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BALANCING PRIVACY AND THE OPEN COURT PRINCIPLE IN FAMILY LAW: DOES DE-IDENTIFYING CASE LAW PROTECT ANONYMITY?

Sujoy Chatterjee*

ABSTRACT

This paper discusses the right to privacy in the context of family law cases. In balancing the open court principle against the right of the individual to remain anonymous, it is argued that there is a greater public good in maintaining transparency of the judicial process. Disclosing the personal details of individuals who use the public court system allows the public to hold the judiciary accountable for their decisions. While advocates for greater privacy would argue that the personal details of litigants have no bearing on the legal rules that emerge from cases, landmark decisions such as *Murdoch v Murdoch* and *Pettkens v Becker* demonstrate how these same details colour the facts and allow for greater empathy and public activism. This is especially relevant where citizens feel that the courts have made a wrong decision. While preserving anonymity is important to protect vulnerable parties such as children, it is difficult from a technical standpoint to maintain anonymity for those involved in public proceedings. The widespread availability of personal information online, coupled with the expansion of online case law databases, facilitates the identification of individual litigants, even if case law is anonymized. Anonymizing family law cases by default is therefore a moot exercise that should not expand beyond the need to protect vulnerable individuals.

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"In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice...¹ Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."²

—Jeremy Bentham

Introduction

Every year, thousands of family law litigants attend court to have their cases heard by judges. It is a process legitimized by allowing public scrutiny of the bench, including a judge's ability to uphold civic values and the legal rights of citizens. As Bentham's passage suggests, transparency is essential to this process—the open court principle underpins public disclosure within the justice system and is a crucial element of judicial transparency.³ In the family law context, the open court principle often involves exposing the private details of family affairs. Allegations of abuse, adultery, and parental neglect can be raised in statements of claim, regardless of the truth.⁴ Personal information such as parties' names, dates of birth, account statements, and residential addresses are submitted to courts for cataloguing and evidentiary purposes.⁵ Former federal Privacy Commissioner Jennifer Stoddart has identified the need for better privacy protection in the judicial system and supports the anonymization of court documents.⁶ To date, Quebec is the only jurisdiction in Canada that anonymizes family law cases by default.⁷

Although it may be uncomfortable for some to have their personal information exposed in open court, privacy protection must be balanced against the need for public scrutiny. This is fundamentally a conflict between an individual's right to privacy (recognized at common law under section 8 of the *Charter of Rights and Freedoms*) and the long-standing open court principle. Open courts, like privacy, are meant to protect citizens. They expose family law litigants to a public adjudication process in which more than the parties are being judged; the court process itself is held to account by a critical and inquiring public.

In balancing these two principles, having a regime that anonymizes family law case names by default is neither practical nor desirable. With the advent of re-identification technology, it is becoming increasingly difficult to maintain anonymous data. Professor

¹ "Constitutional Code, Book II, ch XII, sect XIV" in J Bowring, ed, *The Works of Jeremy Bentham, published under the superintendence of John Bowring* (Edinburgh, UK: Tait, 1843), vol 9 at 493.

² *Ibid* at 316.

³ Office of the Privacy Commissioner of Canada, *Annual Report to Parliament: Report on the Privacy Act*, (Ottawa: Minister of Public Works and Government Services Canada, 2008) at 26 [*Privacy Act Report*].

⁴ John C Mayoue, *Balancing Competing Interests in Family Law*, 2d ed (Chicago: American Bar Association Section of Family Law, 2003) at 5.

⁵ Fareen Jamal, "Anonymity in Family Courts: Stop Naming and Shaming" (July 2011) 22:5 Ontario Bar Association – Family Law Section at 1.

⁶ Jennifer Stoddart, "Open Courts and Privacy: Privacy Law in Canada" (Remarks at the Supreme Court of British Columbia Education Seminar, November 11, 2009), online: Office of the Privacy Commissioner of Canada <<http://www.priv.gc.ca>>.

⁷ Colin LaChance, "Immoveable object meet irresistible force" (23 July 2012), online: Slaw <<http://www.slaw.ca>>.

Paul Ohm has demonstrated how limited information such as date of birth, address, and sex can be used to specifically identify individuals.⁸ Moreover, *Murdoch v Murdoch* serves as a poignant reminder of how the personal identity of litigants is vital to political activism, particularly as it relates to gender equality and property distribution after divorce.⁹ The public disclosure of court proceedings provides an opportunity for citizen engagement on matters before the Court. This is an important aspect of the dialogue that exists between Parliament and the judiciary.¹⁰

In Canada, the right to privacy has been examined in both civil and criminal law contexts. Privacy principles from criminal law cases are relevant to family law because both fields frequently deal with vulnerable populations such as children or victims of crime. No matter what the context, anonymity is essential to the protection of these individuals.¹¹ However, in the interest of maintaining a transparent legal system that facilitates social activism and holds judges accountable, courts should not anonymize family law cases by default.

Situating the Discussion of Privacy and the Open Court Principle in the Digital Context

“Quod non est in actis, non est in mundo”: (That which is not in the record does not exist).¹²

The electronic availability of case law complicates the relationship between privacy and the open court principle. With many decisions now available online, there is virtually unlimited disclosure of personal information from court documents. Andrew Feldstein comments that court documents such as applications, sworn financial statements, and affidavits can expose “an individual’s address, employment, banking, social insurance number, date of birth, and income tax information.”¹³ This serves as a veritable gold mine of information that Feldstein suggests could be used for identity theft and fraud.¹⁴ The level of access to court information available today could not have been envisioned by an 18th century jurist who operated in a time where many could not read, let alone access court records. Thus, the privacy implications of ubiquitous electronic disclosure are in many ways yet to be discovered.

⁸ Paul Ohm, “Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization” (2010) 57 UCLA L Rev 1701 at 1705.

⁹ *Murdoch v Murdoch*, [1975] 1 SCR 423, 41 DLR (3d) 367 [*Murdoch*].

¹⁰ Peter W Hogg & Allison Bushnell, “The Charter Dialogue Between Courts and Legislatures” (1997) 35:1 Osgoode Hall LJ 76 at 77.

¹¹ Mayoue, *supra* note 4.

¹² Cornelia Vismann, “Out of File Out of Mind” in Wendy Hui-Kyong Chun & Thomas Keenan, eds, *New Media, Old Media: A history and theory reader* (New York: Routledge, Taylor and Francis, 2006) at 97.

¹³ Andrew Feldstein, “Open courts destroy privacy for divorcing spouses” *The Province* (11 June 2012), online: Markham Family Lawyers <<http://www.separation.ca/pdfs/Open-courts-%20destroy-privacy-for-divorcing-spouses.pdf>>.

¹⁴ *Ibid.*

Anonymization Does Not Necessarily Make Parties Anonymous

At common law, the onus to prove that extraordinary circumstances justify a publication ban on particular court proceedings lies with those seeking the ban.¹⁵ This protection is used to maintain public confidence in the court system by several means. Firstly, it ensures that judicial decisions are exposed to public scrutiny. When a decision does not conform to public values, citizens have the right to be informed and to protest decisions of the court. Secondly, the judiciary maintains public confidence by sharing its decisions through a transparent and open process. Lastly, the open court principle allows an ongoing opportunity for the general public to learn how the justice system operates and how the law is being applied on a daily basis.¹⁶

The modern-day challenge in defending the open court principle is to retain the value of public scrutiny when information is much more accessible and capable of being manipulated for uses beyond public disclosure. Speaking for the majority in *R v Legal Aid*, Justice Woolf (then the Master of the Rolls and Records of the Chancery of England) states that the open court principle:

...enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice that this can involve.¹⁷

Maintaining anonymized data is an increasingly difficult task. Despite attempts to obscure personal information in court records, enough information is available in public records that the identities of most parties to a legal action can be uncovered.¹⁸ In 2000, Professor Latanya Sweeney (then a Master's student at MIT) showed how an anonymized data set could be "re-identified" using the voting records for the City of Cambridge, Massachusetts, which contained only the sex, ZIP code, and birth date of each citizen in the data set.¹⁹ Sweeney found that "87.1 percent of people in the United States were uniquely identifiable by their combined five-digit ZIP code, birth date (including year), and sex."²⁰ That is not a lot of information. It is the kind of information that is regularly volunteered on social media channels such as Facebook and LinkedIn. Additionally, consumers regularly provide their personal information to companies for promotional offers, advertising, product registration, and marketing purposes. Overlaying this with the extensive data networks that gather and store this information demonstrates that it is fairly easy to put together a profile of an individual. Ontario Privacy Commissioner Ann Cavoukian argues that:

¹⁵ *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 71, 139 DLR (4th) 385.

¹⁶ *Ibid.*

¹⁷ *R v Legal Aid Board, ex parte Kaim Todner (a firm)*, [1999] QB 966 at para 4 CA (Eng).

¹⁸ Ohm, *supra* note 8 at 1703.

¹⁹ *Ibid* at 1719.

²⁰ *Ibid* at 1705.

In this day and age of 24/7 online expanded connectivity and immediate access to digitized information, new analytic tools and algorithms now make it possible, not only to link a number with a name, but also to combine information from multiple sources, ultimately creating an accurate profile of a personally identifiable individual.²¹

The ease with which personal information can be aggregated from other sources and used to decipher court records may frustrate any protection offered by anonymizing court documents. To illustrate how much more careful legal professionals must be in using anonymized cases, consider *D v D*, a decision of the British Columbia Supreme Court involving a divorce in a very wealthy family. The court documents list the birth dates of both parties along with the names of their children and the date of divorce.²² Combining this information with data similar to what Sweeney accessed for Cambridge, such as birth records for the parties' municipality, the case can be effectively de-anonymized with relative ease. The simple act of cross-referencing the facts of a case with public records defeats anonymity and the protection offered by it. Anonymity in family law matters is therefore challenged from a technical perspective in implementing a system that can be comprehensive in obscuring personal data. It is also challenged by the technological sophistication of information specialists who can use limited pieces of information to re-identify anonymized data.

The federal Privacy Commissioner has addressed the issue of de-identification and its ineffectiveness in anonymizing cases. In particular, the Commissioner found personal information that has been de-identified does not qualify as anonymous under the *Personal Information Protection and Electronic Documents Act* (PIPEDA) if it is still possible to link de-identified data to an identifiable individual.²³

When access to case law required physical presence at a law library or courtroom—either to witness proceedings or to access court records—privacy was effectively protected by virtue of the public's limited access. The online publication of decisions through various free legal databases has curtailed these limits in the interest of increasing access to justice.²⁴ The Free Access to Law Movement enables Internet users to access unprecedented amounts of legal information. With more than fifty member organizations, national legal databases such as CanLII provide quick access to case law, revealing the identities of parties involved in legal proceedings.²⁵ Modern legal record keeping therefore provides a level of disclosure that goes beyond what is necessary to hold the judiciary accountable. Rather than placing the institution under a microscope, it is litigants who face the prospect of indefinite scrutiny, as these online records remain available long after a case is decided.²⁶ Exploring Canada's statutory framework and

²¹ Ann Cavoukian, "Beware of 'Surveillance by Design'", *The National Post* (14 December 2011), online: Financial Post <<http://business.financialpost.com>>.

²² *D v D*, [2008] BCSC 306 at 1, 51 RFL (6th) 334.

²³ PIPEDA Case Summary #2009-018, "Psychologist's anonymized peer review notes are the personal information of the patient" (February 23 2009), online: Office of the Privacy Commissioner of Canada <<http://www.priv.gc.ca>>.

²⁴ Jamal, *supra* note 5.

²⁵ *Free Access to Law Movement*, (2013), online: <<http://www.fatlm.org>>.

²⁶ Jennifer Stoddart, "The Open Court Principle and Privacy Legislation in the Digital Age" (Remarks at a Lunch-and-learn session on the de-identification of the decisions of labour tribunals and the protection of privacy in the 21st century, September 27, 2011), online: Office of the Privacy Commissioner of Canada <<http://www.priv.gc.ca>>.

jurisprudence on anonymity rights explains how the open court principle has expanded its reach.

Understanding Anonymity Rights in the Canadian Context

Although there is no general right to anonymity in Canada, anonymity is understood as a condition in which one's identity is not connected to certain pieces of personal information.²⁷ In this paper, anonymity is described as a function of the extent to which information, such as the names of parties, is redacted in court documents. Anonymity limits the accountability mechanism endorsed by the open court principle and denies citizens' rights to fully witness the public court process.

Establishing the Right to Privacy

The right to privacy is a contested term that has been interpreted by many in the legal profession. Brandeis and Warren's seminal piece entitled "The Right to Privacy" famously describe this as "the right to be left alone."²⁸ Legal scholars and judges alike have since built on this basic idea with theorists such as Parent indicating that the right to privacy includes the ability to control information about oneself.²⁹ Meanwhile, Bloustein infuses notions of human dignity into the right to privacy by coupling the right with the principle of inviolate personality.³⁰ He argues that the right to privacy includes the individual's independence, dignity, and integrity.³¹ This is particularly relevant in the family law context where deeply personal facts about human relations within a family are exposed for judgment by a third party.

Although it is not formally enshrined in Canadian constitutional law, the genesis of the right to privacy stems from section 8 of the *Constitution Act, 1982*: "Everyone has the right to be secure against unreasonable search or seizure."³² The right to privacy in Canada arises from the Supreme Court decision in *Hunter v Southam*, which affirms that section 8 protects the individual from unreasonable search and seizure and that this section guarantees a reasonable expectation of privacy.³³ This means that the *Charter* guarantees a broad and general right that extends at least so far as to protect the right of privacy from unjustifiable state intrusion. In *Southam*, Dickson C.J. states that:

Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and sei-

²⁷ Carole Lucock & Katie Black, "Anonymity and the Law in Canada" in Ian Kerr, Valerie Steeves & Carole Lucock, eds, *Lessons from the Identity Trail* (New York: Oxford University Press, 2009) at 465.

²⁸ Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193.

²⁹ WA Parent, "Privacy, Morality and the Law" (1983) 12 Philosophy and Public Affairs 269 at 272.

³⁰ Edward J Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYUL Rev 962 at 971.

³¹ *Ibid.*

³² Karon C Bales, "Family Law and Estates" (Ontario Bar Association, Institute of Continuing Legal Education delivered at Privacy Essentials – Tips, Traps and Hot Issues: Estate and Family Law, 23 January 2006) at 2, [unpublished]; *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³³ *Hunter v Southam*, [1984] 2 SCR 145 at 160, 11 DLR (4th) 641 [*Southam*].

zure might protect interests beyond the right of privacy, but for purposes of the present appeal I am satisfied that its protections go at least that far.³⁴

Protection from state intrusion into privacy enables courts to disallow the collection of personal information by the state. Many section 8 cases such as *Southam* and *R v Dymont* analyze the boundaries of state authority in collecting personal information “based on the notion of the dignity and integrity of the individual.”³⁵

Family law operates within a particularly sensitive area of privacy law, as protection of privacy broadly encompasses activities that fall within the domestic sphere. As Professor Jeannie Suk writes in *At Home in the Law*, “[the] home has been central to the articulation of constitutional rights, including the right against unreasonable search and seizure, the right to due process, the right to privacy, and (recently) the right to bear arms.”³⁶ This is recognized in Canada where territorial privacy, especially as it relates to the home, is given a high degree of protection.³⁷

As a private place, the home can be conceptualized as not just the setting for family law issues, but also as a place for personal liberty, free from state intrusion. The purpose of the home is to act as a place of security. However, by recognizing the home as a private place and shielding it from public view, it can also become a site for abuse.³⁸ Both Suk and MacKinnon have argued that preventing intrusion upon seclusion and suggesting that people can function with impunity in the private sphere allows for domination, control, subjugation, and the obfuscation of abuse against women in the household.³⁹ Thanks to individual *Charter* protections, including the right to security of the person, the household is not immune to prosecution; however, the unwillingness of domestic abuse victims to report their injuries means that many cases go unreported.⁴⁰ Although matters before the court are generally open, cases involving children or youth in child protection or adoption proceedings, the innocent in need of protection, and those who may be subject to harm are the main exceptions to this rule. Even with these exceptions, many others are unwilling or afraid to identify themselves. In this way, the open court principle paradoxically undermines justice by preventing people from speaking up about their personal stories of abuse even as it is supposed to strengthen justice by making courts publicly accountable for their decisions. Even if one’s identity is anonymized, many are afraid to bring court challenges for fear of reprisal.⁴¹

Analyzing the Open Court Principle

The open court principle is a fundamental element of the common law system. It ensures the effectiveness of the evidentiary process while encouraging fair and transparent decision-making.⁴² The *Privacy Act* acknowledges the importance of maintaining the

³⁴ *Ibid* at 159.

³⁵ *R v Dymont*, [1988] 2 SCR 417 at para 22, 55 DLR (4th) 503.

³⁶ Jeannie Suk, *At Home in the Law* (New Haven: Yale University Press, 2009) at 3.

³⁷ *R v Tessling*, [2004] 3 SCR 432 at para 22, 244 DLR (4th) 541.

³⁸ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 101.

³⁹ Suk, *supra* note 36 at 12.

⁴⁰ *Ibid* at 138.

⁴¹ *Ibid*.

⁴² *Privacy Act Report*, *supra* note 3.

open court principle as well as protecting the privacy of individuals. To this end, section 8 of the *Privacy Act*, allows the disclosure of personal information without the consent of the individual in situations where the public interest clearly outweighs any invasion of privacy.⁴³

The open court principle serves as a means of disseminating information about the judicial process and therefore plays an important role in educating the public.⁴⁴ The motivation behind such a policy is public confidence. Without confidence in the judicial system, court authority lacks legitimacy, and without legitimacy the rule of law would be diminished.⁴⁵

In the context of court proceedings, section 2(b) of the *Charter* serves as a central pillar for the open court principle. It protects freedom of expression, which empowers the press and other media to publicize court proceedings. So, for example, in *Edmonton Journal v Alberta (Attorney General)* the Supreme Court of Canada held that restricting the publication of matrimonial proceedings violated section 2(b) of the *Charter*. Crucially, Justice Wilson adopted a contextual approach in analyzing fundamental *Charter* rights.⁴⁶ In Ontario, section 137(2) of the *Courts of Justice Act* allows a court to seal documents submitted in civil proceedings, treating them as confidential and exempt from the public record.⁴⁷ The test for granting a publication ban on court proceedings and court records was developed at the Supreme Court through *Dagenais v Canadian Broadcasting Corporation*.⁴⁸ The test was later modified by *R v Mentuck*.⁴⁹ The decision in *Dagenais* held that judges have the discretion to impose publication bans on information revealed in a criminal trial, however that right must be weighed against other rights, such as freedom of the press and the right to a fair trial.⁵⁰ *Mentuck* modifies *Dagenais* by adding that a publication ban should only be ordered when it is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the ban must outweigh the deleterious effects of publication.⁵¹

Mentuck and *Dagenais* are murder cases. Some may challenge the need to anonymize case names in the family law context. Although family law cases do not often involve murder, they may involve extreme cases of both physical and psychological abuse. Anonymization helps to protect victims of this abuse.

There is a Need to Maintain Anonymization when Children are the Central Focus of Family Law Cases

There is little doubt that children should remain anonymous when the fallout from a court decision may affect them. The Supreme Court of Canada has made it easier to protect anonymity when children are involved with its decision in *AB v Bragg Communications Inc*. This case involved a challenge by the Halifax Herald and Global Television to a

⁴³ *Privacy Act*, RSC 1985, c P-21, s 8(2)(m)(i).

⁴⁴ Beverley McLachlin, "Courts, Transparency and Public Confidence – To the Better Administration of Justice" (2003) 8(1) *Deakin Law Review* 1 at 6.

⁴⁵ *Ibid*.

⁴⁶ *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at para 1, 64 DLR (4th) 577.

⁴⁷ *Courts of Justice Act*, RSO 1990, c C-43, s 137(2).

⁴⁸ *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, [1994] ACS No 104 [*Dagenais*].

⁴⁹ *R v Mentuck*, [2001] 3 SCR 442, 205 DLR (4th) 512 [*Mentuck*].

⁵⁰ *Dagenais*, *supra* note 48 at 838.

⁵¹ *Mentuck*, *supra* note 49 at para 32.

publication ban sought by a 15-year-old victim of cyberbullying.⁵² The high school student was provided with the IP address of someone who had created a fake Facebook profile of her with disparaging remarks about her appearance, as well as intimate and sexually explicit comments.⁵³ The media argued a publication ban would violate the open court principle. At trial, the court sided with AB, finding that AB had established a *prima facie* defamation case. However, the trial judge held that a publication ban would limit public awareness of cyberbullying, and that the public could not fully recognize the importance of this issue without full disclosure.⁵⁴ So, the judge ordered a temporary publication ban until AB decided whether she would pursue an action for defamation, but AB had not shown that she would be specifically harmed by publication if the action were to go forward. The Court of Appeal upheld this decision. By contrast, the Supreme Court was willing to assume that, because the subject matter involved children and children are in need of special protection by virtue of their chronology, the harm caused by cyberbullying could be objectively determined.⁵⁵ As such, preserving anonymity for children is only minimally intrusive on freedom of expression and AB was entitled to proceed anonymously.⁵⁶

Weighing the Costs and Benefits of the Open Court Principle

“The first cost of the open court principle is to privacy.”

—Chief Justice Beverley McLachlin⁵⁷

By exposing the private details of individuals to court, the open court principle creates the potential to violate informational privacy. As early as 2003, the Canadian Judicial Council highlighted how personal information listed on public court documents may be used for identity theft.⁵⁸ There is also the potential for discrimination or bias against parties involved in family law cases. Anyone interested in searching for court documents related to an individual (whether a potential employer, client, or member of the public at large) can do so by visiting the court records office in person or by searching online via CanLII or courthouse databases. In this sense, the open court principle threatens an individual’s privacy; yet having an open court is the cornerstone for public law because public access allows oversight of the judicial process. As Justice Fish stated in *Toronto Star Newspapers Ltd v Ontario*, “In every constitutional climate, the administration of justice thrives on exposure to light—and withers under a cloud of secrecy.”⁵⁹ It is through the open court principle that the public gains confidence in the integrity of the court system. At the same time, however, the Supreme Court gives privacy a quasi-

⁵² *AB v Bragg Communications Inc*, 2012 SCC 46 at para 1, [2012] 2 SCR 567.

⁵³ *Ibid* at para 2.

⁵⁴ *Ibid* at para 5.

⁵⁵ *Ibid* at para 9.

⁵⁶ *Ibid* at para 28.

⁵⁷ McLachlin, *supra* note 44 at 2.

⁵⁸ Canadian Judicial Council, Judges Technology Advisory Committee, “Discussion Paper: Open Courts, Electronic Access to Court Records, And Privacy” (2003) at 30, online: Canadian Judicial Council <<http://www.cjc-ccm.gc.ca>>.

⁵⁹ *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 4 at para 1, [2005] 2 SCR 188.

constitutional status in *Southam*, where Dickson J. says the purpose of section 8 of the *Charter* is “to protect individuals from unjustified state intrusions upon their privacy.”⁶⁰

This exposes a fundamental tension between privacy and the open court principle: how can there be protection for an individual’s privacy when the open court principle requires “justice to be seen to be done?”⁶¹

Private Matters in Public View

This tension comes to the fore in family law where it is often necessary to expose detailed personal information in order to establish rights to child custody, property, and support payments for separating spouses. In an era where online access to court decisions is ubiquitous, there are concerns that disclosing personal information in court exposes the individual to identity theft. Moreover, it is an unanticipated consequence of divorce that what was said in confidence in the context of a marriage is now exposed to the public. The public exposure of such information can be embarrassing and widespread. For example, Vic Toews, the former Minister for Public Safety, learned this the hard way when details of his divorce were broadcast on Twitter after a Liberal Party staff member requested access to his 2008 divorce file.⁶²

Some judges in Ontario have used the open court principle to illustrate how litigants are using court resources imprudently. For example, in *Bruni v Bruni* Justice Quinn demonstrates the limits of a court’s patience for families with chronic legal issues. Despite numerous appearances in family court, the litigants in *Bruni* were so far from a resolution that the judge resorted to ridicule in order to embarrass them and dissuade them from returning to court.⁶³ Some choice words from the proceeding include Justice Quinn stating, “Here, a husband and wife have been marinating in a mutual hatred so intense as to surely amount to a personality disorder requiring treatment. The source of difficulties is hatred: a hardened, harmful, high-octane hatred.”⁶⁴ Owing to his disappointment with both sides in this affair, Justice Quinn awarded sole custody to the mother, with the stipulation that she should receive only \$1.00 in annual spousal support.⁶⁵ This story was the subject of significant commentary in Toronto’s legal community. It raises awareness about the behaviour of some individuals and how judges may respond by publicly disclosing this behaviour. While it is true that knowing the names of the individuals in this case adds no value to the legal decision, there may be some benefit to lawyers and their clients in knowing that improper conduct in the courtroom can follow a person well beyond their civil action.

Although it may be unsettling to have such intimate details surface in a public courtroom, courts have been reluctant to grant anonymity on the grounds of parties suffering embarrassment, shame, or humiliation.⁶⁶

⁶⁰ *Southam*, *supra* note 33 at 161.

⁶¹ *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256 at 259.

⁶² Gloria Galloway, “Rae apologizes after Liberal staffer admits to ‘Vikileaks’ attack”, *The Globe and Mail* (27 February, 2012), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

⁶³ *Bruni v Bruni*, 2010 ONSC 6568 at para 213, 104 OR (3d) 254.

⁶⁴ *Ibid* at para 10.

⁶⁵ *Ibid* at para 36.

⁶⁶ *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175 at para 185, 132 DLR (3d) 385.

Indeed, sensitive issues are brought to light through the public justice system and provide the traditional justification for the open court principle as a means of exposing injustice and driving social reform in family law.

Political Activism and the Courts: Are Anonymous Records an Alphabet Soup?

Advocates for anonymization argue that the disclosure of litigants' identities, as well as that of their families, should be limited in order to secure privacy in family law cases. For instance, they argue family courts should use initials and pseudonyms as a universal standard based on the principle that records should only reveal as much information as necessary for a judge to make a determination.⁶⁷

Even if there is some limited protection for individuals by anonymizing court cases, there are administrative challenges in implementing an anonymized system. Since family law deals with issues such as property division and child custody, it lists identifiable information within court records including location, date of marriage, and birth dates for spouses and children. Anonymization would offer some limited protection for family law litigants only if it is comprehensive in removing all identifiers from court documents. With the volume of information present in most family law cases, there is a high likelihood that personal data that should be obscured could be missed.

In Quebec, family law cases are anonymized by replacing party names with letters such as *A v B* followed by a catalogue number.⁶⁸ Lawyers, librarians, students, and judges have to be exceedingly careful in how they cite cases that have been anonymized. With similarly named, de-identified case law, this could lead to more mistakes by legal professionals as they navigate the already complicated task of legal research.⁶⁹

However, as evidenced by *Becker* and *Murdoch*, there are public benefits in personalizing the style of cause. While there is a cost in terms of the privacy afforded to individuals who use the court system, the cost is insufficient to justify a right to anonymity by default since such a right does not exist either by statute or under the common law.

There is a reason why names such as *Pettkus v Becker* and *Murdoch v Murdoch* are etched into the memories of family lawyers and law students alike. *Pettkus v Becker* establishes the constructive trust as a remedy for spouses lacking title to property.⁷⁰ Unfortunately, it is also infamous for the tragic suicide of Rosa Becker, which exposed the ineffectiveness of the courts in enforcing orders for payment by a recalcitrant spouse.⁷¹ In her suicide note, Rosa Becker explained that her death was a protest against an unfair legal system which had "deprived her of justice and left her penniless."⁷² *Becker*

⁶⁷ Jamal, *supra* note 5 at 1.

⁶⁸ LaChance, *supra* note 7.

⁶⁹ Lisa M 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, 2005) at para 7, online: Canadian Judicial Council <<http://www.cjc-ccm.gc.ca>>.

⁷⁰ *Pettkus v Becker*, [1980] 2 SCR 834 at 843, 117 DLR (3d) 257.

⁷¹ Mary Jane Mossman, *Families and the Law* (Toronto: Captus Press, 2012) at 554.

⁷² Peter Bowal, "A Famous Case Revisited – Becker v Pettkus: Limits of the Law" (January 2009), online: University of Calgary Haskayne School of Business <http://dspace.ucalgary.ca/bitstream/1880/47951/1/Bowal_Famous2009_LawNow.pdf> at 2.

highlights how personal stories are inter-woven within the facts of a case; they add substance to the legal principles established by law. The names Rosa Becker and Lothar Pettkus helped to personalize this tragic story, which meant that the public could empathize with the injustice that Rosa Becker felt. Had the parties been anonymous, it is questionable to what extent the public would empathize with the tragic case of *A v B*,⁷³ particularly when such anonymization is unlikely to be unique in identifying family cases.

Unlike most areas of law, family law requires the disclosure of personal details revealing the conduct and character of disputing parties. In *Murdoch v Murdoch*, public outrage at the Supreme Court's decision to deny a wife's property claim permeated communities across Canada. As Professor Mary Jane Mossman explains, "...Irene Murdoch's case became a *cause célèbre* when some women in Manitoba created a skit about the case, demonstrating wives' lack of legal entitlement to property. The skit was reproduced and circulated for performance by women's groups in many parts of Canada..."⁷³ Had there been no public disclosure of the manner in which Mrs. Murdoch was victimized, the changes in the area of unjust enrichment and constructive trusts may have been long delayed. Instead, attaching a name and a face to the injustice propelled the issue of women's property rights to the forefront of 20th century Canadian jurisprudence. This is a central function of the open court principle that many privacy advocates overlook.

Family Law: A Constant Target for Judicial Reform

"...we must concentrate our efforts on the specific areas of law with the greatest societal need and where we can have the highest impact. It is for this reason that I continue to advocate for ongoing family law reform."

—Former Chief Justice of Ontario, Warren Winkler⁷⁴

The cases cited above are well over 30 years old, which raises the question as to whether public disclosure is still relevant to contemporary issues in family law. Arguably, public disclosure is necessary in family law because family law is a regular object of legal reform in Canada. For instance, disclosure was central to Professor John McCamus' landmark 1994 report in Ontario, which criticized how family law narrowly focused on the interests of married couples, rather than those of common law and cohabiting spouses.⁷⁵ At the turn of the century, law reform in Nova Scotia also placed heavy emphasis on family law issues such as enforcement of spousal and child maintenance obligations.⁷⁶ More recently in 2011, the province of Nova Scotia asked its residents for feedback on legal reforms that would help ensure that families experienc-

⁷³ Mossman, *supra* note 71 at 410.

⁷⁴ Warren K Winkler, "Opening of the Courts of Ontario" (12 September 2012), online: Court of Appeal for Ontario <<http://www.ontariocourts.ca/coa/en>>.

⁷⁵ John D McCamus, *Family Law Reform in Ontario*, (Toronto: Ontario Law Reform Commission, 1994) at 452.

⁷⁶ Law Reform Commission of Nova Scotia, *Tenth Annual Report*, (2001) at 16, online: Law Reform Commission of Nova Scotia <http://www.lawreform.ns.ca/Downloads/AnnRpt_00.pdf>.

ing divorce and separation would have clear laws governing child custody and access.⁷⁷ Thus, discussions of legal reform in Canada consistently focus on family law and how the system can be more equitable to family law litigants.

Access to justice issues in family law offer at least a partial explanation as to why family law features so consistently as a target for reform. *Canadian Lawyer* magazine reports that the vast majority of unrepresented clients arise from family law cases.⁷⁸ The cost of legal services is an obvious barrier to prospective family law litigants as there are often unequal parties bargaining for rights to custody of children and property ownership. Alternative Dispute Resolution (ADR) serves as a very attractive option for family law litigants, offering a less costly, and perhaps more co-operative means of civil dispute resolution. However, Professor Trevor Farrow cites concerns about ADR processes because of their private nature. As a starting point, private dispute resolution methods do not allow for the development of jurisprudence in a particular area of law.⁷⁹ Clients, lawyers, and mediators hold whatever resolution parties arrive at in confidence. Bentham's words—"In the darkness of secrecy, sinister interest and evil in every shape have full swing"⁸⁰—still hold some truth.⁸⁰ ADR takes privacy one step further than mere anonymity because the entire process is confidential. As more individuals turn to private dispute resolution instead of the courts for family law matters, any inequity remains hidden from public view. This is particularly troublesome since wealthy individuals are able to shield themselves from public scrutiny by pursuing private dispute resolution. The result is that the public loses the ability to debate serious family law issues because they have no way of knowing what issues arise in the first place. This in turn diminishes the prospect of meaningful reform in family law where it is so desperately needed. Anonymity impoverishes the narrative in family law cases despite the need for a compelling story to elicit civic action and eventual reform in family law.

Where Does Dissent Come From?

Murdoch is interesting not only for its social activism, but also for the dissent of Justice Laskin (as he then was) where he argues for a constructive trust in favour of Mrs. Murdoch.⁸¹ During Laskin's tenure at the Supreme Court of Canada, judges would frequently write dissenting opinions. Under Chief Justice McLachlin, however, dissent is not nearly as common. For this reason, hers has been called the "consensus-driven court" with more of its members agreeing than any other composition in recent history.⁸² Unanimous decisions are commonplace and suggest a dearth of critical thought on the bench. Today the Supreme Court acts less as a check on power and more like a government advisor. Regardless of one's politics, this is a fundamentally different role

⁷⁷ Nova Scotia Department of Justice, "Consultations on Family Law Changes Begin" (12 September 2011), online: Nova Scotia <<http://novascotia.ca>>.

⁷⁸ Mark Cardwell, "The 'scourge' of unrepresented litigants" *Canadian Lawyer* (7 January 2013), online: *Canadian Lawyer* <<http://www.canadianlawyermag.com>>.

⁷⁹ Trevor Farrow, "Public Justice, Private Dispute Resolution and Democracy" (2008) *Comparative Research in Law and Political Economy Research Paper No 18/2008* at 2.

⁸⁰ Bowring, *supra* note 1.

⁸¹ *Murdoch*, *supra* note 9 at 439.

⁸² Kirk Makin, "Consensus-driven Supreme Court under the microscope" *The Globe and Mail* (24 August 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

for courts than the one they have traditionally served.⁸³ As Professor Jamie Cameron observes, “The evolution of the *Charter* has slowed right down,” at least in the sense that lower courts are less likely to innovate if the top court is not also doing so.⁸⁴ With the number of appeals to the Supreme Court declining, *The Globe and Mail* reports that “many lawyers question whether the Court is dodging some of the tougher, but more significant, cases.”⁸⁵

The concern is that if members of the bench are not driving dissent, then that responsibility falls to the public. This is one reason why public disclosure in court cases is particularly important today. An informed public that knows the names, backgrounds, and socio-economic conditions of the people involved in family court cases will be better equipped to critique a particular court decision in the hope of creating real social change. The law is so often a vehicle for oppressing the rights of those who do not have the resources to advance their claims to the highest court, or for privileging the rights of those who do. Public disclosure is one of the last defenses to such oppression.

Conclusion

The open court principle legitimizes the judicial process by exposing decisions to public debate. There is an obvious tension between an individual’s right to privacy and maintaining an open system that allows the public to question a judge’s thought process in rendering a decision. It must be acknowledged that the open court principle needs to be tempered by the right to privacy, which has been interpreted as falling under section 8 of the *Charter*. It is a judge’s responsibility to ensure that vulnerable members of society such as children, victims of crime, and witnesses are protected from exposure. This is because there are serious consequences in exposing personal information about individuals that use the public court system.

However, public disclosure has also facilitated political activism, prompting meaningful legal reform. In the context of family law, leading cases such as *Murdoch* and *Becker* have highlighted the social inequities arising between men and women. Disclosing the identities of those involved in such cases helps humanize the legal issues and to generate momentum for change. In an era where justices of the Supreme Court are increasingly in agreement and approach difficult legal issues with a consensus-building model, there is a greater need for public activism; knowing the personal stories behind legal cases gives citizens ammunition as they advocate for change.

It is also important to recognize that privacy advocates are correct in calling for greater protection of personal information pertaining to the financial assets, home addresses, and names of children mentioned in family law cases. However, with the advent of digital record keeping and the ability to connect disparate pieces of an individual’s online identity, courts face an uphill battle in protecting this information. The judiciary is ill-equipped to tackle the sophisticated means of re-identifying information available to the public and so calls for anonymizing individuals involved in family law cases may be a lost cause. Use of the judicial system, as with any public institution, comes at the price of personal liberty in the interest of maintaining the system’s integrity.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*