bc-judge-allows-amanda-todds-name-to-be-made-public-as-her-accused/>. Here, the requesting party could file a motion with notice being provided to the original parties. The original parties should have the onus to demonstrate that they meet the conditions for confidentiality set out in the case law (*i.e.* a presumption of openness in the absence of a confidentiality order).

216 The Canadian Judicial Council already offers guidance here. However, with better technology and processes, the Council's objectives could be better achieved—either through automated processes or automated error checking/correction. See generally CJC, *Use of Personal Information*, *supra* note 160.

transparency in decision-making through broader limits on access to court materials.

8. **Make privacy-related information accessible and available.** Courts, administrative tribunals, and other institutions should freely and frequently offer advice to parties, counsel, and all stakeholders on how the materials can be redacted or how confidentiality orders can be sought to reduce privacy risks. In particular, courts should prepare plain language materials advising unrepresented parties that materials they file are part of the public record and may be available online. Unrepresented parties face significant disadvantages in the legal system; prioritizing privacy and fair access for these parties is a necessary measure to reduce inequity and improve access to justice.
9. **Explore wider technological solutions.** Courts, administrative tribunals, and legal aid programs should embrace the opportunity to use technology to enhance fair access to materials, rather than seeing technology only as the enemy of privacy. Technologies may include using natural language processing (*e.g.* automated redaction using named entity recognition)[217] to de-identify past and future published decisions and work with online publishers to do the same. Other solutions could also be explored—removing styles of cause and party names from online court dockets in proceedings with sensitive information, like in some immigration and refugee proceedings.
10. **Guarantee machine-readability.** Courts should work with stakeholders to ensure that electronically filed materials are truly electronic and machine-readable rather than just providing barebones PDFs. This practice will enhance accessibility for users who rely on assistive technologies and facilitate further uses of the materials. Organizations that advocate for universal design and increased accessibility for people with disabilities should be proactively consulted, along with researchers and advocates who work with marginalized parties and communities, to promote their fair access to this important data.
11. **Integrate privacy and efficiency in court databases.** Courts should develop consistent meta-data for online materials to facilitate internal and external research on improving transparency, fairness, privacy, and efficiency in the judicial system. For example, if courts never examine certain materials, practices can be changed to reduce the frequency

217 See generally Tom Clarke et al, "Automated Redaction Proof of Concept Report" (December 2018), online (pdf): <ncsc.contentdm.oclc.org/digital/collection/accessfair/id/804/rec/1>.

with which those materials are filed, which will, in turn, increase both efficiency and privacy. Designing databases and information management processes with a focus on fairness reduces the improper use of data while promoting its availability for advocacy, research, and practice-enhancement purposes. If these goals are built into the system design, then access is no longer reliant on obtaining discretionary permission or having the resources required to sort through huge volumes of uncategorized information, which may unfairly favour well-resourced or well-connected parties.

12. **Work with researchers, not just for-profit stakeholders.** Courts should develop policies that facilitate bulk access to materials for non-commercial research purposes, possibly subject to data-sharing agreements. Ensuring access for researchers and advocates, rather than leaving this information only in the hands of the government and commercial entities looking to extract profit from legal data, can advance transparency and access to justice while reducing existing informational asymmetries.
13. **Remove fees for accessing court materials.** Existing fees are only justifiable because copying imposes costs on the court, and members of the public can avoid these costs by examining the materials in person. No similar justification applies to electronic documents. If any fees are to be applied for accessing online materials, they should be minimal and nominal, akin to access to information requests, followed by further fees only if direct labour or reproduction costs arise from that specific request. Fair access is incompatible with using fees to reintroduce "friction" to maintain practical obscurity. Such a practice will inevitably amplify inequitable access to court materials by favouring commercial legal publishers or legal technology companies that can afford to access large numbers of files that academic researchers and individual counsel representing marginalized groups cannot.

These recommendations represent some small steps towards policies that critically embrace the supposed tension between openness and privacy in access to court records. As we have argued, the apparent impasse between those committed to open access and those committed to privacy can be overcome if we understand that the primary objective of policies is to promote fair electronic access.

APPENDIX A — ACCESS POLICIES OF CANADIAN COURTS

Some Canadian courts have access policies where individuals seeking access to the complete court file must present a written request to the court.

- Supreme Court of British Columbia, *supra* note 95 at 42.
- Court of Appeal for British Columbia, "Record and Courtroom Access Policy" (last modified March 2023) at 7–8, online (pdf): <www.bccourts.ca/Court_of_Appeal/practice_and_procedure/record_and_courtroom_access_policy/PDF/Court_of_Appeal_Record_and_Courtroom_Access_Policy.pdf>.
- Alberta Courts, "Court Information Access Guide for Alberta" (April 2022) at 15, online (pdf): <www.albertacourts.ca/docs/default-source/qb/public_and_media_access_guide.pdf?sfvrsn=77a1df80_0>.
- Courts of Saskatchewan, "Public Access to Court Records in Saskatchewan: Guidelines for the Media and the Public" (2020) at 11, online (pdf): <sasklawcourts.ca/wp-content/uploads/2021/05/Access_Guidelines_2020.pdf>.
- Nunavut Court of Justice, "Access to Court Records Policy" (last visited 25 February 2023) at para 6.1, online (pdf): <www.nunavutcourts.ca/phocadownloadpap/EN/CourtRecords_AccessPolicy.pdf>.
- Supreme Court of Newfoundland and Labrador, "A Guide to Accessing Court Proceedings and Records for the Public and Media" (last modified March 2019) at 11–13, online (pdf): <www.court.nl.ca/supreme/files/2018-01-09-A-Guide-to-Accessing-Court-Proceedings-and-Records.pdf>.

Some courts appear to have slightly more permissive regimes.

- Manitoba Courts, "Policy: Access to Court Records in Manitoba" (last visited 25 February 2023) at 2, online (pdf): <www.manitobacourts.mb.ca/site/assets/files/1129/access_policy_final.pdf>.
- Ministry of the Attorney General, "Access court files, documents and exhibits" (last modified April 2019) at para 1.1, online: <www.ontario.ca/document/access-court-files-documents-and-exhibits>.
- Executive Office of the Nova Scotia Judiciary, "Guidelines Re: Media and Public Access to the Courts of Nova Scotia" (1 April 2019) at 13, online (pdf): <www.courts.ns.ca/sites/default/files/editor-uploads/FINAL_Media_Access_Guidelines_04_01_19.pdf>.
- Prince Edward Island Court of Appeal, "Practice Directions" (last modified 1 September 2018) at 33–34, online (pdf): <www.courts.pe.ca/sites/www.courts.pe.ca/files/Practice-Directions.pdf>.

Some courts have no access policies posted online.

- The Nunavut Court of Appeal has not posted access information online. Presumably, its policy mirrors or is like that of the Nunavut Court of Justice.
- The Supreme Court of the Northwest Territories and the Court of Appeal for the Northwest Territories have not posted access information online.
- The Supreme Court of Yukon and the Court of Appeal for Yukon have not posted access information online.
- The Supreme Court of Prince Edward Island has not posted access information online. Presumably, its policy mirrors or is like that of the Prince Edward Island Court of Appeal.

- The Court of Appeal of Newfoundland and Labrador has not posted general information online, but it does have regimes for accessing materials under publication bans and copies of sound recording. See Court of Appeal of Newfoundland and Labrador, "Access to Proceedings and Documents" (last visited 25 February 2023), online: <www.court.nl.ca/appeal/access-to-proceedings-and-documents>.