



Technology Safety for Women and Children: Legal Remedies for the Distribution of Non Consensual Images (Revenge Porn)

INTRODUCTION

This information sheet is designed to assist frontline anti-violence workers, usually non-lawyers, to better understand the legal causes of action related to the distribution of non-consensual images, or revenge porn, and the possible legal remedies for their clients when they are addressing these incidents. The sheet provides general legal information. Legal advice or representation must come from a lawyer who can advise you whether you should do something in a lawsuit or whether you should take certain actions in a court matter.

The Distribution of Non Consensual Images or Revenge Porn is the sharing of an intimate image, without your consent, when you expected the image to be kept private. An intimate image is one where a person is nude, or exposing their breasts, genitals, or anal region, or is engaged in sexual activity. It can be any visual recording, including a photograph, film, or video recording.

There are several Canadian cases illustrating what the courts have found as an actionable case for the distribution of non consensual images. In *R v Kapoor*¹, the perpetrator posted a video online that he and his ex-girlfriend agreed to make privately while having oral sex. In *R v (DPS)*², an image of a portion of the victim's breasts were sent by the perpetrator to his friends. In *R v Maurer*³, the perpetrator found intimate images of his girlfriend on her computer, saved them, and then posted them on a website.

WAYS TO COLLECT EVIDENCE

Before collecting evidence ensure you are doing so safely. Ensure to the best of your ability that all the devices are not being monitored, tracked or spied on. For more information on safety on technology safety strategies

http://nnedv.org/downloads/SafetyNet/OVW/NNEDV_TechSafetyQuickTipsChart_2011.pdf

If the image is of a person under the age of 18, do not take steps to save the image, but instead contact the police immediately, as the image could be considered child pornography.

¹ 2012 ABPC 299.

² 2016 BCPC 400.

³ 2014 SKPC 118.



If the image is posted on an online social media platform by the perpetrator, use the screen shot photo function on a cell phone or the print screen function option on a computer or laptop to capture the image and identifying information about the perpetrator. It is best to also take a photo, with another camera, of the cell phone or computer, with the image and identifying information of the perpetrator visible on the screen. Many social media platforms also contain a report function, allowing the victim to request that the image be removed from the website. This function should be easily identifiable under or around the image and once accessed provides additional protection and a record of the image being posted and removed.

If the image has been sent through text message, email, or an instant messaging platform to a third person who is willing to aid the victim, have that third person save the image and then take further steps to preserve the evidence. Print off emails. Take a screen shot photo of any text messages, but first ensure the phone number of the sender is visible on the screen (as opposed to only a contact name). It is best to also take a photo, with another camera, of the cell phone with the image visible on the screen. Do the same for an instant messaging platform. For those available on a computer or lap top, use the print screen function. Again, it is best to also take a photo of the computer screen with the image visible on the screen.

If the image was published online, but has now been removed, you may still be able to find the image using an online Internet archive website such as www.archive.org. Usually, this works by going to an online archive website, typing in the name of the website where the image was posted, and searching through the records. There is no guarantee, however, that the archive website contains the image or that it will be easy to find if it does. Thus, it is important to save the evidence before it is removed.

If the perpetrator has posted the image online anonymously, it may be more difficult to prove the perpetrator's identity. In a criminal proceeding, the police may be able to get a warrant to obtain this information. In a civil proceeding, you may be able to get an order from the court to get this evidence from the website. This, however, can both be costly and timely, and almost impossible if the website is not based in Canada.

POSSIBLE LEGAL REMEDIES

If a person is subject to the distribution of non-consensual images by another person there are civil and criminal remedies to consider for protection, to stop the distribution and to hold the perpetrator accountable.



A. Protection Order:

Peace Bond

A peace bond requires a potential perpetrator keep the peace and follow any other conditions specified by the court (e.g. not share any intimate images of the victim). If the peace bond is entered into and any of its conditions are violated, the perpetrator can be charged criminally. You can report any violations directly to the police. Generally, the peace bond lasts for one year and there is no fee to apply. If necessary, you can apply to the court at a later stage to change or cancel the order.

If you fear that someone might commit an offence against you or somebody you know, you can ask the police to draft a peace bond. If you do not want to involve the police, you can go directly to the courthouse and ask to speak with the clerk of the criminal court, who will help you with the process.

Removal Order

There is currently no law that allows a court to order removal of an online intimate image unless it is considered child pornography. However, many websites and Internet service providers will voluntarily remove the image and provide a record of the image being posted and then removed.

B. Criminal Proceeding:

In a criminal proceeding, it is the Crown or government that starts the proceedings against a perpetrator, the accused. The purpose of the proceeding is to prosecute the accused. The victim aids only by reporting the offence, complying with police investigations, and potentially being a witness in court.

These are potential offences in the *Criminal Code* that the Crown may charge a perpetrator with in connection to revenge porn:

- **Publication of an Intimate Image Without Consent (s 162.1)** – it is an offence to knowingly publish or distribute an intimate image of a person without their consent when they had a reasonable expectation that it would be kept private.
- **Distribution of Child Pornography (s 163.1(3))** – it is an offence to distribute an image or video of a person under the age of 18, if in that image the child is, or appears to be, engaged in sexual activity, or the child’s sexual organs or anal region is exposed for sexual purposes.
- **Criminal Harassment (s 264)** - it is an offence to repeatedly follow, communicate, beset, watch a person’s home or workplace, or engage in threatening conduct towards a person, directly or



indirectly, in a manner that causes that person to fear for their safety, either physically or psychologically. The perpetrator must know, or be reckless to whether, their behaviour is harassing.

- **Uttering Threats (s 264.1)** – it is an offence to knowingly threaten to harm a person, their property, or their pet.
- **Extortion (s 364)** – it is an offence to use threats, accusations, menaces, or violence to compel or try to compel a person to do something they do not want to do (e.g. threatening to post a sexually explicit video of a female online if she does not have sex with the perpetrator).
- **Intimidation (s 423)** – it is an offence to use intimidating behaviour in order to either prevent a person from doing something they are legally allowed to do, or to compel a person to do something they do not legally have to do (e.g. threatening to post a nude photo of a female if she does not break up with her current boyfriend). Intimidating behaviour can include violence, threats, following a person, depriving a person of their property, besetting, watching a person's workplace or home, as well as blocking or obstructing a person on a highway. This offence varies from extortion in that the perpetrator need only to coerce the victim's behaviour, as opposed to causing the victim to perform some sort of activity.

In *R v (DP)S*⁴, one of the cases mentioned above, the perpetrator took an image of his girlfriend, showing portions of her bare breasts, without her consent and sent the image to his friends. The perpetrator was found guilty of violating **Publication of an Intimate Image Without Consent**, s 162.1 of the criminal code. The fact that the image was taken without the victim's consent was not a necessary factor in finding the perpetrator guilty of the offence. The judge, instead, saw it as an aggravating factor.

C. Civil Proceeding:

In a civil proceeding, it is the victim of the distribution, called the plaintiff, who starts the case against the perpetrator, who is called the defendant. The purpose of the case is to compensate the plaintiff or order the defendant to do, or stop from doing, certain actions (e.g. remove a photo from an online profile page). Often a lawyer is helpful, but costly. You may wish to proceed without a lawyer, however, the process can be complex and difficult to manage alone.

There are potential actions that may be used in a civil proceeding against the perpetrator and the list below shows what will be needed to be prove each action in connection to revenge porn:

⁴ 2016 BCPC 400.



- **Violation of privacy**, as per s 1 of the *Privacy Act*
 - The perpetrator intentionally did an act (e.g. distributed an intimate image)
 - that he knew, or should have known, would violate the victim's privacy. The victim is not required to prove any harm resulted.
- **Breach of confidence**
 - The victim shared something (e.g. a private image) in confidence that the perpetrator would keep it private and
 - It was misused by the perpetrator (e.g. shared when it was not supposed to be) leading to some form of harm or damage to the victim.
- **Intentional affliction of mental suffering**
 - Very offensive and outrageous conduct by the perpetrator
 - intended to produce harm to the victim
 - resulting in a visible and provable illness in the victim (e.g. severe mental suffering; depression; post-traumatic stress disorder).
- **Intimidation**
 - Threats by a perpetrator to do something unlawful (e.g. share a private intimate image of the victim with his friends)
 - in order to get the victim to obey his wishes. Those wishes being: doing something the victim does not have to do (e.g. causing her to continue a relationship with the perpetrator), or having the victim refrain from doing something she is allowed to do (e.g. causing her to no longer see her current boyfriend).

In an Ontario case, *Doe 464533 v ND*⁵, a judge found the perpetrator liable for breach of confidence and intentional infliction of mental suffering after posting a sexually explicit video of his ex-girlfriend, that she had sent him during their relationship, on a pornography website. The ex-boyfriend was ordered to pay the victim a total of \$141, 708.03. He was also ordered to destroy any images and videos of the victim in his possession and was prohibited from ever distributing any images or videos of her again.

CONCLUSION

If working with a person who appears to have a distribution of non-consensual images case, remember to review with her the safe ways to collect and preserve the evidence and then have her consider the

⁵ 2016 ONSC 541.



safety planning and legal remedies available to keep her safe, stop the distribution, and hold the perpetrator accountable.⁶

RESOURCES

Online Image and Video Removal guide:

www.cybercivilrights.org/online-removal

General tools for victims:

www.justiceeducation.ca/legal-help/lawsuits-legal-system/lawsuits/starting-lawsuit

www2.gov.bc.ca/gov/content/safety/crime-prevention/protection-order-registry/qa

www.withoutmyconsent.org/resources#boxes-box-scbd_welcome_block

www.getcybersafe.gc.ca/cnt/cbrblng/prnts/lgl-cnsqncs-en.aspx

www.westcoastleaf.org/wp-content/uploads/2014/09/2014-CYBER-MISOGYNY-Legal-Guide.pdf

Legal Consultation:

Law Students' Legal Advice Program: 604-822-5791 www.lslap.bc.ca

Access Pro Bono: 604-878-7400 www.accessprobono.ca

⁶ This resource was authored by Julie Gaydar, JD Candidate, Peter A. Allard School of Law, UBC, and supported by the Pro Bono Students Canada Organization. We gratefully acknowledge this work and support. This document does not contain legal advice. Pro Bono Students Canada is a student organization. This document was prepared with the assistance of PBSC UBC law student volunteers. PBSC students are not lawyers and they are not authorized to provide legal advice. This document contains general discussion of certain legal and related issues only. If you require legal advice, please consult with a lawyer.