
Judges' Technology Advisory Committee

# Use of Personal Information in Judgments and Recommended Protocol

**Approved by the Canadian Judicial Council, March 2005**

## Contents

## *Background*

[1] The JTAC Open Courts and E-Access to Court Records and Privacy Subcommittee was asked in February, 2004 to consider developing and implementing a standardized national protocol to de-identify family judgments which would allow all of them to be posted on court websites (see the Council's Discussion Paper on *Open Courts, Electronic Access to Court Records, and Privacy*, available at **{** HYPERLINK "http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf" **}**).

[2] The subcommittee drafted a recommended protocol that was endorsed by JTAC on February 4, 2005. It should be noted that this protocol extends to all judgments in which sensitive personal information or information subject to publication bans may be contained as it is clear that these issues are not limited to family cases.

## *Threshold Questions*

[3] In fulfilling its mandate, the subcommittee has identified two threshold questions that should be considered and debated by JTAC in the context of considering the recommended protocol.

I. Who should be responsible to ensure that the content of judgments conforms with publication bans?

II. Is it desirable for courts to publish all of their judgments on the internet given the answer to question one as well as other policy considerations?

The threshold questions are dealt with separately as a preface to the protocol.

## *Discussion of Threshold Questions*

### I. Responsibility for the Contents of Judgments

[4] A question has been raised about whether judges should take responsibility for ensuring that the contents of their judgments do not violate publication bans or whether this should remain in the hands of publishers. Traditionally, the courts have left the dissemination and publication of their judgments to publishers. As a result most publishers have adopted guidelines and employed editing staff to remove sensitive identifying information from judgments in cases subject to publication bans and in some instances, in all cases falling within a particular category regardless of whether there is an order banning the disclosure of this information. It would appear that the latter practice is, at least in part, a protective measure against the situation where the existence of a publication ban is not communicated to the publisher by the court. Now several courts across Canada have themselves become publishers by posting judgments on their own websites and are facing the same issues.

[5] One potential advantage to having a publisher deal with editing the judgments to conform with publication bans and non-disclosure provisions is that judges can focus on writing a decision that is most meaningful to the parties and do not have to concern themselves with whether the contents of the judgment, when more widely circulated beyond the parties, might violate a publication ban. One disadvantage of placing the onus on a publisher is that the court, not the publishers, is in the best position to be aware of the existence of publication bans. Moreover, this is not an option for those courts that publish decisions directly on their websites and do not have the resources to employ staff to edit those judgments. In addition, there is likely to be inconsistency between publishers as to how judgments are edited and this will be particularly acute when the same judgment is edited in different ways by different publishers. When the editing process takes place during the drafting stage, this is avoided.

[6] In considering this question, it is relevant to consider who bears the responsibility to ensure that judgments which contain information subject to publication bans are not published in contravention of a publication ban. The sub-committee also considered what liability may flow from the breach of a publication ban through the posting of a judgment on a court website. Courts are not immune from censure for the failure to withhold court information that is subject to a non-disclosure provision. In *Re (F.N.)*, [2000] 1 S.C.R. 880, the Supreme Court of Canada held that the court staff of the St. John's Youth Court had breached the non-disclosure provisions of the *Young Offenders Act* by routinely distributing its weekly Youth Court docket to local school boards. One of the dockets distributed disclosed the name of the appellant and the fact that he was charged with two counts of assault and breach of probation. The young person sought an order of prohibition. Although there were several exceptions to the relevant disclosure provisions in the

*Young Offenders Act*, none of them were found to justify the disclosure made by the court's staff.

[7] Provisions for publication bans on the identity of victims, complainants and young persons set out in the *Criminal Code* and the *Youth Criminal Justice* Act include an exception for the disclosure of information "in the course of the administration of justice where it is not the purpose of the disclosure to make the information known in the community" (see section 486(3.1) of the *Criminal Code* and section 110(2)(c) of the *Youth Criminal Justice Act*). While the dissemination of judgments may be part and parcel of the administration of justice, it is doubtful that the publication of judgments on the internet would be found to fall within this exception as the whole purpose of posting judgments is to inform the public and facilitate access to the decisions of the court.

[8] It seems equally clear that publishers not connected with the courts also have a responsibility to ensure that judgments published by them conform to the law in respect of publication bans.

[9] The sub-committee recommends that the ultimate responsibility to ensure that reasons for judgment comply with publication bans and non-disclosure provisions should rest with the judge drafting the decision. The sub-committee recognizes that judges need support in the form of information and resources to ensure that this responsibility can be carried out. The sub-committee recommends that the protocol, if adopted, be proposed as a part of the curriculum of the judgment writing course offered by the National Judicial Institute. It is also recommended that the Chief Justices in each jurisdiction be encouraged to provide informational support by maintaining an up to date document which informs judges of the publication ban and statutory non-disclosure provisions applicable in their jurisdiction similar to the compendium appended to the discussion paper *Open Courts, Electronic Access to Court Records and Privacy.*[1]

## II. Desirability of Placing All Judgments on the Internet

[10] One of the purposes of the protocol is to encourage each court to post all of its judgments to its website. The subcommittee has debated whether this is desirable. Providing public access to reasons for judgment is an important aspect of the open courts principle as it allows for justice to be seen to be done. Having judgments available on court websites enhances access to the courts. Free access to all decisions of the court also facilitates research for the legal profession, the media, and the public. On the other hand, concerns have been raised about the need to place certain judgments, particularly family judgments which contain sensitive personal information which may be relevant only to the parties before the court, on the internet for all to see.

[1] On-line: The Canadian Judicial Council <http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf>.

[11] In debating this question, the sub-committee considered the risks of placing judgments on court websites. One potential risk examined was liability for defamation and whether posting a judgment to the internet constitutes publication for the purposes of the law of defamation. Posting material on the internet has been held to constitute publication for the purposes of the law of defamation[2]. However, judges enjoy an absolute privilege to write and speak without legal liability for defamation when doing so in the context of a judicial proceeding.[3] This includes written reasons for judgment.[4] One author describes the rationale for this immunity from prosecution as follows:

> … in the proper administration of justice, the participants in such proceedings should feel free to speak freely, frankly, openly and candidly and not be subject to constraints inhibiting the disclosure of the processing of information essential to the judicial process or be left open to fear of influence by fear of a possible defamation action and the vexation of having to defend them…. The privilege promotes the search for the truth, the very heart of the process.[5]

[12] It has been held that this immunity is unchanged by the fact that a judge has permitted his or her judgment to be broadcast through the communications media.[6] However, the publishing of judgments on court websites is a function performed by court staff. This immunity has been held to extend to court staff who carry out the administrative duties.[7] Thus, it would appear that there is little risk of liability for defamation for court staff in posting judgments to court websites.

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[2] *Vaquero Energy Ltd. v. Weir*, 2004 ABQB 68; *Barrick Gold Corp. v. Lopehandia,* [2004] O.J. No. 2329; *Ross v. Holley,* [2004] O.J. No. 4643

[3] Linden, *Canadian Tort Law,* 6th Ed. (Toronto: Butterworths, 1997) at 699.

[4] *Stark v. Auerback* (1979), 11 B.C.L.R. 355 (S.C.)

[5] Brown, *The Law of Defamation in Canada,* 2nd Ed. Looseleaf (Toronto: Carswell, 1999) at para 12.4(1).

[6] *Irwin v. Ashurst,* 158 Or 61, 74 P.2d 1127 (1938) as quoted in Brown, *supra* at para 12.4(4)(b)

[7] *Crispin v. Registrar of the District Court*, [1986] 2 N.Z.L.R. 246 (H.C.). Here the plaintiff, Crispin, was incorrectly named as a defendant in a default summons. He took steps to have the correct defendant substituted in the pleadings. In spite of this correction, when the registrar entered default judgment, he mistakenly entered Crispin's name in the civil record book as the defendant. This information was then subsequently published in a local weekly business publication. The court found that the registrar was exercising a judicial function in entering the name in the civil record book and on that basis held that he was immune from prosecution for defamation. However, the court went on to consider whether judicial immunity extends to court staff performing purely administrative functions. The court held as follows at page 252:

> The immunity is not confined to words spoken or written in a Courtroom. It extends to at least some categories of documents prepared outside a Courtroom collateral to the case concerned. Well known examples are briefs of evidence for witnesses as in *Thompson v. Turbott,* pleadings as in *Atkins v. Mays,* and written decisions or findings as in *Jekyll v. Sir John Moore* (1806) 6 Esp 63 and *Addis v. Crocker* [1961] 1 QB 11. The authors of such decisions are entitled to immunity. Logically, those responsible for recording and directing such decisions should have like protection. The underlying policy is that those required to exercise judicial functions should have

[13] Although the sub-committee was not able to come to a unanimous view on this question, it recommends that courts be encouraged to post all of their written judgments on their own court websites or make them available to other publicly accessible sites such as the site hosted by CANLII. While there may be privacy concerns associated with doing so, a majority of the sub-committee holds the view that these concerns are outweighed by the benefits of facilitating open access to the decisions of the court and that any adverse impacts on the privacy of justice system participants can be significantly reduced by following the guidelines set out in the attached protocol.

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> freedom to speak and act without fear of reprisal. That will be subverted if, while the author is free from attack, his subordinates in the form of officers of the Court required to record and despatch his decisions are not protected. Obviously a judge must not be in a position where he knows that what he does or says may expose the staff of his Court to a personal liability…. The position of a Registrar who records a judgment will indeed involve "perilous duty" if not protected by immunity, and the judiciary will indeed have a very weak flank if despite individual immunity for Judges, Court staff are open to attack. I have no doubt that even if a registrar recording entry of a judgment by default is at that stage merely acting administratively, he is protected by the immunity. The administration of justice requires it.

# Recommended Protocol for the Use of Personal Information in Judgments

## I. Why a Protocol is Needed

[14] The principle of open justice is a cornerstone of our judicial system. Except in the most exceptional of cases, proceedings before the court are open to the public. Generally speaking, the identity of participants in court proceedings is a matter of public record and, for the most part, individuals are not protected from being named in reasons for judgment. However, it is also clear that there are times when the privacy interests of participants in the judicial system outweigh the public interest of open justice. This is reflected in legislative and common law restrictions on the publication of certain personal facts or information disclosed in court documents, proceedings, and reasons for judgment.

[15] In the past, judgments were made accessible to the public through court registries and legal publishers. Decisions were published through law reports and were traditionally available only at law libraries and more recently, through electronic subscription services. Where publication bans were ordered by the court, commercial case law reporters traditionally assumed the task of editing reasons before publication to ensure compliance with the law.

[16] In the past ten years, court decisions have been made much more widely available over the internet on court websites. Judicial decisions are now available free of charge to any member of the public who has access to a computer and an internet connection. This is a very positive development which greatly enhances access to justice by giving more members of the public the opportunity to understand how court decisions are made. At the same time, the wide dissemination of decisions by the courts over the internet has raised new privacy concerns that must now be addressed by the courts and the judges. Reasons for judgment in any type of proceeding before the court can contain personal information about parties to the litigation, witnesses, or third parties with some connection to the proceedings. Beyond the restrictions imposed by legislative and common law publication bans, some have begun to question the need to disseminate sensitive personal information in judgments which are posted on the internet.

[17] Courts across Canada have developed a variety of different solutions to protect the privacy of the parties and others involved in litigation. Although concerns about personal information can arise in any type of proceedings, decisions involving family law matters are particularly sensitive. Some courts do not publish family law decisions on their websites; others publish only headnotes, using initials; while others publish the decisions with full names. The anomalies in the electronic publishing of judgments across jurisdictions were highlighted in the *Discussion Paper on Open Courts, Electronic Access to Court Records and Privacy* prepared by the Judges Technology Advisory Committee for the Canadian Judicial Council at

paragraphs 55 to 57. The uneven dissemination of family law judgments across the country has caused some concern among the public and legal community as the internet has come to be a resource heavily relied upon by the public, lawyers and the media for information on noteworthy decisions and case law research.

## II. Objectives of the Protocol

[18] The purpose of the protocol is to encourage consistency in the way judgments are drafted when publication bans apply or when the privacy interests of the parties and others involved in proceedings should be protected. It is preferable to have judges address these issues when their decisions are drafted, rather than to have decisions either edited inconsistently by the various publishers after they are issued, or to have judgments removed from the scrutiny of the public and the legal community by not posting them to court websites. It is hoped that through use of the protocol, courts will be encouraged to publish all of their decisions on the internet and to reconsider whether it is necessary to exclude certain classes of cases from internet publication to adequately protect privacy.

[19] This protocol is intended to assist judges in striking a balance between protecting the privacy of litigants in appropriate cases and fostering an open judicial system when drafting reasons for judgment. As noted above, unless there are publication bans in place with respect to the name of a party, individuals, are generally not protected from being named when involved in court proceedings. However, even in cases where no publication ban is in place, it may still be appropriate for a judge when drafting reasons to omit certain personal information from a judgment in the interest of protecting the privacy of the litigants or other participants in the proceedings. The protocol establishes some basic types of cases where individual identities or factual information needs to be protected and suggests what types of information should be removed. There are four objectives which must be taken into account when determining what information should be included or omitted from reasons for judgment:

1) ensuring full compliance with the law;

2) fostering an open and accountable judicial system;

3) protecting the privacy of justice system participants where appropriate; and

4) maintaining the readability of reasons for judgment.

[20] Compliance with the law relates to decisions where there are legal publication restrictions in place. Openness of the judicial system requires that even where restrictions are in place or a case involves highly personal information, such as in family matters, the public still should have access to the relevant facts of the case and the reasons for the judge's decision. The tensions among these objectives need to be considered when editing judgments for privacy concerns. For example,

publishing egregious facts in a case may be seen to violate privacy concerns of a litigant, but if these facts are highly relevant to the case and in particular, to an understanding of the decision reached, their omission would deny the public full access to the judicial system. It is also important to ensure that judgments are understandable and that the removal of information does not hinder the ability of the public to comprehend the decision that has been reached.

## III. Levels of Protection

[21] The protocol addresses the following three levels of protection:

A. **Personal Data Identifiers:** omitting personal data identifiers which by their very nature are fundamental to an individual's right to privacy;

B. **Legal Prohibitions on Publication:** omitting information which, if published, could disclose the identity of certain participants in the judicial proceeding in violation of a statutory or common law restriction on publication; and

C. **Discretionary Protection of Privacy Rights:** omitting other personal information to prevent the identification of parties where the circumstances are such that the dissemination of this information over the internet could harm innocent persons or subvert the course of justice.

### *A. Personal Data Identifiers*

[22] The first level of protection to be considered relates to information, other than a person's name, which serves as part of an individual's legal identity. This type of information is typically referred to as personal data identifiers and includes:

- day and month of birth;
- social insurance numbers;
- credit card numbers; and
- financial account numbers (banks, investments etc.).

[23] This type of information is susceptible to misuse and, when connected with a person's name, could be used to perpetrate identity theft especially if such information is easily accessible over the internet. Individuals have the right to the privacy of this information and to be protected against identity theft. Except in cases where identification is an issue, there is rarely any reason to include this type of information in a decision. As such, this type of information should generally be omitted from all reasons for judgment. If it is necessary to include a personal data identifier, consideration should be given to removing some of the information to obscure the full identifier.

### *B. Legal Prohibitions on Publication – Statutory and Common Law Publication Bans and Legislative Restrictions*

[24] Publication bans are imposed either by order of the court or through the operation of a federal or provincial statute. The most common bans occur in the context of *Youth Criminal Justice Act* matters, criminal pre-trial proceedings, criminal jury matters and criminal proceedings relating to sexual and other violent criminal offences. Typically, these bans prohibit the publication of the identity, or any information which would disclose the identity, of a complainant, witness or youth dealt with under the *Youth Criminal Justice Act*. Provincially there may also be statutory bans in proceedings involving adoption, family law, child protection, health and social assistance statutes, as well as some professional discipline statutes.

[25] Appendix A provides guidelines for the removal of names from a decision where it is appropriate to do so. However, avoiding the use of the name of the person who is sought to be protected by a publication ban is often not sufficient in and of itself to prevent disclosure of identity. Sometimes further information connected to the individual must also be omitted to ensure that the identity is protected. The following general considerations may be helpful in determining what further information should be avoided to comply with a publication ban:

- The presence of **personal data** (e.g., address, account numbers) and **personal acquaintances' information** (e.g., personal data of parents, workplace, school) in a decision represents a high risk of disclosure of identity and should not be included in a judgment where there is a prohibition on publishing the identity of a person.

- With respect to the ability of the public to understand why a decision was reached, **specific factual information** (names of communities, accused persons or persons acting in an official capacity) tends to have little or no legal relevance in and of itself, while **general factual information** (age, occupation, judicial district of residence) tends to be more relevant.

- Sometimes the presence of **specific factual information** could increase the risk of identification. This type of information should also be avoided unless it is clear that once **personal data** is eliminated from the judgment, there is a minimal risk of identification through this **specific factual information**. Caution should be exercised here as often leaving such specific factual information out can impair the readability of the reasons for judgment.

- The presence of **general factual information** in a decision tends to represent a low risk of identification of a person if **personal data** (e.g., name, address) and **personal acquaintances** have not been included.

[26] Avoiding **personal data, personal acquaintances' information** and **specific factual information** will generally be sufficient to prevent the disclosure of the identity of the person sought to be protected by the ban. The following list more specifically identifies the types of information which falls into these three categories of information.

### *1. Personal Data*

[27] Personal data is information that allows for direct or indirect contact with a person. This would include:

- Names, nicknames, aliases;
- Day and month of birth;
- Birthplace;
- Addresses – street name and number, municipality, postal code, phone, fax, e-mail, URL, IP address;
- Unique personal identifiers (e.g., numbers, images or codes for social security, health insurance, medical record, passport, bank or credit card accounts);
- Personal possession identifiers (e.g., licence or serial number, property or land identification, corporate or business name).

### *2. Personal Acquaintances Information*

[28] Personal acquaintances information is names and other personal data of persons or organizations with which a person is directly involved. This type of information would include names and other personal data of:

- Extended family members: parents, children, brothers and sisters, in-laws, grandparents, cousins;
- Foster family members, tutors, guardians, teachers, babysitters;
- Friends, co-habiting persons, lessors, tenants, neighbours;
- Employers, employees, co-workers, business associates, schools, sports teams.

### *3. Specific Factual Information*

[29] This type of information includes:

- Names of communities or geographic locations;
- Names of accused or co-accused persons (if not already included in the publication restriction);
- Names of persons acting in an official capacity (e.g., expert witnesses, social workers, police officers, physicians);

- Extraordinary or atypical information on a person (e.g., renowned professional athlete, very large number of children in the family, unusually high income, celebrity).

[30] If personal data and any other potentially identifying information is avoided in the judgment, certain other types of specific factual information may be safely included if doing so will improve readability and is required to explain the rationale for the decision. The possibility that some people in the local area may be able to deduce the individual involved by piecing together the specific factual information should not outweigh the public interest in providing a cohesive, reasoned decision. This type of information would include:

- Year of birth, age;
- Gender and sexual orientation;
- Race, ethnic and national origin;
- District, jurisdiction and country of birth and residence;
- Professional status and occupation;
- Marital and family status;
- Religious beliefs and political affiliations.

### *C. Discretionary Protection of Privacy Rights*

[31] Absent a legislative or common law publication ban, there may be exceptional cases where the presence of egregious or sensational facts justifies the omission of certain identifying information from reasons for judgment. However, such protection should only be resorted to where there may be harm to minor children or innocent third parties, or where the ends of justice may be subverted by disclosure or the information might be used for an improper purpose. In such a situation it may be necessary to avoid the use of information which identifies the parties in order to protect an innocent third party.

[32] Protection of the innocent from unnecessary harm is a valid and important policy consideration (see *A.G. of Nova Scotia* v. *MacIntyre,* [1982] 1 S.C.R. 175). In these cases, the judge must balance this consideration with the open court principle by asking how much information must be included in the judgment to ensure that the public will understand the decision that has been made. It should be noted that where there is no publication ban in place, the identity of persons sought to be protected by editing reasons for judgment may still be ascertainable by examining the actual court file. Thus, full access to the record is maintained for those who have sufficient reason to take the extra step of attending at the registry or doing an online search for court records. However, by not disseminating the information to easily accessible court websites, some level of protection is maintained.

[33] Cases in which it may be appropriate to exercise a discretion to remove personal identifying information may include those involving allegations of sexual assault or exploitation or the sexual, physical or mental abuse of children or adults.

In such cases, consideration should be given to whether the identity of the victims should be included in reasons for judgment. The abuse of children may be severe enough to warrant name protection if the children were subjected to serious physical or psychological harm. The protection might also be extended in situations where the child welfare authorities have been contacted concerning abuse or lack of care, or if there is any mention of child protection proceedings, foster care, guardianship or wardship. In divorce or custody proceedings where allegations of sexual abuse are made, consideration could be given to protecting the identity of all family members, even where the allegation is unfounded. In proceedings where a paternity issue is raised, it may also be appropriate to protect the identity of the children involved.

References:

*Alberta Courts Website Privacy Policy* (Revised May 17, 2002) (contact Kate Welsh, Privacy Officer)

Brenner, Chief Justice Donald I. and Hoffman, Judith, *Electronic Filing, Access to Court Records and Privacy*, Report Prepared for the Administration of Justice Committee, Canadian Judicial Council (March, 2002)

British Columbia Court of Appeal "*Guidelines for Protecting Privacy Interests in Reasons for Judgment"* (2004)

*Open Courts, Electronic Access to Court Records, and Privacy,* Discussion Paper prepared on behalf of the Judges Technology Advisory Committee, Canadian Judicial Council, (May 2003)

Pelletier, Frédéric, *Protecting Identities in Published Case Law* (December 12, 2003)

*Quicklaw Case Name Indexing Manual* (July 2001)

## Appendix A

## Removing Names from Decisions

[34] Where it is considered to be appropriate to avoid using a name in a decision, the name should be replaced either with initials, omission marks or both, as provided for below. Initials are used to allow for the creation of a wider variety of case names (e.g., "*M.L. v. D.L.*").

[35] In very rare instances where initials, combined with the facts of the case, would clearly reveal the identity of an individual or of an organization, the letter "X" is used to replace the name instead of initials. For an additional individual or organization, the letter "Y" is used for the second individual/organization named, then "Z" for the third, "A" for the fourth, "B" for the fifth, and so on.

[36] The same initials are used to replace each occurrence of an individual or an organization's name throughout the judgment, including cover pages and headnotes, even if there are variations in the way this individual/organization is referred to in the decision.

[37] If the judge has expressly used a fictitious name to replace a real name, this fictitious name must be used throughout the decision.

### *A. Name of an Individual*

[38] When the name of an individual must be replaced, the full initials of the name are used: one initial for each forename and one initial for the surname.

[39] Only one initial is used for a compound or hyphenated forename or surname.

Examples:

| **Name** | **Replaced by:** |
|---|---|
| Mary Jane Davis | M.J.D. |
| Linda S. St-James | L.S.S. |
| Kate van de Wiel | K.V. |
| John McKeown | J.M. |
| Sean O'Neil | S.O. |
| Marie-Claude Desbien-Marcotte | M.D. |
| Simon B. de Grandpré | S.B.D. |

[40] To avoid confusion between many individuals who have the same initials, a fictitious initial is added after the first forename of the other persons named in the decision that have the same initials. This fictitious initial is the second letter of the person's first forename for the second one named, the third letter for the third named, and so on.

Examples

| **Names** | **Replaced by** |
|---|---|
| John McKeown and James Morgan | J.M. and J.A.M. |
| Mary Jane Davis and Mark John Dalton | M.J.D. and M.A.J.D. |
| Mary, Mark and Mario Davis | M.D., M.A.D. and M.R.D. |

### *B. Name of an Organization*

[41] When the name of an organization is to be avoided (e.g., for a person's employer, a business, a community or a school), only its first initial is used, followed by omission marks.

Examples

| **Names** | **Replaced by** |
|---|---|
| Air Canada | A…. |
| John McCain Auto Parts Inc. | J…. |
| Sydney Steel Corporation | S… |
| Municipality of Truro | T… |

[42] To avoid confusion between two organizations which are being referred to by initials but have the same initial, a second letter is added to the initial of the name of the second organization named in the decision that has the same initial. This second letter is the second letter of the organization's name for the second one named, the third letter for the third named, and so on.

Examples

| **Names** | **Replaced by** |
|---|---|
| Air Canada and Alimport Inc. | A… and A.L…. |
| Air Canada, Alimport and Alcan | A…, A.L…. and A.C…. |