Refugee Law Lab Working Paper (18 November 2021)

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

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Abstract

Court decisions and court documents are becoming easier to access online than ever before. This access provides many possible benefits, including increased fairness. But court decisions and documents often contain intensely personal information. Public exposure of that private information may even lead to significant harm. The Federal Court of Canada has demonstrated leadership among Canadian courts in attempting to proactively grapple with these issues, including by consulting stakeholders about increased electronic access to court records.

We—researchers connected with the Refugee Law Lab based out of York University's Centre for Refugee Studies and Osgoode Hall Law School—write this paper to participate in the Federal Court's consultation. To date, consultations have highlighted immigration and refugee proceedings as one area of particular concern for privacy risks. Some are even calling for restricted access that could compromise the open court principle and systemic fairness. This article suggests the Federal Court could enhance privacy interests in immigration and refugee proceedings without compromising the open court principle. It suggests that any measures taken to protect privacy should be crafted to avoid amplifying unfairness in access to legal materials. The Federal Court must avoid creating access regimes that asymmetrically block research and technological development that could advance the interests of refugees and other displaced people.

Feedback

This is a working paper that may be revised for subsequent publication. Feedback sent to refugeelab@yorku.ca would be most welcome.

Refugee Law Lab

For further information about the Refugee Law Lab, visit: https://refugeelab.ca.

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Introduction

Court decisions and court documents are becoming easier to access online than ever before.[1] Corporations,[2] lawyers,[3] judges,[4] law students,[5] legal scholars,[6] political scientists,[7] and even some unrepresented parties[8] have already benefited from this access. Many more benefits are possible, including increased transparency, accountability, efficiency, and access to justice. [9] To pursue these benefits, researchers, legal publishing companies, governments, data scientists, tech start-ups, and other stakeholders are increasingly attempting to leverage bulk access to court decisions, court documents, and court data.[10]

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[1] In contrast the United States, however, bulk access to decisions is far more limited (see Wolfgang Alschner, "AI and Legal Analytics" in Florian Martin-Bariteau & Teresa Scassa, eds, *Artificial Intelligence and the Law in Canada* (Toronto: LexisNexis Canada, 2021); Addison Cameron-Huff, "Why Google Can't Build A Case Law Search Engine in Canada" (11 February 2014), online: <https://www.cameronhuff.com/blog/ontario-case-law-private/>). And, in many cases, neither individual nor bulk access to either paper or electronic court records is available (see 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" (LLM Thesis, University of Toronto, 2016).

[2] Loom Analytics, online: <https://www.loomanalytics.com/>; "Westlaw Edge Canada Coming Soon" (8 July 2021), online: <https://www.youtube.com/watch?v=2Wpfg4XPxG0>; LexisNexis, "What is Legal Analytics", online: <https://www.lexisnexis.ca/sites/en-ca/sl/2020-03/what-is-legal-analytics.page>; Blue J, "Build better answers", online: <https://www.bluej.com/ca>; Alexsei, "Legal Memos. On Demand", online: <https://www.alexsei.com>.

[3] Lawyers already used many of the tools included in the previous footnote. And lawyers are also creating their own tools (see, e.g., Lenczner Slaght, "Data-Driven Decisions", online: <https://www.litigate.com/data-driven-decisions>.

[4] Some courts may use these materials to derive benefits and insights for their court and judges. 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" (21 September 2018) *The Toronto Star*, online: <https://www.thestar.com/news/immigration/2018/09/21/getting-refugee-decisions-appealed-in-court-the-luck-of-the-draw-study-shows.html>.

[5] Some law schools are attempting to use court decisions and court documents to gain better understandings of Canada's legal system (see, e.g., Data Science for Lawyers, "About", online: <https://www.datascienceforlawyers.org/about/>; Queen's University, "Conflict Analytics Lab", online: <https://conflictanalytics.queenslaw.ca>; Laboratoire de Cyberjustice, "The Laboratory", online: <https://www.cyberjustice.ca/en/laboratoire/presentation/>.

[6] See, e.g., Michael Trebilcock & Albert H Yoon, "Equality before the Law? Evaluating Criminal Case Outcomes in Canada" (2016) 53 Osgoode Hall Law Journal 587; Sean Rehaag, Judicial Review of Refugee Determinations: The Luck of the Draw? (2012) 38:1 Queen's LJ 1.

[7] Peter McCormick, "Structures of Judgment: How the Modern Supreme Court of Canada Organizes Its Reasons" (2009) 32 Dalhousie LJ 35.

[8] See, e.g., NSRLP, "Welcome to the NSRLP!", online: <https://representingyourselfcanada.com>.

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

[10] Canadian Judicial Council, "Guidelines for Canadian Courts: Management of Requests for Bulk Access to Court Information by Commercial Entities" (April 2021) Canadian Judicial Council, online: <https://cjc-ccm.ca/sites/default/files/documents/2021/Bulk%20Access%20to%20Court%20Info%20-%20Guidelines%202020-12_EN%20Final%20-%20One%20PDF.pdf>.

At the same time, the increasing accessibility of court decisions and documents has prompted pushback due to concerns about privacy—pushback that sometimes includes skepticism about the open court principle as a foundational norm.[11] Court decisions and documents often contain intensely personal information, and sometimes public exposure of that information may lead to significant harm.[12] Many concerns about the sensitivity of court decisions and documents arise regardless of whether access occurs online or in-person. Other concerns are specific to online information. And some concerns are limited to scenarios where online information is accumulated in bulk. Careful attention needs to be paid to privacy issues when thinking about the open court principle and how it applies to electronic access to court decisions and documents.

To date, governments have provided little legislative guidance about how to best address these privacy issues.[13] So courts and the Canadian Judicial Council have largely been left on their own to develop strategies to satisfy the open court principle and privacy protections in the face of rapidly changing technologies.[14]

The Federal Court has demonstrated leadership among Canadian courts in attempting to proactively grapple with these issues. Its most recent Strategic Plan identifies leveraging technology to become "a more accessible digital court" as a key priority.[15] In pursuing that priority, the Court is consulting stakeholders about increased electronic access to court records.[16] One area of particular concern that has arisen in those consultations is privacy in immigration and refugee proceedings.[17]

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[11] For some examples of pushback to electronic access in Canada and the U.S., see, e.g., 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; 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*, 2d ed (Toronto: Irwin Law Inc, 2016); Woodrow Hartzog, "The Public Information Fallacy" (2019) 99 Boston University Law Review 459; Laura W Morgan, "Preserving Practical Obscurity in Divorce Records in the Age of E-Filing and Online Access" (2019) 31:2 J Am Acad Matrimonial Law 405.

[12] See, e.g., Jacquelyn Burkell & Jane Bailey, "Equality at Stake: Connecting the Privacy/ Vulnerability Cycle to the Debate about Publicly Accessible Online Court Records" (2018) 4 Can J Comp & Contemp L 67.

[13] 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).

[14] *Supra* note 10.

[15] Federal Court, "Federal Court Strategic Plan: 2020-2025", online: https://www.fct-cf.gc.ca/content/assets/pdf/base/2020-07-15%20Strategic%20Plan%202020-2025.pdf>

[16] *Ibid* at 10-16.

[17] *Ibid* at 15.

We write this paper to participate in that consultation. We are researchers connected with the Refugee Law Laboratory (RLL). The RLL, which is based at York University's Centre for Refugee Studies and Osgoode Hall Law School, is a laboratory devoted to research and advocacy related to new legal technologies and their impact on refugees, other displaced communities, and people on the move. The RLL does three main things: develop datasets and legal analytics that enhance transparency in refugee law processes; produce legal technology that advances the interests of refugees and other displaced people; and critically examine government and private actor use of new legal technologies in the migration field. The RLL is committed to social justice, to interdisciplinarity, to evidence-informed policy, and to ensuring that the data, research, and technologies it produces are freely accessible to the public. The RLL also strives to work from a community-based perspective by foregrounding the lived experiences of people on the move and their interactions with technology.

This paper argues that the Federal Court could enhance privacy interests in immigration and refugee proceedings without compromising the open court principle. Any measures taken to protect privacy should be crafted to avoid amplifying unfairness in access to legal materials. The Court must avoid creating access regimes that asymmetrically block research and technological development that could advance refugees and other displaced people's interests.

Open court principles should not trump privacy principles. This point is always true. But it is particularly important in the immigration and refugee law setting where privacy issues are especially acute for a group of litigants who are already marginalized. But at the same time, privacy should not trump open court principles. Again, this point is always true. And it is particularly important in the immigration and refugee law setting because of multiple factors: serious imbalances of power and resources between government and non-citizens; unequal access to new legal technologies and the data needed to build those technologies by the legal representatives of the government and non-citizens; non-transparent (and all too often arbitrary) high-stakes legal decision-making processes; and highly constrained procedural protections.

Instead of pursuing policies that only advance the open court principle or privacy, we advocate paths forward that have the potential to maximize privacy, fairness, and openness. New technologies, more deliberate processes, and more equal access to court documents can

simultaneously promote privacy, respect the open court principle, and improve the fairness of court processes involving non-citizens.

This paper proceeds as follows: Part 1 addresses the Federal Court's Strategic Plan and Consultation, including calls to limit electronic access and to keep in place practical obscurity mechanisms. Part 2 discusses why it is time to realize the open court principle more fully. Part 3 discusses why practical obscurity and practical friction (*i.e.*, relying on obscure or impractical access to court records to protect privacy) were never good solutions for privacy protection. Part 4 discusses opportunities and challenges in using technology to improve privacy protections and open courts. Part 5 addresses concerns about immigration and refugee court records, judicial decisions, and necessary information for adjudicating such disputes. Part 6 lays out our concluding recommendations for what the Federal Court should do for historic and future court records and judicial decisions.

1. The Federal Court's Strategic Plan and Consultations

As it does every five years, the Federal Court released its new strategic plan in 2020.[18] One theme was clear. The COVID-19 pandemic stimulated the Court to rapidly innovate and evolve:

> As the saying goes: 'Necessity is the mother of invention.' The suspension of the Court's regular operations spurred the Court to redouble its efforts to shift away from being a paper-based organisation. … There will be no going back. Instead, the Court is getting used to a new 'normal,' which is requiring much greater flexibility and adaptability than ever before. These changes are enhancing access to justice by yielding earlier hearings, significantly reduced legal costs and more streamlined procedures.[19]

i. Increase access to justice and improve public service by becoming a more accessible digital court

The Court set out to pursue two principal and related objectives to pursue over the next 5 years: significantly increase access to justice and enhance the Court's ability to serve the public across Canada. It will achieve these objectives 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

[18] *Ibid.*
[19] *Ibid* at 2.
[20] *Ibid* at 4. And the Court will build on the twin objectives and achievements of the 2014-2019 Strategic—*i.e.*, improving access to justice and modernizing (*Ibid* at 5 [The Court achieved a number of successes—including, rolling out a national digital recording system (DARS) that is integrated into the Court's IT network; installing

enable the public and media to electronically access non-confidential court records and non-confidential portions of electronic hearings. Put simply, the Court is about to become a lot more open.

The Court sees this shift as having the potential to better achieve its goals of being impartial,[21] responsive,[22] efficient,[23] proportional,[24] timely,[25] innovative,[26] consistent,[27] equitable,[28] diverse,[29] accountable,[30] predictable,[31] and accessible.[32] The Court also sees this shift as necessary to ensure it keeps pace with society and parties' expectations:

> As the world in which the Court functions becomes increasingly digital, the Court will keep pace. Parties … will be able to deal with the Court using the same types of technological tools that they use in their dealings with each other. The same will be true for members of the general public and the media.[33]

Easy electronic access to court materials is a key step for ensuring the Court meets parties and the public's expectations. It also enables the Court to ensure compliance with constitutionally protected open court principles:

> The principle of open and accessible court proceedings is inextricably tied to the rights guaranteed in section 2(b) of the *Canadian Charter of Rights and Freedoms*…. It is also the foundation upon which the judicial process is scrutinized and criticized. Justice must not only be done, it must also be seen to be done.
>
> Accordingly, anyone seeking to limit the scope of court documentation that is accessible to the public bears the burden of demonstrating two things: (i) that a confidentiality order is *necessary* to prevent a serious risk to an important interest because reasonable alternative measures will not prevent that risk, and (ii) the salutary effects of the order outweigh its

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electronic courts across Canada; establishing an enhanced video conferencing system; adopting electronic communication as the Court's default communication mode; replaced the previous antiquated court and registry management system with an innovated state-of-the-art system; launching more robust e-filed system; providing the public with greater electronic access to Court records; and providing Court members with improved technological tools].

[21] *Ibid* at 9.
[22] *Ibid*.
[23] *Ibid* at 6, 9.
[24] *Ibid* at 16.
[25] *Ibid* at 17.
[26] *Ibid* at 9.
[27] *Ibid* at 18
[28] *Ibid* at 9.
[29] *Ibid* at 25.
[30] *Ibid* at 25-26
[31] *Ibid* at 24.
[32] *Ibid* at 4, 9, 18, 19, 24.
[33] *Ibid* at 9.

> deleterious effects, including on access to justice and on the public interest in open and accessible court proceedings.
>
> Currently, the legal community and members of the general public who want to obtain copies of one or more documents that have been filed with the Court must physically travel to the regional Registry office where the file is located or to the central Registry in Ottawa. Then they must pay 40¢ per page for each document they wish to have copied. In addition, costs are incurred by the Registry to send files to various locations for viewing and photocopying by the public.
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> In 2020, this is unacceptable.[5]

We wholeheartedly agree. As Part II will discuss, courts across Canada 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 Court's call for some caution because of potential privacy concerns, especially in immigration and refugee matters. The Court has clearly recognized a fundamental point: despite the benefits of open digital access, putting certain types of information online brings increased risks. So the Court intends to proceed cautiously in three phases:[34]

1. To date, it is offering electronic access to all its public decisions, directions, and other communications. And Federal Court judges are endeavouring to write those documents in ways that do not include confidential information that later must be redacted.[35]
2. Soon, the Federal Court will provide electronic access to all parties' and interveners' non-confidential legal submissions. Like with judges, it will encourage counsel and self-represented litigants to draft their submissions to exclude confidential information, especially when they can confidentially annex it.[36]
3. Then, over the long term, the Federal Court will work with stakeholders to expand the scope of its electronic access initiative to include evidence and other documentation.[37] Special considerations, such as personal safety and privacy,[38] "*may* justify a more cautious approach in making its files electronically accessible in certain limited types of cases …

[34] Federal Court Strategic Plan, *supra* note 16 at 14.
[35] *Ibid* at 15.
[36] *Ibid*.
[37] *Ibid* ["The Court will rely on "will work with interested stakeholders, including the immigration bar, refugee organizations, the privacy law bar and members of the media law bar, to arrive at an appropriate approach to increasing electronic access to its records, while protecting private or otherwise confidential information."]
[38] For example, the Federal Court notes these possible harms in immigration and refugee proceedings "information that might identify a minor, breach privacy rights or reasonably expose an individual to a risk of persecution or harm in his or her country of origin" (*Ibid*).

[:] i) minors, (ii) refugee applicants, (iii) persons applying for immigration status, in certain circumstances, and (iv) self-represented litigants."[39]

ii. Consultation has revealed divergent views on electronic access to court records

The Federal Court did not begin this shift without first undertaking pilot project tests or consultation,[40] key principles of user-centred design that we think other courts should embrace.[41]

In 2019, the Federal Court developed a pilot project for immigration proceedings in Toronto that allowed any party to electronically file documents.[42] And it engaged in public consultation from 2018-2021 that revealed divergent views on electronic access:

- Some agree that anonymizing court records and decisions should be available from the outset of proceedings. Others are concerned that too many anonymization requests could compromise the open court principle.[43]
- Many agree that online access to court documents poses a risk for sensitive information being widely distributed online.[44]
- Many are concerned about electronic access to court records in judicial reviews of refugee, H&C, PRRA, and other risk-based cases.[45]

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[39] *Ibid*.
[40] *Ibid* at 11.
[41] See Jon Khan, "'The Life of a Reserve': How Might We Improve the Structure, Content, Accessibility, Length, and Timeliness of Judicial Decisions" (LLM Thesis, University of Toronto, 2019) Part 4.
[42] Federal Court, "Notice to the Parties and the Profession: Policy Project (Toronto Local Office Only): IMM E-Process (4 July 2019), online: <https://www.fct-cf.gc.ca/content/assets/pdf/base/IMM%20e-process%20pilot%20Notice%20July%204-2019%20revision%20ENG%20FINAL.pdf>.
[43] 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. One Federal Court judge (Diner J.) agreed with such a proposal. But he also said anonymity must be balanced with the open court principle. In other words, no blanket anonymity for all proceedings. At the other end of the spectrum, the Federal Court Chief Justice (Crampton C.J.) 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): <https://www.fct-cf.gc.ca/Content/assets/pdf/base/IMM%20Bar%20-%20April%2012-2018%20minutes%20FINAL%20ENG.PDF>; Federal Court, "Bench and Bar Liaison Committee (Citizenship, Immigration & Refugee Law) Minutes" (4 June 2018), online (pdf): <https://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>.
[44] The Federal Court Chief Justice, Legal Aid Ontario, and the Quebec Lawyers Association all noted potential risks but agreement (see Federal Court, "Bench and Bar Liaison Committee (Citizenship, Immigration & Refugee Law) Minutes" (9 May 2019), online (pdf): ≤https://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)>.
[45] Federal Court, "Bench and Bar Liaison Committee (Citizenship, Immigration & Refugee Law) Minutes" (31 May 2019) at 2, online (pdf): <https://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>

- Fewer are concerned about online access for immigration and refugee court records for judicial reviews of visa officer, express entry, and other non-risk decisions.[46]

In the Federal Court's consultations, the CBA was invited to provide a submission.[47] In response, the CBA has called for a reverse onus approach to accessing many court records electronically or in-person. It argues 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."[48] And it argues that Australia's federal court offers an exemplary approach:

- Australia provides online access to files and does not distinguish between electronic or paper-based records. Access depends on the documents' classification (non-restricted, restricted, or confidential).[49]
- Its docket search is like the Federal Court's, and anyone can access it (or register with it to track cases).[50]
- Its online search portal contains non-restricted, restricted, and confidential documents.[51]
- Parties and non-parties can create accounts, but only parties can view documents online.[52]
- If non-parties want to access either restricted[53] or non-restricted documents,[54] they must use the access form and pay a fee for access. But no rationale for access is required for non-restricted documents. But a rationale is helpful (but again not required) when seeking court leave to access restricted documents.[55]

Relying on Australia's scheme and its overall views, the CBA makes eight recommendations:

1. Require online accounts and fees to access filed documents: Registration promotes accountability and enhances security. All users should upload identification and their full name and address when creating accounts. Non-parties should pay an access fee for

[46] *Ibid*.
[47] Federal Court, "Bench and Bar Liaison Committee (Citizenship, Immigration & Refugee Law) Minutes" (16 October 2019), online: <https://www.fct-cf.gc.ca/Content/assets/pdf/base/imm/IMM%20Bar%20Liaison%2016-oct-2019%20minutes%20v5%20ENG%20%20(for%20circulation%20to%20Committee).pdf>.
[48] Canadian Bar Association, "Access to Documents on Federal Court Website" (December 2019) at 2, online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=eed26a1c-5256-4c66-87d6-20c2c99afa84>.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid* at 3.
[52] *Ibid*.
[53] *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].
[54] *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.]
[55] *Ibid*.

documents. Such fees would offset registry officers' time and may dissuade frivolous requests. The Court should consider hierarchical access for media and non-lawyers.[56]

2. Open online access subject to limited exceptions: All court records should be accessible online unless they are designated confidential, are immigration and refugee documents, or matters involving minors.[57]
3. Putting the onus of protecting sensitive personal information on the Federal Court and counsel: Counsel should consider the impact of online access when filing materials with the court and take steps to protect clients' privacy and confidentiality. The Court should also be mindful of limiting personal information when preparing judgments and materials. Litigants should be informed about the consequences of court records being online, inherent risks, and steps needed to protect sensitive information.[58]
4. Special considerations in the immigration context: To reduce risk, the Federal Court should use Australia's classification system of non-restricted, restricted, and confidential.[59] Non-parties would be allowed to view a list of documents in the court file and access non-restricted documents on request.[60] But they should not have access to restricted documents unless they obtain court permission after providing an access rationale. [61] Requiring court "permission to access these items would protect against the potential unlawful use of this information overseas (e.g., foreign governments, agents of persecution in a refugee context, fraudsters with financial and identity documents)."[62] When examining access requests, the Court could consider two factors: non-party identity and whether the rationale and declared use are consistent with s. 2b of the *Charter*.[63]
5. Special consideration for minors: Information related to children requires special protection even when it is anonymized. Restricted documents could include pleadings, affidavits, exhibits, and other documents containing sensitive information.[64]
6. Data security: Rigorous security measures and storage on Canadian servers is imperative. Data mining is a huge problem. Data security of court records and other privacy rights should be equivalent to privacy legislation. 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 circumventing of technological barriers. Finally, the Court should consult with

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[56] *Ibid* at 4.
[57] *Ibid* at 5, 6-10.
[58] *Ibid* at 5-6.
[59] 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 vias applications for refugee or H&C protected persons; and
- no certified tribal records (*Ibid* at 8-9).

[60] The CBA proposes these documents should be classified: 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).
[61] The CBA proposes these documents would be restricted (pleadings, affidavits, exhibits, and certified tribunal records) (*Ibid* at 7).
[62] *Ibid* at 7.
[63] *Ibid* at 8.
[64] *Ibid* at 9.

the Office of the Privacy Commissioner on best practices for data security of online records.[65]

7. Searchability: Documents should only be searchable through the Federal Court website. Internet search engines or software designed for "bulk" online searching should not have access to court files. The current search functionality on the Court websites should be maintained (only allowing for searches by person's last name, corporation name, ship name, court file number, intellectual property name/number, and counsel of record). No ability to search by details, phrase, or words should be provided.[66]
8. Pilot Project: Before full online access is provided, a pilot project should occur to evaluate feasibility, effectiveness, and cost. It would also allow the Court to determine the extent and type of non-party requests for immigration documents.[67]

The Canadian Media Lawyers Association also provided submissions. It applauded the Federal Court's efforts, but it strongly objected to CBA's proposal. It cautioned the Court to "be wary of fearmongering around how those technologies might be used as an excuse to place limits on the open court principle."[68] It argued the CBA's proposal would frustrate transparency, and it raised six main points in reply to the CBA's recommendations:

1. Balancing exercises are not the starting point for open courts. Presumptive public and media access are the starting point. The open court principle "does not seek to find an equilibrium between competing interests…."[69] Balancing exercises only arise if restrictions are necessary to prevent serious risks to the administration of justice because reasonably alternative measures will not prevent risks. The CBA's calls to make balancing the starting point improperly reverses the burden and open court presumption.[70]
2. Australia's court record access policy cannot work in Canada. Australia's open court principles rely on the common law whereas Canada's open court principles are constitutionally guaranteed rights.[71]
3. Using pay-for-access models to discourage access to court files flies in the face of the open court principle.[72]
4. Requiring applicants to show why they are interested in court material invites courts to "engaged improperly in editorial decision making."[73]
5. Restricting access to individuals present in Canada unduly limits individuals with legitimate interests in Canadian court proceedings from accessing them.[74]

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[65] *Ibid* at 9-10.
[66] *Ibid* at 10.
[67] *Ibid* at 10.
[68] Canadian Media Lawyers Association, "Re: Online Accessibility of Court File" (9 January 2020), on file with authors.
[69] *Ibid* at 2.
[70] *Ibid*.
[71] *Ibid* at 2-3
[72] *Ibid* at 3.
[73] *Ibid* at 3-4.
[74] *Ibid* at 4.

6. Instead of making certain records presumptively "restricted", courts should remind parties that filed documents are presumptively available to the public. And if parties want to restrict access, they bear the burden.[75]

In our view, the CBA and CMLA positions are both untenable. The former too easily sacrifices the open court principle in the name of privacy, and the latter fails to accommodate important privacy interests, particularly in the immigration and refugee law setting. Even worse, neither position meaningfully engages with a key issue: fair and equitable access to court materials in a context of overwhelming power imbalances and information asymmetries. Before resorting to either extreme position, our view is that options that simultaneously maximize privacy, openness, and fairness must be explored.

2. Open Courts in Canada: It is Time to Realize Them More Fully

We are often told the open court principle is the "hallmark"[76] of democratic society or that open courts are "deeply embedded in the common law tradition."[77] But historically speaking, courts were not so "open."[78] Unless you were able to get to the courtroom in person to see and hear what was going on, UK courts in the 12th to 18th century were hardly open to you.

i. You do not have to be in the courtroom for it to be partially open to you

Despite many ongoing transparency gaps, Canadian judges and courts in 2021 are far more transparent than their historical colleagues. For example, for most of the common law history, judges simply did not issue reasoned decisions in disputes.[79] But now, many Canadian courts offer published written reasons for decisions in many disputes or audio recordings of reasoned oral decisions if they are not reported. This shift showcases how far Canada has come and the importance of not regressing in openness, transparency, accountability, or fairness. In 2021, you

[75] *Ibid* at 4-6.
[76] *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 22.
[77] *Ibid* at para 21.
[78] 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 Indiana Law Journal 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 Claredon and the beginning of the English common law and professional judges (See, e.g., Courts and Tribunals, "History of the judiciary", online: <https://www.judiciary.uk/about-the-judiciary/history-of-the-judiciary/>.
[79] See Khan, *supra* note 41, Part 1.

simply do not have to be in a Canadian courtroom for the courtroom to be at least *partially* open to you.

But full transparency has yet to apply to all subject matters or courts. For example, in many immigration and refugee law disputes, judges do not offer reasons. Decisions denying leave for judicial review (which is required for most immigration and refugee law matters) typically do not include reasons.[80] And reasons are not always provided even in cases where leave has been granted and the matter is decided on the merits.[81] As we will discuss, this gap in reason-giving makes open access to Federal Court files and records especially important in immigration and refugee decisions.

The shift from historical opacity to more (but still not full) openness and transparency is partly tied to constitutional rights to access many court records. Unlike the UK, which historically took a more restricted approach, Canadian courts sought to foster broad access to court records.[82] In Canada, at least, open courts do not end when proceedings conclude, and access is not limited to the courtroom or only to the final proceeding:[83] "Access to exhibits is a corollary to the open court

[80] Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw" (2012) 38:1 Queens LJ 1 at 7, 10. This gap also applies to the Supreme Court of Canada and their lack of reasons when granting or denying leave (see, e.g., Matthew Scott, "Leave Applications at the Supreme Court of Canada: Should Reasons be Provided?" (5 March 2019) Saskatchewan Law Review, online: <https://sasklawreview.ca/comment/leave-applications-at-the-supreme-court-of-canada-should-reasons-be-provided.php>.

[81] Sean Rehaag & Pierre-André Thériault, "Judgments v Reasons in Federal Court Refugee Claim Judicial Reviews: A Bad Precedent?" (forthcoming) 44:2 Dalhousie Law Journal, available on SSRN, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920722>.

[82] Justice Dickson suggested his holding was a clear departure from UK practices (see *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175 at 189. That said, 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'" Dean Jobb, Media Law for Canadian Journalists (Toronto: Edmond Montgomery, 2006) at 74 as cited in Dana Adams, "Access Denied?: Inconsistent Jurisprudence of the Open Court Principle and Media Access to Exhibits in Canadian Criminal Cases" (2011) 49:1 Alberta Law Review 177; see also D R Jones, "Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records" (2013) 61:2 Drake L Rev 375 at 376, 377, 379.

[83] *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 17 at 189 ["At every stage the rule should be one of public accessibility and concomitant judicial accountability.…curtailment 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."]

principle."[84] As a general matter, then, "the 'open court' principle applies … to all documents filed with the courts."[85]

Such open access is a basic tenet of Canada's legal system.[86] As the SCC recently noted in its 2021 decision in *Canadian Broadcasting Corporation v. Manitoba*, openness 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 … Public access to the court record facilitates this scrutiny."[87] The open court principle is also central to democracy as the SCC recently noted in another 2021 decision, *Sherman Estate v. Donovan*:

> This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable."

Many have written about why open courts are necessary for democracy.[88] But open courts and open access are also fundamentally necessary for fairness. Part V will discuss this point further. But here is one clear example for now. Historically, when commercial electronic legal publishing

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[84] *Canadian Broadcasting Corp v The Queen*, 2011 SCC 3 at para 12; *Aboriginal Peoples Television Network v. Alberta (Attorney General)* 2018 ABCA 133 at para 15; *Foster-Jacques v. Jacques*, 2012 NSCA 83 at paras 89, 94; *R v Fry*, 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; *R v Baltovich [re Canadian Broadcasting Corp]*, 2008 CanLII 28062 (ON SC) at para 6.

[85] *Husky v Schad*, 2015 ONSC 460 at para 15.

[86] *Singer v Canada (Attorney General)*, 2011 FCA 3 at para 6. Unfortunately, Canadian courts have inconsistently applied access to court records principles (see, e.g., Adams, *supra* note **Error! Bookmark not defined.**; see also Ko, *supra* note 1. While *Vickery v Nova Scotia (Prothonotary, Supreme Court)* [1991] 1 SCR 671 still offers persuasive value (see *R v Panghali*, 2011 BCSC 422 at para 37), some courts continue to place too much reliance on it notwithstanding the dissent's position being adopted in subsequent SCC jurisprudence (see *Ibid* at 31-36). Indeed, latter jurisprudence is clear that *Vickery*'s framework is subservient to the *Dageneis Mentuck* framework (see *Dufour*, *supra* note 27 at 14). But courts have continually found that individuals—especially the media—have the right to access court records (*Canadian Broadcasting Corp v R*, 2010 ONCA 726; but see *R v Wellwood*, 2011 BCSC 689 at para 33 ["I am not convinced, for example, that the right to make copies of exhibits, referred to by the Ontario Court of Appeal in Canadian Broadcasting Corp. v. R. flows from every order granting access to the exhibit."]; *R. v. Panghali*, 2011 BCSC 422 at para 32 ["Access to permit the scrutiny or inspection of an exhibit is often facilitated by providing the applicant with a physical copy of the exhibit. However, that convenience does not transform a right grounded in the court's accountability to the public into an almost proprietary interest in the evidence that is placed before the court and made available for access."]). Perhaps that right 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" (University of Alberta, LLM Thesis, 2007) at 31-41)

[87] *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para 82.

[88] See, e.g., David S Ardia, "Court Transparency and the First Amendment" (2017) 38 Cardoza Law Review 835.

first became prominent, some lawyers (e.g., those with bigger pockets because they mostly represent governments or well-financed institutions) had access to electronic databases with many decisions and effective electronic tools to quickly find and navigate those decisions. Their opponents (often representing marginalized people) had no such access. Instead, they had to either use inferior search tools or manually go to libraries to look up and note up cases in dusty books. Such access disparities to the legal materials necessary to form persuasive legal arguments were clearly unfair.

Substantial investments have been made to support open access legal databases to attempt to address that historical unfairness. Unfortunately, while these investments—particularly in CanLII—have provided better access to caselaw, access continues to be unfair in many areas. And we are concerned that this unfairness is getting worse.

As legal technology develops, lawyers who mainly do their legal research in CanLII are at risk of becoming akin to lawyers who were forced to go to libraries while opposing lawyers accessed electronic databases. Their opponents (who once again are often lawyers with bigger pockets because they mostly represent governments or well-financed institutions) do not just rely on CanLII. They increasingly use bespoke and off-the-shelf artificial intelligence and machine learning tools, including: predictive analytics; large scale precedent databases and datasets, including arguments, pleadings, *etc*.; and a host of other cutting-edge tools to support legal research and form legal arguments. In other words, despite technology's ability to level the playing field, technology is also amplifying historic unfairness. As Part V notes, if responses to privacy interests result in limited and asymmetrical access to court records and court files, this sort of unfairness will be exacerbated.

ii. Sustaining the status quo would compromise openness, transparency, and fairness

Some privacy advocates and scholars are skeptical about using technology to improve access. Some argue that instead of using technology to improve democratic access, efforts should be made to sustain the status quo with things like practical obscurity or the practical friction caused by court access policies and court supervision. But sustaining the status quo is not compatible with open courts and puts basic fairness at risk.

In the status quo, access to legal data is surprisingly difficult in Canada. Currently, non-electronic access to court records in most Canadian courts is not easy, truly open, or equitable. Because of privacy considerations and arguably technological limitations, many courts require everyone to request permission to access court files,[89] much like the CBA is advocating for in 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.[90] But if you want to access court records in many parts of Canada—even though you could have heard the same things live—access looks different.[91] Instead of anonymously viewing the court file, you must often provide your name and the basis for wanting to observe what already occurred in open court. As the CMLA suggested in its response to the CBA, such approaches effectively put a reverse-onus de-facto publication ban on the court record (a point we will discuss more in a moment). Instead of abiding by open court principles—where litigants have the onus to justify their court file being closed until permission is provided—these regimes put the onus justifying access on anyone

[89] 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 counter, and start riffling through the court file. Some scholars even suggest it is as easy of a free google search. That reality simply does not exist in Canada, even for most judicial decisions (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) Can JL & Tech 231 at 236-237 ["technology has irrevocably changed the way the Canadian judicial system conducts business. At one time, in the not-so-distant past, access to judicial proceedings required some effort; it involved actually *going* to the courthouse to watch a proceeding unfold, hunting through a plethora of specialized legal texts or waiting in line to pay for copies of court documents. Today, by contrast, access to judicial records is an effortless process that often involves nothing more arduous than a free Google search of a legal concept and a party's name. Indeed, an increasing number of courts provide remote electronic retrieval of docket information, post reasons for judicial decisions electronically on court websites or through commercial publishers, and invite cameras into the courtroom, making legal drama a staple of the nightly suppertime news."). This reality is just not representative. As Heather Douglas noted in 2016 (and not much has changed since), "Currently finding pleadings, motion records, or factums filed with the courts online is nearly impossible. It is not only an issue of access to justice, it is an issue of accuracy" (Heather Douglas, "Show me the Pleading: Show me the Evidence" (24 August 2016) *Slaw*, online: <http://www.slaw.ca/2016/08/24/show-me-the-pleading-show-me-the-evidence/>).

[90] While CanLII's coverage is incomplete and it does not provide bulk access, its open access is nonetheless world leading and the envy of many countries.

[91] See, e.g., the process in British Columbia where any non-party must make a formal request to the presiding judge to see anything that's not available online through its pay for use service that requires an account (see Supreme Court of British Columbia, "Court Record Access Policy", online: <https://www.bccourts.ca/supreme_court/media/BCSC_Court_Record_Access_Policy.pdf>; British Columbia, "Access court records", online: <https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/access-court-records>.

seeking access to court records. No legal principle we are aware of justifies flipping the initial onus aside from vague invocations of courts' supervisory jurisdiction.

As noted, the CBA is calling for a similar reliance on this reverse onus approach in the Federal Court's consultation for possible electronic immigration record access. The CBA is also clear that if this historical reverse onus approach applies to electronic records, it should also apply to paper ones. In other words, the CBA is calling to regress the Federal Court's openness.[92] But no new technology or technological risk justifies bringing this approach to the Federal Court. Indeed, the Federal Court has not previously supported such a reverse onus process to access its court files (unless you wish to access to the audio recording of the proceeding).[93] In contrast to many Canadian s. 96 and appellate courts, documents filed in the Federal Court are presumptively accessible without proceeding through an administrative supervisory process (unless documents are subject to an order).[94]

This practice distinguishes the Federal Court from many of its superior court and appellate court peers and makes it one of the more open Canadian courts.[95] Considering the Federal Court's role

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[92] Canadian Bar Association, "Access to Documents on Federal Court Website" (December 2019) at 2-9, online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=eed26a1c-5256-4c66-87d6-20c2c99afa84>.

[93] Federal Court, "Notice to the Profession: Pilot Project for Access to Digital Audio Recordings of Federal Court Proceedings" (6 February 2015), online*:* https://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", online: <https://www.fct-cf.gc.ca/en/pages/media/policy-on-public-and-media-access>.

[94] *Ibid*.

[95] Many Canadian courts have access policies where individuals seeking access to the complete court file most present a written request to the court:

- Supreme Court of British Columbia, "Court Record Access Policy", *supra* note 43;
- Court of Appeal for British Columbia, "Record and Courtroom Acess Policy (31 January 2017) online: <https://www.bccourts.ca/Court_of_Appeal/practice_and_procedure/record_and_courtroom_access_policy/PDF/Court_of_Appeal_Record_and_Courtroom_Access_Policy.pdf>;
- Court of Queen's Bench of Alberta and Court of Appeal of Alberta, "Public and Media Access Guidance" (1 August 2013, online: <https://www.albertacourts.ca/docs/default-source/qb/public_and_media_access_guide.pdf?sfvrsn=77a1df80_0>.
- Court of Queen's Bench for Saskatchewan & Court of Appeal for Saskatchewan, "Public Access to Court Records in Saskatchewan" (2020), online: <https://sasklawcourts.ca/wp-content/uploads/2021/05/Access_Guidelines_2020.pdf>.
- Nunavut Court of Justice, "Access to Court Records Policy", online: <https://www.nunavutcourts.ca/phocadownloadpap/EN/CourtRecords_AccessPolicy.pdf>.
- Supreme Court of Newfoundland and Labrador, "A Guide to Acessining Court Proceedings and Records for the Public and Media" (2019), online, < https://court.nl.ca/supreme/forms/2018%2001%2009%20-%20A%20Guide%20to%20Accessing%20Court%20Proceedings%20and%20Records%20for%20the%20....pdf >.

These courts appear to have slightly more permissive regimes.

in reviewing government action, this level of access and transparency makes sense and should remain. Further access should also be explored to ensure that everyone can observe judicial oversight of federal actions—including, for example, further testing of virtual public access to judicial review hearings.[96]

Whether the CBA's recommendation would be constitutional is debatable. Constitutional challenges to courts' reverse onus access policies have hardly ever occurred.[97] So judicial commentary on this issue is limited. But the British Columbia Court of Appeal faced a constitutional challenge to its access policy in the 2020 decision *R. v. Moazami* and held its reverse onus access policy was constitutional. Instead of violating the requestors' rights, the Court held that BC's four-step process for access is "a simple administrative mechanism that invokes the court's well established supervisory role over its own records":[98]

1. Individuals seeking access fill out the Access Request Form and submit it.

- Court of Queen's Bench of Manitoba & Manitoba Court of Appeal, "Policy: Access to Court Records in Manitoba", online: <http://www.manitobacourts.mb.ca/site/assets/files/1129/access_policy_final.pdf>.
- Ontario Superior Court of Justice & Court of Appeal for Ontario record are hosted by the Ministry of the Attorney General for Ontario, "Court Services Division Policies and Procedures on Public Access to Court Files, Documents and Exhibits" (2019), online: <https://www.attorneygeneral.jus.gov.on.ca/english/courts/policies_and_procedures/public_access/public_access_to_court_documents-EN.html>.
- The Nova Scotia Supreme Court & and Nova Scotia Court of Appeal: Executive Office of the Nova Scotia Judiciary, "Guidelines Re: Media and Public Access to the Courts of Nova Scotia" (2019), online: <https://www.courts.ns.ca/Media_Information/documents/FINAL_Media_Access_Guidelines_04_01_19.pdf>.
- Prince Edward Island Court of Appeal, "Practice Directions", online: <https://www.courts.pe.ca/sites/www.courts.pe.ca/files/PracticeDirections.pdf>.

These courts have no access policies posted online:

- Nunavut Court of Appeal posts no information available online. Presumably, its policy mirrors or is like the Nunavut Court of Justice.
- Supreme Court of the Northwest Territories and Court of Appeal for the Northwest territories posts no information online.
- Supreme Court of Yukon and Court of Appeal for Yukon post no information online.
- Supreme Court of Prince Edward Island posts no information online. Presumably, its policy mirrors or is like the Prince Edward Island Court of Appeal.
- Court of Appeal of Newfoundland and Labrador post no general information online. But they do 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", online: <https://www.court.nl.ca/appeal/access-to-proceedings-and-documents/>.

[96] Because judicial review does not involve the same considerations as many trials, we see virtual broadcasting of most judicial reviews like most scholars see broadcasts of appellate and apex court proceeds: they are fine; trials are not (see, e.g. David Lepofsky, "Cameras in courtroom—Not without my Consent" in *Media, Freedom and Contempt of Court*, ed (Routledge: London, 2009) 333.

[97] See, e.g., for one of the only report decisions where such a point was alluded to *R v CBC et al*, 2013 ONCJ 164 at paras 8-11.

[98] *R v Moazami*, 2020 BCCA 350

2. Acting on the Chief Justice's behalf, the Registrar asks parties for positions on access.
3. If parties cannot resolve access at this informal stage, a hearing before a judge can occur.
4. If parties still cannot resolve access, the parties opposing access would bring a formal application, and the court would make a final determination on access rights.[99]

The Court went on to suggest this process is akin to processes in other provincial superior courts and courts of appeal that have issued access policies.[100]And it rejected an argument like the one we just presented—*i.e.*, its access policy is not like a de facto sealing order. Instead, it held that "unfettered public access to court records is not the promise of the open court principle. That access is subject to supervision by the court."[101] So, if the BC Court of Appeal is right on this point, courts can establish access processes through which "Charter rights are exercised and the interests competing with openness are properly weighed in a judicial determination."[102]

We agree that competing interests need to be weighed. But the equating of an administrative supervisory process to access materials filed in open court falls short.[103] The Access Policy is not merely a simple procedural administrative mechanism. As mentioned, it exposes everyone seeking access to a supervisory process they would not be subjected to if they wanted to anonymously walk into almost any Canadian courtroom.[104] If the distinction is live vs. recorded evidence, the distinction falls short. As Part III will discuss, if the material is too sensitive to be physically reviewed (and if it is that sensitivity that justifies the administrative process for access to court records), then it is also too sensitive to come out in open court or to be in an open court file in the first place (and a publication ban should have already attached).

iii. The technological revolution is changing what is required for adequate judicial transparency

This brings us to why the CBA's position and others like it are misplaced. The constitutional right to access open courts and their records should not be lessened because we now have better technology. Accessing records is corollary to accessing proceedings—not subsidiary to them.

[99] *Ibid* at paras 29-32.
[100] *Ibid* at para 51.
[101] *Ibid* at para 56.
[102] *Ibid*.
[103] *Ibid* at para 58.
[104] This point remains even when courts require identification to enter in high profile or secure courtrooms. Courts are not keeping record of who enters.

Courts must do everything to ensure this reality while also promoting privacy and ensuring fairness. As David Ardia notes, courts are "the most insular branch of … government, and public access provides an important source of information to citizens to understand how the government exercises power across a broad range of societal activities."[105] The constitutional requirement of open courts should motivate all courts to do what the Federal Court is considering: use technology to bring about a fuller realization of the open court principle. Notwithstanding its current views, the CBA's prior comments on this issue in 2004 aptly capture this point and were prescient:

> 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.[106]

The technological revolution that courts are now finally starting to participate in should not reduce transparency or access. Nor should it further erode the limited privacy individuals already experience in Canadian courts. Instead, technological developments should encourage us to revisit "what is required for adequate judicial transparency…."[107] Concepts like practical obscurity and other dated practices like BC's reverse onus Access Policy or the CBA's suggestions to the Federal Court are insufficient to provide adequate transparency, fairness, or accountability. While BC's policy (and presumably others like it) works with some administrative efficiency[108] and the balance generally tilts in favour of those who request access (over a five-year period, 69% access to all requested records; 27% to some requested records; 0% for no access to requested records, and 4% for no record of outcomes),[109] better solutions and mechanisms are possible with technology and improved processes.

3. Privacy and Court Documents: Practical Obscurity Never Was a Good Solution

[105] David S Ardia, "Court Transparency and the First Amendment" (2017) 38 Cardoza Law Review 835 at 842.
[106] Canadian Bar Association, "Submission on the Discussion Paper: *Open Courts, Electronic Access to Court Records, and Privacy*" (April 2004) at 4, online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=7569f214-b1a3-406c-8c9c-998e00701836>.
[107] Hon TS Ellis, "Sealing, Judicial Transparency, and Judicial Independence" (2008) 53 Vill L Rev 939.
[108] But actual overall efficiency is unknown. At least in some courts, access has been poor (see Jesse McLean, " Ontario reviewing access to criminal court records" (17 September 2013) *The Toronto Star*, online: <https://www.thestar.com/news/canada/2013/09/17/ontario_reviewing_access_to_criminal_court_records.html>
[109] *Moazami*, *supra* note 109 at 109-110.

Practical obscurity was never a good way to protect litigants' privacy. Effectively, practical obscurity relies on people being lazy, lacking time, or lacking money.[110]

The BC Access Policy we just discussed is somewhat related here. It injects what practical obscurity advocates call "friction" into the access process. Baked into the idea of practical obscurity or practical friction is the idea that individuals remain lazy; that they will lack the time or money to proceed through the access process; or that they will not even discover the access process and subsequently not access records and their information.[111] But academics, scholars, advocates, and activists should welcome increased attention about what goes on in courts.[112] In many ways, what open courts can bring is better participation in Canada's democracy and better accountability for our courts and judges.[113]

As Parts III and IV suggest, more upstream solutions could achieve the goals of privacy and access with minimal compromise to privacy. Current calls for continued practical obscurity and practical friction overlook comprehensive targeted upstream mechanisms to protect privacy and open access. If privacy and potential threats are truly as severe as some fear (of course, some are), courts can do far better than practical obscurity or practical friction.[114] There are at least six flaws or weaknesses in using practical obscurity or practical friction to protect privacy.[115]

i. Some of the logic, doctrine, and promise underlying practical obscurity and practical friction appear tenuous and unsound

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[110] For a thorough discussion of the history of practical obscurity, including the governments' reliance on it to shield its 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 Balt J Media L & Ethics 4; see also David S Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017) 2017:5 University of Illinois Law Review 1385 at 1385.

[111] Notably this point arose during one of the first pieces of litigation that mentioned practical obscurity, see File, *supra* note 110 at 17.

[112] Retter & Shariff, *supra* note 89 seem to suggest that more people watching creates new problems (see 232-233).

[113] Ko, *supra* note 1 at 118.

[114] Scholars in this area use terms like barrier. We employ the term friction here for a catch-all term for supervisory access or mechanisms that slow down or weed out individuals seeking access (see, e.g., Bailey & Burkell, "Revisiting the Open Court", *supra* note 11 at 144 ["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."].

[115] For a thorough analysis of such flaws, see 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" (University of Alberta, LLM Thesis, 2007) at 57-78.

In terms of logic, if one, ten, or fifty people can anonymously watch a court proceeding and hear about and see filed material in court records, it is not clear why a problem should arise when more people want to view the records outside the courtroom, including electronically.[116] If the information is too sensitive for one million people, then the information should be too sensitive for the one, ten or fifty people in the courtroom.[117] As one U.S. Court noted, "it 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."[118]

In terms of doctrine, advocates and scholars who reach to practical obscurity seem to ignore or downplay the importance of overall systemic accountability and ways in which their proposed approaches entrench unfairness. To be clear, we disagree with the notion that individuals must sacrifice their privacy to access Canadian courts.[119] But courts are not a private place.[120] Ensuring openness in individual cases provides accountability that encourages better individual and overall outcomes. If individual privacy is the focal point, overall systemic accountability may be undermined. Beyond systemic accountability, broader systemic efficiency, improvement, and fairness would also suffer,[121] including hampering the development of tools that improve lawyers' and judges' work.[122] Such tools could benefit the overall system and improve fairness in the legal system. As others have noted, "courts are among the most information-rich institutions in society."[123] Yet Canada has a massive legal data deficit.[124] Unlocking the information in court records could unlock far more understanding about our legal system and ways to improve it,

[116] See, e.g., *Ibid* at 77; Gregory M Silverman, "Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet" (2004) 79:1 Wash L Rev 175 at 220.
[117] *Ibid* at 198, 208, 209, 220.
[118] *United States v Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994).
[119] See, e.g., *MediaQMI inc v Kame*l, 2021 SCC 23 at para 52; *Sherman Estate v Donovan*, 2021 SCC 25 at para 58.
[120] Racicot, *supra* note 38 at 68.
[121] See, e.g., Julie C Turner, "Changes in the Courthouse - Electronic Records, Filings and Court Dockets: Goals, Issues, and the Road ahead" (2002) 21:4 Legal Reference Services Q 275 for discussion of some outstanding efficiency benefits.
[122] See, e.g., Kristen Bell et al, "The Recon Approach: A New Direction for Machine Learning in Criminal Law" (2021) 37 Berkeley Technology Law Journal 101; Jens Ludwig & Sendhil Mullainathan, "Fragile Algorithms and Fallible Decision-Makers: Lessons from the Justice System" (2021) NBER Working Paper 29267, online: <http://www.nber.org/papers/w29267>.
[123] Lynn M LoPucki, "Court-System Transparency" (20009) 94 Iowa Law Review 481 at 510.
[124] See, e.g., Khan, *supra* note **Error! Bookmark not defined.** at 2.

including in the refugee and immigration sector where existing research suggests that non-citizens experience radical unfairness.[125]

In terms of promise, the practical obscurity doctrine has never actually promised to keep individuals' information private. Rather, it just promised individuals the expectation that their documents and records will likely remain relatively obscure.[126] In other words, practical obscurity and practical friction is not a tailored or targeted privacy solution. Instead, they are blunt tools that rely on inefficiency to protect some of the most personal and sensitive details of peoples' lives.

ii. Personal information in paper format can instantly be transformed into electronic form and widely distributed

In many ways, the difference between electronic and print records is overhyped. 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 quite some time ago, "The 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."[127]

iii. Practical obscurity and practical friction promote inequitable, uneven access

The approach the CBA is requesting the Federal Court to implement would keep some court documents obscure from people it deems less trustworthy presumably because they lack ethics codes—e.g., non-lawyers and non-media. So non-party lawyers, for example, would have greater access than that the rest of the public.[128] Put another way, "practical obscurity doesn't protect privacy as much as it protects privileged access."[129] In contrast, electronic access to court records "makes it possible for the benefits of court transparency to be widely dispersed through society."[130]

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[125] Sean Rehaag, "'I Simply do not Believe...': A Case Study of Credibility Determinations in Canadian Refugee Adjudication" (2017) 38 Windsor Rev Leg Soc Issues 37); Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw" (2012) 38:1 Queens LJ 1.
[126] See, e.g., David S Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017) 5 University of Illinois Law Review 1385 at 1449; 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 Berkeley Technology Law Journal 1807 at 1832.
[127] Investigation Report F06-01 (Re), [2006] B.C.I.P.C.D. No. 758 at para 4.
[128] Canadian Bar Association, "Access to Documents", *supra* note 92 at 7.
[129] Racicot, *supra* note **Error! Bookmark not defined.** a 74.
[130] David S Ardia, "Court Transparency and the First Amendment" (2017) 38 Cardoza Law Review 835 at 917.

Canada already has inequitable access to court documents, especially judicial decisions where corporate monopolies have accumulated incredible detail about Canada's legal system.[131] And the approach in many Canadian courts simply excludes everyone who cannot physically attend court or easily access paper-based documents. David Lepofsky aptly summarizes this point:

> the term 'access' in the disability context tends to conjure up only issues of physical access to facilities…. [But] 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.[132]

iv. Practical friction and practical obscurity advocates often rely on unsubstantiated fears

Jurisprudence about limitations to the open court principle, including constitutional jurisprudence, is clear. Courts should only issue limitations based on "thorough convincing evidence" [133]—not on supposition. Often, Canadian scholars rely on U.S. examples, one-off cases where something egregious or untoward occurred, or vague guesses (like people will stop accessing courts if materials are online) to argue against broader electronic access.[134] But generalizing from a handful of examples to preclude access is a flawed evidentiary and methodological approach, especially because abuse has also occurred with paper records.

v. Practical obscurity or practical friction does not keep sensitive information that is often extraneous to the dispute out of the court file

Here, we fully agree with many privacy scholars and advocates who call for far less personal information in judicial decisions and for full anonymization of party and witness names unless a compelling reason exists for naming them.[135] But even beyond anonymization and de-

[131] See Alschner, *supra* note 1; Cameron-Huff, *supra* note 2.
[132] M David Lepofsky, "Equal Access to Canada's Judicial System for Persons with Disabilities – A Time for Reform" (1995) National Journal of Constitutional Law 183 at 186, online: <https://www.oba.org/getmedia/9a1b75da-80bf-402b-b6c9-4ba30340e8e9/b1s2ciaj3>.
[133] *R v Canadian Broadcasting Corporation*, *supra* note 37 at 20.
[134] See, e.g., Canadian Bar Association, "Access to Documents", *supra* note 92 at 2; Bailey & Burkell, "Revisiting the Open Court", *supra* note 11 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 only happened once.]
[135] See, e.g., Bailey & Burkell, "Revisiting the Open Court", *supra* note *supra* note 11 at 171.

identification (which are not perfect solutions),[136] much of the information and evidence that is filed in court is never relied on by parties or is irrelevant to the final dispute.[137]

Perhaps because lawyers do not know what evidence is truly required or meaningful, they tend to include more evidence than necessary. Other times, lawyers seem to be throwing everything but the kitchen sink at courts. Judges then do not have the time to go back and carefully edit decisions (based on their notes) to remove extraneous information, and parties cannot cull the court file for information they filed but did not use.[138] This trend has proliferated over the last forty years as the increasing length of trials and judicial decisions suggests.[139] Ironically, however, useful information (e.g., for systemic analysis) is also often missing from court decisions and files—e.g., socioeconomic data, *etc*. 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, "not placing personal information in public records eliminates late inappropriate exposure… Many courts have not considered the need to rethink the nature and purpose of filings."[140]

If lawyers were more targeted in their materials, everyone could benefit. Time could be saved. Privacy could be better protected. Efficiency and fairness could increase.

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[136] See, e.g., Micah Altman et al, "Towards a Modern Approach to Privacy-Aware Government Data Releases" (2015) 30:3 Berkeley Tech LJ 1967 at 2038.
[137] See, e.g., CIAJ, "Easy Reading is Damn Hard Writing" (3 December 2020) *In All Fairness,* online: <https://podcasts.apple.com/ca/podcast/ciaj-in-all-fairness-icaj-en-toute-justice/id1543273287?i=1000501254606>.
[138] Other jurisdictions have sought to limit this information from the outset (see, e.g., D R Jones, "Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records" (2013) 61:2 Drake L Rev 375 at 44 [Jones raises the example of Florida where they have sought to curtail and minimize the amount of personal information in court files that is not necessary for adjudication and case management].
[139] See, Khan*, supra* note 41, Part 2; Kevin LaRoche, M Laurentius Marais & David Salter, "The Length of Civil Trials and Time to Judgment in Canada: A Case for Time-Limited Trials" 99:2 Canadian Bar Review 286; Evan Rosevear & Andrew McDougall, "Cut to the Case Counsellor: Patterns of Judicial Writing at the Supreme Court of Canada 1970 to 2015" (2018) Canadian Political Science Association Annual Conference, online: <https://www.cpsa-acsp.ca/documents/conference/2018/856.McDougall.Rosevear.pdf> at 1, 2; For a recent notable example, see 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) *Slaw*, online: <http://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/>.
[140] Jones, *supra* note 140 at 421.

4. Technological Developments: Opportunities and Challenges to Improve Privacy & Open Courts

A better appreciation of the technological opportunities and challenges to improve privacy and open courts is a better alternative to maintaining the status quo or introducing friction to attain practical obscurity. Instead of relying on flawed, dated historical concepts and solutions, the Federal Court should examine how to better protect privacy, enhance fairness, and maintain openness through technology.

The idea that privacy must be balanced against accountability creates a false binary where privacy is pitted against openness.[141] Such framings seem to suggest that technology is inherently privacy-invading rather than privacy promoting.[142] Shedding this technologically deterministic binary is fundamental to improving privacy and open courts.[143]

Other disciplines have already faced many of the issues the legal community is facing. For example, the medical and scientific communities have sought to understand how to improve privacy and data-driven solutions based on systemic records.[144] While we do not propose to compare all the various overlaps between court and medical records, many exist.[145] And medicine has already recognized the vital importance of using technology and a broad set of patient records to improve individual and systemic outcomes.[146] But medicine has faced many of the same challenges that courts and lawyers do. Because of flaws in how medical records were originally built and implemented, they are often clunky, unwieldy, not useful, and not privacy promoting.

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[141] Silverman, *supra* note 116 at 176.
[142] *Ibid* at 176, 179, 181.
[143] For a discussion of how technological determinism can lead to warped outcomes, including in research and access to research data, see, e.g., Jon Kha, "CRISPR, Like any Other Technology: Shedding Determinism & Reviving Athens (July 26, 2021). (2021) 19 Canadian Journal of Law and Technology 173.
[144] Ontario Genomics, ''Call for an Ontario Health Data Ecosystem" (2015) at 1, online (pdf): <www.ontariogenomics.ca/wp-content/uploads/sites/1/2016/10/Call-for- an-Ontario-Health-Data-Ecosystem.pdf>; Council of Canadian Academics, 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, 2015) online (pdf): <https://cca-reports.ca/wp-content/uploads/ 2018/10/healthdatafullreporten.pdf>.
[145] For a discussion of the flaws of such deterministic thinking, see Jon Khan, "CRISPR, Like any Other Technology: Shedding Determinism & Reviving Athens, (2021) 19 Canadian Journal of Law and Technology 173.
[146] See e.g., Marzyeh Ghassemi, ''How Machine Learning Enhances Healthcare" (19 February 2021) online (video): TedxTalks, YouTube <www.youtube.com/watch?- v=zpcOjNtd-70>; Dianne Daniel, ''Machine learning makes process in care at Ontario Hospitals", Canadian Healthcare Technology (29 October 2020), online: www.can-health.com/2020/10/29/machine-learning-makes-progress-in-care-at-ontario-hospi-tals-2/.

The same is true about most legal records. Yet medical records and court records often contain troves of information that researchers and administrators can employ to improve outcomes.

Medical records and medical record systems (again, like court records and court systems) are often labelled as failures or not useful because system end users and research potential were often ignored in the process through which the records' and systems' were developed.[147] Efforts have been made to improve medical records, including issuing design challenges to multidisciplinary teams to transform medical records to something more digestible and easier to use.[148] The same could be done in Canada's courts. While such a challenge might be outside the scope of the Federal Court's plan, innovation around court records is being explored in other jurisdictions—e.g., to make them more user-friendly for self-represented litigants.[149]

Redesigning court records holds a great deal of promise. If record-keeping systems were properly designed, records and documents could be automatically tagged as structured data (e.g., by using XML standards or some other markup language). In this somewhat lengthy quote, Gregory Silverman explains how electronic documents provide a more comprehensive way of accessing and protecting the information in court documents:

> By 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 plaintiffs 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

[147] For a through summary of the medical record's progress, including the electronic medical record's shortcomings, see Gregory Schmidt, "Evolution of the medical record: Milestones" (2019) online: <http://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" (18 March 2019) Kaiser Health News, online: <https://khn.org/news/death-by-a-thousand-clicks/>; Amalio Telenti, Steven R Steinhubl & Eric J Topol, "Rethinking the medical record" (2018) 391:10125 The Lancet 1013; Raj Ratwani, "Electronic Health Records and Improved Patient Care: Opportunities for Applied Psychology" (2017) 26(4) Curr Dir Pyschol Sci 359.

[148] DevPost, "We invite designers and develops to redesign the patient health record", online: <https://healthdesign.devpost.com/>; see also Kimber Streams, "Is 'Nightingale' the future of user-friendly medical records?" (28 January 2013) *The Verge*, online: <https://www.theverge.com/2013/1/28/3925734/is-nightingale-the-future-of-user-friendly-medical-records>

[149] See, e.g., Court Forms Online, "MassAccess", online: <https://courtformsonline.org>; Quinten Steenhuis & David Colarusso, "Digital Curb Cuts: Towards an Inclusive Open Forms Ecosystem" (25 August 2021), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911381>

> easily be created if we filed structured information with the courts rather than documents-electronic or paper.[150]

The promise for privacy is also good. If information is properly tagged, then courts and lawyers could protect sensitive information far better than we currently do.[151] Researchers and court officials could see how this properly tagged information travels through the litigation process and how it was used. Our intuition is that such an information journey for court documents may show that much of the material parties submit never gets relied on or examined. That information often contains troves of personal, sensitive, and at times, harmful information. But if no one ever uses it, instead of adding a layer of privacy protections on a regime that promotes filing irrelevant, sensitive information, why not reform the upstream intake of that information to better bring about the full promise of open courts while also enhancing privacy?

Regardless of what the Federal Court decides to do on an overall record-keeping basis, the current discourse and submissions surrounding access to court records and privacy risks need to become far more nuanced and comprehensive in Canada. While the Canadian Judicial Council—specifically its Judges Technology Advisory Committee—has sporadically worked on these issues and offered guidance, the approach appears to fall short.[152]

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[150] Silverman, *supra* note 116 at 198.
[151] *Ibid at* 206, 211.
[152] This list addresses most of the Canadian Judicial Council's work on this subject:

- Canadian Judicial Council, "Discussion Paper: Prepared on Behalf of the Judges Technology Advisory Committee for the Canadian Judicial Council on Open Access to Courts, Electronic Access to Court Records, and Privacy (May 2003), online: <https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_OpenCourts_20030904_en.pdf>.;
- Lisa Austin & Frédéric Pelletier, "Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy Prepared on Behalf of the Judges Technology Advisory Committee For the Canadian Judicial Council" (January, 2005), online: <https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_Synthesis_2005_en.pdf.>;
- Canadian Judicial Council, "Use of Personal Information in Judgements and Recommend Protocol" (March 2005) online: <https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_UseProtocol_2005_en.pdf>;
- Canadian Judicial Council, "Model Policy for Access to Court Records in Canada" (September, 2005), online: <https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_AccessPolicy_2005_en.pdf>; Canadian Judicial Council, "Model Definition of Judicial Information" (September, 2020), online: <https://cjc-ccm.ca/sites/default/files/documents/2021/Model%20def%20of%20jud%20info%20report_EN_approved%202020-09.pdf>;
- Canadian Judicial Council, "Guidelines for Canadian Courts: Management of Requests for Bulk Access to Court Information for Commercial Entities" (April 2021), online: <https://cjc-

To truly understand the opportunities and challenges of using more technology in the court system, a more comprehensive framework is needed, such as the one proposed by Altman *et al*.[153] They advocate for more specificity in the privacy and access discussion. Instead of just lumping privacy into risks or challenges, they propose a more detailed catalogue and framework of privacy controls,[154] privacy threats,[155] privacy harms,[156] privacy vulnerability,[157] and utility.[158] Instead of looking at the issue in isolation or at specific points in time, they argue for more lifecycle analysis and protection of data, including collection,[159] transformation,[160] retention,[161] access/release,[162] and post access.[163]

Appendix A includes a table from Altman *et al*. laying out an example categorization of privacy controls and interventions. Others, like David Ardia and Ann Klinefelter, have empirically reviewed existing U.S. court records to identify categories of sensitive information, actual examples of them, and where they are most likely to appear (in other words, they have identified with some specificity where the privacy risks are the greatest vs. just guessing).[164] Such

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ccm.ca/sites/default/files/documents/2021/Bulk%20Access%20to%20Court%20Info%20-%20Guidelines%202020-12_EN%20Final%20-%20One%20PDF.pdf>.

- Canadian Judicial Council, "Blueprint for the Security of Court Information" (April 2021), online: <https://cjc-ccm.ca/sites/default/files/documents/2021/Blueprint%206th%20edition%202021-02-11_Final_EN.pdf>.

[153] Altman et al, *supra* note 136.
[154] *Ibid* at 2016-2017 procedural, technical, educational, economic, or legal methods or mechanisms to enhance privacy and confidentiality—e.g., targeted interventions such as privacy education, encryption, authorized users, data suppression, criminal penalties, *etc*.;
[155] *Ibid* at 2012-2013 [potential adverse circumstances (or events that could cause harm) that occur because of 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, *etc.*;
[156] *Ibid* [injuries like embarrassment, reputational loss, loss of employability or insurability, imprisonment, or death because of the realization of a privacy threat;
[157] *Ibid* [characteristics that increase the likelihood that threats will be realized—e.g., data characteristics' systems to collect, store, manage, or release the data; contexts in which systems operate, *etc*
[158] *Ibid* [the data's analytic—e.g., the analysis the data can support and how privacy controls like data suppression can diminish the data's' practical utility or accountability, *etc*.].
[159] *Ibid* at 2015 [collecting, ingesting, acquiring, receiving, or accepting data].
[160] *Ibid* [processing data before non-transient storage, including structural transformations like encryption or data reduction].
[161] *Ibid* [non-transient storage, including third party storage].
[162] *Ibid* [access to data by third parties, including access to transformed data, subsets, aggregates, derivatives such as model results or visualizations].
[163] *Ibid* [availability and operations on data and subsets passed on to third parties, including any subsequent downstream access].
[164] David S Ardia & Anne Klinefelter, "Privacy and Court Records: An Empirical Study" (2015) 30:3 Berkeley Technology Law Journal 1807; 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.

information could easily be folded into a framework like Altman *et al*.'s for testing in Canadian courts, including the Federal Court.

Based on the above, there are at least three problems with the current Canadian debates and guidelines on privacy risks and the open court principle in light of technological developments:

1. The discussion has rarely been as technical or specific as necessary. While some excellent work has occurred, this issue requires more than just a few academics and comments from jurists hypothesizing or surmising about potential worse 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 far way to go in terms of aligning privacy concerns with technological advances.[165]
2. Pilot projects must be more iterative and deliberative. Instead of surmising worst case outcomes, the Federal Court should try to clearly identify modern threats and controls. For example, if the Federal Court decided to avail modern anonymization techniques, it could try to replicate previous re-identification efforts.[166] Put another way, it could do what tech-experts call red-teaming where system designers try to break or invade the security mechanism they created.
3. The set of voices in the conversation to date has been narrow.[167] Protecting privacy from a technological perspective cannot be limited to the same historic voices. More diversity from the legal and technological community is imperative, especially as it applies to equitable, democratic access to courts and their records.

These three points are not meant to disparage or suggest that the Canadian Judicial Council or individual court work was flawed.[168] We recognize that courts are consistently underfunded and that administrative practices may limit their ability to do more.[169]

But we suggest that the Federal Court's Strategic Plan and Consultation are currently operating in a bit of a vacuum. The Canadian discussion on these issues is not yet rich, especially as it applies

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[165] *Ibid* at 2072 ["Addressing 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"]

[166] See, e.g., Paul Ohm, "Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization" (2010) 57 UCLA Law Review 701.

[167] See, e.g., Lisa Austin & Frédéric Pelletier. "Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy Prepared on Behalf of the Judges Technology Advisory Committee" (January 2005) at 26, online: <https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_Synthesis_2005_en.pdf>.

[168] But scholars and lawyers allege that some of the work has been one sided and inconsistent with existing SCC jurisprudence on access.

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

to modern technical solutions. But the U.S. discussion is quite rich, including as mentioned, areas where problems most frequently occur.[170] The United States Federal Court has been providing electronic access for almost over two decades, and many state courts have grappled with similar challenges in that period. While consultation with affected stakeholders matters, learning from U.S. and other international practices (including successes and failures) is also imperative. Either way, David Ardia's comments about the U.S. context apply with equal force here: our "current framework for dealing with sensitive information in court records is broken."[171] We suggest a better appreciation of technologies' potential could point to new and better ways to resolve access and privacy concerns.

5. The Immigration and Refugee Law Context

Immigration and refugee law court proceedings are a particularly challenging context when it comes to protecting privacy, respecting the open court principle, and ensuring fairness in access to court materials.

i. The privacy challenges are real and significant

One of the main challenges relates to the seriousness of the privacy interests that may arise in court materials in this area. For example, many court decisions and court files involving refugee claims, pre-removal risk assessments, or humanitarian and compassionate applications for permanent residence contain incredibly personal information. Examples of highly personal information include: sexual orientation; HIV status and other stigmatized medical conditions; political views; religious views; experiences of sexual violence; experiences of intimate partner violence; and the like. This sensitive information may bring court decisions and documents into the exception to the

[170] Almost half of the US State Courts had online access to records in some form since 2001 (see, e.g., 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 Acad Matrimonial Law 45 at 61), and the Federal Court started providing access to online information in 1990 (see, e.g., David S Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017) University of Illinois Law Review 1385 at 1397; see also Peter W Martin, "Online Access to Court Records - From Documents to Data, Particulars to Patterns" (2008) 53:5 Vill L Rev 855.)Empirical study of concerns and risks has also occurred (see David S Ardia & Anne Klinefelter, "Privacy and Court Records: An Empirical Study" (2015) 30:3 Berkeley Technology Law Journal 1807.

[171] David S Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017) University of Illinois Law Review 1385 at 1453.

constitutional guarantee of open courts. The SCC recently articulated that exception and held that information could be excluded from open access if 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."[172]

Disclosure of information in immigration and refugee law proceedings may also create risks to physical safety. For example, court decisions or documents about refugee claims involving political dissidents may directly or indirectly disclose information about identifiable third parties (family members, friends, colleagues). Authorities in the claimant's country of origin may use that information to target them. Authorities may also use similar information against a party if the individual returns to their country of origin. The availability of this information might pose such serious risks to the individual that its availability could ground a sur place refugee claim.

More generally, immigration and refugee law proceedings often involve materials that could facilitate identity theft, such as dates of birth, places of residence, reproductions of identity documents, *etc*. Data aggregators could also use this information for any number of difficult to foresee commercial purposes.

Many of these risks are not new and are not restricted to the question of whether the Federal Court 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

[172] *Sherman*, *supra* note 119 at para 21.

concerning risk to persons, including decisions by the Refugee Protection Division, Refugee Appeal Decision, the Immigration Division, and Minister's delegates.[173]

While many of the risks are not new, some could be amplified if the Federal Court makes additional court materials available online—particularly if the additional information is systematically collected by search indexes, data aggregators, or foreign governments. At the same time, however, as we will now discuss, many aspects of the immigration and refugee law setting make it particularly important for the Court to provide increased access to decisions and materials.

ii. The power imbalances in immigration and refugee adjudication are extraordinary

One key factor that separates immigration and refugee law from other legal areas is its extraordinary power imbalances. In immigration and refugee law cases, non-citizens who frequently experience marginalization along multiple vectors (e.g., status, race, class, disability, etc.) are confronted by the Federal government's overwhelming power and resources. In this area, the government

- sets and frequently changes the rules for initial immigration and refugee law decision-making (and gives itself lots of discretion in that decision-making);
- sets the rules for how courts will exercise oversight over that decision-making (and has established more procedural constraints on the exercise of that oversight than in other areas of law);
- decides whether the Court receives adequate resources to exercise oversight (and generally does not provide sufficient resources);
- decides how much funding to provide for legal aid for non-citizens and how much funding to provide to their own lawyers; and
- appoints the judges who exercise oversight and decides which of those judges are appointed to the appellate level.

While the Federal Court has taken many measures to try to create fair processes despite these power imbalances—including at times by reaching to constitutional norms—any changes to Court policies and practices must remain sensitive to this context.

One of the most pernicious power imbalances in this area involves information asymmetries. Because the government is a party in all immigration and refugee law proceedings, the Department of Justice has access to all the court materials in all immigration and refugee law cases. By contrast,

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

lawyers and advocates for non-citizens, researchers, and the media mostly rely on information that the 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. However, 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 information to seek out, and the resulting paper-based information is not in a format that is accessible to those who rely on assistive technologies.

One way to see this problem at work is to consider stay applications. Until recently, Federal Court stays of removal decisions generally took the form of unpublished orders. The immigration law bar has long complained that Department of Justice lawyers regularly pointed to unpublished Court orders that denied stays in analogous circumstances when arguing stay motions. This reality was problematic. Department of Justice lawyers had access to all stay orders and could choose which orders to bring to the Court's attention. In contrast, lawyers for non-citizens subject to removal had no ability to search for stay decisions that supported their positions. For one side in litigation to have easy access to all the relevant case law while the other side does not is manifestly unfair. The Court recognized this unfairness and now provides stay of removal decisions to CanLII for publication to correct the information asymmetry. Along similar lines, the Court has recently moved towards publishing all decisions on the merits so that everyone has access to all the decisions.[174]

Despite these efforts, information asymmetries persist and are appearing in new forms. The Department of Justice has, for example, recently explored opportunities to leverage artificial intelligence technologies to assist with their litigation strategies.[175] Building such technologies requires bulk access to materials. But the Federal Court does not make bulk access to decisions conveniently available on its website (and third-party publishers, including CanLII, all prohibit bulk access). Moreover, the Department of Justice has access to all records that are part of all case

[174] For a discussion of the evolution of the Federal Court's practice in this area, see Rehaag & Theriault, *supra* note 81.
[175] 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 7-8, online: <https://citizenlab.ca/2018/09/bots-at-the-gate-human-rights-analysis-automated-decision-making-in-canadas-immigration-refugee-system/>.

files. The Department of Justice obviously has access to materials that they themselves created (*i.e.*, pleadings in all their cases). But they also have 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 formats that are currently inconvenient for artificial intelligence technologies. But as the Court moves increasingly to electronic records, these documents will be increasingly amenable to similar artificial intelligence technologies. The Department of Justice may be able to leverage all this data to create technologies that assist them in their work. Yet lawyers for non-citizens lack the data needed to create similar competing technologies. The direct result will be to further enhance power imbalances and to undermine the fairness of the process.

Put simply, limits on access to court materials in the immigration and refugee law context are inevitably asymmetrical. One party—the government—will always have access. The question is whether the Court will level the playing field by allowing other parties, researchers, the media, and others similar access.

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, at least for the purposes of non-commercial reproduction. This reality has allowed researchers—including RLL 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.

In that context, two key points arise: First, the Court should recognize that, at least in the immigration and refugee law field, it exercises oversight of government decision-making that involves both power imbalances and information asymmetries. Whatever measures the Court takes to protect the important privacy interests at play in this area should not exacerbate those imbalances. In other words, the issue is not just balancing individual privacy against constitutional imperatives related to the open court principle. The Court should also consider how its policies in this area can enhance the fairness of its own processes—especially in a world where litigation will increasingly be informed by data and technology. Second, the Court should be mindful of how

access to court materials might enhance the quality of counsel, which itself is 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 patterns in the quality of counsel. Easy access to pleadings in many files would also help lawyers new to the area prepare strong materials by drawing on precedents. Making pleadings available in bulk may also allow for the development of technologies that would identify ghost counsel. Using machine learning technologies, it may also be possible to develop tools that can reduce the amount of time required by lawyers to prepare pleadings or to help improve those pleadings.

In thinking about the impact of electronic access to court records in light of these two points, we encourage the Federal Court to distinguish between commercial and non-commercial access. We recognize the very real concerns about commercial data miners accessing Federal Court materials in bulk. But the Court has also benefited scholarly research involving court records. The Court should ensure that measures taken to enhance privacy do not unduly prevent academic researchers from accessing full datasets of decisions and full datasets of online court dockets. And the Court should 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 there are no written reasons. Thus, for example, researcher access should be available in cases where leave was denied.

Finally, we agree with the 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.[176] However, we think that the aim should be to move towards more access in the 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 that materials are likely to be publicly available. With sufficient notice, other protections (including replacing the names of parties with initials) can be adopted. With sufficient

[176] Other researchers affiliated with the Refugee Law Laboratory have cautioned against using the border control context as a high-risk laboratory for technological develop. See, e.g., Petra Molnar, "Technological Testing Grounds: Migration Management Experiments and Reflections from the Ground Up" (2020) online: <https://edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf>.

notice, lawyers for non-citizens can take other proactive measures, including seeking confidentiality orders, where appropriate. In our view, proceeding cautiously but with the expectation of eventually moving to increased access to enhance fairness is the right approach.

6. Concluding Recommendations

We fully support the Federal Court's efforts, as described in its most recent Strategic Plan, to demonstrate leadership in Canada's judicial system by becoming a more accessible digital court, including making more court materials available online. And we commend the Court on consulting with stakeholders and learning lessons from pilot projects as it pursues this objective.

In considering stakeholder feedback and lessons from pilot projects, the Court should examine the privacy interests, the jurisprudence relating to the open court principle, and the need to ensure equitable access to court materials to maintain the fairness of the system (particularly in light of potential asymmetrical access to emerging technologies that draw on these materials). In conducting that analysis, we provide these guiding recommendations:

1. Due to the significant privacy interests in immigration and refugee procedures, we agree with the Court's decision to focus its initial pilot projects on other areas of law as it tests mechanisms to provide greater online access. However, the Court should articulate an anticipated timeline for when online access to non-confidential materials in immigration and refugee procedures will be available.
2. Key documents that the Court should prioritize for online availability include: all court-produced materials (decisions, orders, court dockets, *etc*.); originating applications; pleadings; and underlying decisions. Consultations with stakeholders should be undertaken about access to other materials. In cases where leave is denied, access to pleadings and underlying decisions is imperative. Without access to these documents, the decision-making process is entirely non-transparent.
3. The Court, the Immigration and Refugee Board, IRCC, CBSA, Department of Justice, and immigration lawyers should use the time between now and when the materials are expected to become available to shift their general practices. They can do more to enhance privacy interests in anticipation that more of the documents they produce will become available more easily.
4. In the meantime, existing availability of court materials should be fully maintained, including the ability to access paper documents. The Court should also maintain its current permissive website terms of use that do not prohibit bulk access to court decisions and online court dockets and that allow for reproduction of these materials for non-commercial use.
5. On a go-forward basis, the 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 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 deanonymization, but to mitigate some of the privacy concerns. To maintain transparency in the rare cases where the media or other public interest necessitate knowing a party's identity, a mechanism to de-anonymize should be available. For example, 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 conditions for confidentiality set out in the case law (*i.e.*, a presumption of openness in the absence of a confidentiality order).

6. Judges should prepare decisions in ways that minimize unnecessary disclosure of private information, including avoiding using party or third-party names and other identifying details.
7. The Immigration and Refugee Board should reconsider how it prepares records in anticipation that they will be increasingly publicly available.
8. Lawyers, both for parties and for the government, should be encouraged to minimize the unnecessary disclosure of private information in their materials, and they should prioritize carefully scrutinizing materials that are expected to be publicly available. Where appropriate, lawyers should consider pursuing confidentiality orders.
9. The Court should prepare plain language materials advising unrepresented parties that materials they file are part of the public record and may be available online. And it should offer advice on how the materials can be redacted or on how confidentiality orders can be sought to reduce privacy risks.
10. The Court, the Immigration and Refugee Board, and legal aid programs should explore opportunities to use technology to assist with de-identifying materials—including using natural language processing (e.g., automated redaction using named entity recognition). If this technology proves effective, the Court should consider using the technology to de-identify past published decisions and work with online publishers to do the same. The Court should also explore other technological solutions (e.g., removing styles of cause and party names from online court dockets in immigration and refugee proceedings is straightforward).
11. The Court should work with stakeholders (including lawyers, IRB, IRCC, CBSA) to ensure that materials filed online are truly electronic and machine-readable rather than PDFs. This practice will enhance accessibility for users that rely on assistive technologies, and it will facilitate further uses of the materials. Organizations that advocate for universal design and increased accessibility for people with disabilities should be proactively consulted.
12. The Court should develop consistent meta-data for online materials to facilitate internal and external research that can enhance transparency, fairness, privacy, and efficiency in the judicial system. For example, if the Court never examines particular materials, practices can be changed to reduce the frequency with which those materials are filed, which will, in turn, increase both efficiency and privacy.
13. The Court should develop policies that facilitate bulk access to materials for non-commercial research purposes, possibly subject to data sharing agreements.

14. Fees should not be imposed 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. They should also be structured in a way that is similar to Access to Information Requests: a nominal fee for the request (e.g., $5), followed by further fees only if direct labour or reproduction costs arise from that specific request. In other words, the fees should not be on a per page, per record, or per file basis. More generally, fees should not be used to reintroduce "friction" in order to maintain practical obscurity. If the Court wishes to limit access to materials, they should not choose a mechanism that allocates access based on money (particularly for access to large numbers of records). Doing so would only amplify inequitable access to court materials (e.g., commercial legal publishers or legal tech companies that can afford to access large numbers of files, whereas academic researchers would not).

We look forward to the Federal Court's next steps.

Appendix A – Altman et al categorization

Table 1: Example categorization of privacy controls and interventions.

	Procedural	Economic	Educational	Legal	Technical
Collection/ Acceptance	• Collection Limitation Data • Data Minimization • Data Protection Officer • Institutional Review Boards • Notice and Consent Procedures • Purpose Specification • Privacy Impact Assessments	• Collection Fees • Markets for Personal Data • Property Rights Assignment	• Consent Education • Transparency • Notice • Nutrition Labels • Public Education • Privacy Icons	• Data Minimization • Notice and Consent • Purpose Specification	• Computable Policy
Transformation	• Process for Correction		• Metadata • Transparency	• Right To Correct or Amend • Safe Harbor De-Identification Standards	• Aggregate Statistics • Computable Policy • Contingency Tables • Data Visualizations • Differentially Private Data Summaries • Redaction • SDL Techniques • Synthetic Data
Retention	• Audits • Controlled Backups • Purpose Specification • Security Assessments • Tethering		• Data Asset Registers • Notice • Transparency	• Breach Reporting Requirements • Data Retention and Destruction Requirements • Integrity and Accuracy Requirements	• Computable Policy • Encryption • Key Management (and Secret Sharing) • Federated Databases • Personal Data Stores
Access/ Release	• Access Controls • Consent • Expert Panels • Individual Privacy Settings • Presumption of Openness vs. Privacy • Purpose Specification • Registration • Use Restrictions • Risk Assessments	• Access/Use Fees (for Data Controller or Subjects) • Property Rights Assignment	• Data Asset Registers • Notice • Transparency	• Integrity and Accuracy Requirements • Data Use Agreements (Contract with Data Recipient) • Terms of Service	• Authentication • Computable Policy • Differential Privacy • Encryption (Incl. Functional, Homomorphic) • Interactive Query Systems • Secure Multiparty Computation
Post-Access (Audit, Review)	• Audit Procedures • Ethical Codes • Tethering	• Fines	• Privacy Dashboard • Transparency	• Civil/ Criminal Penalties • Data Use Agreements • Terms of Service • Private Right of Action	• Computable Policy • Immutable Audit Logs • Personal Data Stores