



## Evidence Law

### Tip Sheet

#### Table of Contents

What is evidence and what is it used for in court?.....	3
When is evidence not required to prove a fact? .....	3
Types of evidence .....	3
Testimonial Evidence.....	4
Oral Evidence.....	4
Affidavit Evidence.....	4
Documents.....	5
Paper Documents .....	5
Electronic Documents .....	5
Videos/Photos.....	5
Audio Recordings .....	6
Improperly Obtained Evidence .....	6
Relevance.....	6
Preparing Your Evidence With Relevance in Mind .....	7
Authentication .....	9
How to Authenticate Evidence.....	9
Hearsay .....	11
What is Hearsay?.....	11
Is Your Evidence Hearsay?.....	12
Exceptions to the Hearsay Rule.....	13
Hearsay in Family Law Cases .....	14
Avoiding Hearsay Evidence .....	14
Opinion Evidence .....	14
Settlement Privilege.....	15
Weight.....	15



---

*\* Notes with regards to navigating this document*

---

*If you are using a PC: to go to a link, hold down CONTROL and click the link. Some links will lead to external webpages. Some links lead to different locations within this document. If you click on a link that leads you to a different location within this document, you can use ALT+ LEFT ARROW to go back to your previous location*

*If you are using a Mac: to go to a link, click the link. Some links will lead to external webpages. Some links lead to different locations within this document. If you click on a link that leads you to a different location within this document, you can use COMMAND + LEFT ARROW to go back to your previous location.*



## What is evidence and what is it used for in court?

When you go to court for a lawsuit or legal proceeding you have your side of the story to tell the court. However, the other party will likely tell a different story to the court. The judge must decide what are the facts of the case. Evidence is the information that you present to the court to convince the judge that your version of the facts is true. The other party will also have a chance to present their own evidence. Once both parties in a legal proceeding have presented their evidence, the judge will consider all the evidence and decide. Evidence can come in many forms; this tip sheet will go over the different types.

The law on evidence can often be complicated. There are rules about when evidence can be admitted in court. Just because you want to present something, as evidence does not mean that the court will allow you to do so. It is important to make sure that the evidence you plan to use in court will actually be accepted by the court. This tip sheet aims to provide an overview of certain areas of evidence law that you may want to consider when gathering evidence for a court matter. However, this tip sheet is not a complete guide and it is recommended that you seek additional legal advice or representation.

Once you have gathered the evidence that you intend to use in court, you should also familiarize yourself with how to [present your evidence in court](#).

## When is evidence not required to prove a fact?

Evidence is only required to prove facts that you and the other party do not agree on. It is not necessary to present evidence for facts that both parties agree are true. If you and the other party agree, a statement of agreed facts can be filed with the court. This will save you time in court since you will not have to prove these facts.

## Types of evidence

Evidence can come in many forms. You do not have to use a specific type of evidence in court. Below is a list of common types of evidence that may be used in court. Be aware that the court will keep the originals of the evidence that you submit so you should keep copies.



## Testimonial Evidence

An individual's knowledge of certain facts or events is an important source of evidence that should not be overlooked. When an individual presents their knowledge of certain facts or events to the court, it can be used as evidence to help one's case. This type of evidence is called testimonial evidence.

*Take, for example, a situation where you are trying to prove that Brian ran a red light. If you saw Brian run the red light, you have knowledge of this fact and can tell the court what you saw. The information that you give to the court would be considered testimonial evidence.*

An individual who presents testimonial evidence in a case is called a "witness". You can be a witness in your own case, and you can also ask other people to act as witnesses in your case. Testimonial evidence is usually presented to the court as either oral evidence or affidavit evidence.

## Oral Evidence

Oral evidence, also known as viva voce (meaning "with living voice" or "by word of mouth") evidence, is the information that a court hears from witnesses who are speaking in the courtroom. Oral evidence is presented to the court through a process called "direct examination" where the witness will answer questions asked of them in court. You (or your lawyer) will have to question your own witnesses. A judge will usually not question a witness for you. If you are your own witness and you do not have a lawyer who can ask you questions, you can just tell the court about what you know.

A witness is usually physically present in court to give oral evidence. However, a witness may ask permission to give their evidence by video if they have a good reason why they are unable to make it to court (for example, if they are out of the country or in a hospital).

## Affidavit Evidence

Affidavit evidence is information that is presented to the court as a written statement. If you are preparing an affidavit, after you have written your statement, you must find someone who has the authority to take oaths and swear to them that your statement is true. You can only swear to the truth of your statement if you yourself can personally verify that it is true. Your written statement (i.e., the affidavit) is then submitted to the court as evidence. You must also send a copy of the affidavit to the parties of your lawsuit or legal proceeding. This [guide](#) goes over preparing affidavits for family law matters in the BC Supreme Court and the BC Provincial Court. This [guide](#) goes over preparing affidavits for civil law matters in the BC Supreme Court, but it is also helpful for civil law matters in the BC Provincial Court. Be aware that the BC Supreme Court and the BC Provincial Court use different forms. You can find most BC court forms [here](#).



Oral evidence and affidavit evidence are both forms of testimonial evidence. They contain truthful knowledge that a witness has regarding relevant facts or events. The main difference between oral evidence and affidavit evidence is the manner in which a witness's knowledge is presented to the court. Oral evidence involves the witness going to court and speaking in court while affidavit evidence is a written statement and does not require the witness to be in court.

## Documents

Documents are records of information, facts, or events. Documents can be presented to the court as evidence to help prove your case. It would be helpful for you to locate and save any documents which might be related to your case so that they are available to you.

### Paper Documents

Paper documents include any information that has been recorded on paper. Common examples of paper documents are receipts, diary pages, bank statements, and doctor's notes. When submitting a paper document to the court, it is acceptable to submit either the original paper document or a copy of the original document, but the original is preferred.

### Electronic Documents

Electronic documents include any information that is recorded digitally. Common examples of electronic documents are text messages, emails, and social media posts. You do not have to submit the original electronic document to the court. It is best to present a copy of the electronic document to the court. A simple way to copy an electronic document would be to print out a screenshot. This [guide](#) takes you through the steps of taking screenshots as well as other methods of preserving electronic documents in a way that allows them to be presented as evidence in court.

## Videos/Photos

Videos and photos of information or events that are related to your case may be useful as evidence. Thus, it may be appropriate to document certain events using photos or videos. However, you should be aware that a court may not accept secretly recorded videos as evidence. In some situations, trying to use a secret recording in court may even result in the judge having an unfavourable impression of you. This is a common occurrence in family law matters, especially in matters involving children. If you feel like you must make a recording in order to prove your case, make sure that you are not purposely trying to make the opposing party look bad for the sake of the recording.

To learn more about video recordings, see the Technology Safety tip sheet [here](#).



## Audio Recordings

Audio recordings of information or events that are related to your case may be useful as evidence. Commonly made audio recordings include recordings of voicemails and phone conversations. As is the case with video recordings, you should be aware that a court may not accept secret audio recordings as evidence. However, you may be able to explain why you had to take a secret recording, such as if you are afraid of your partner and had no other way to collect the evidence of them threatening you.

To learn more about audio recordings, see the Technology Safety tip sheet [here](#).

## Improperly Obtained Evidence

Improperly obtained evidence can include:

- Videos or audio recordings made secretly
- Stolen documents
- Hacked phones or emails

If your evidence has been improperly obtained, there is a good chance that a court will not accept the evidence because they do not want to endorse this behaviour. Usually when improperly obtained evidence is accepted it is because the evidence has a lot of value and is important to the case. Do not try to submit improperly obtained evidence that has barely any [relevance](#) to the case. Even if you think a piece of improperly obtained evidence is central to your case, be prepared for the possibility that the judge will not accept it.

## Relevance

The most basic rule of evidence is that evidence must be relevant.

*Relevant evidence is information that makes a material fact more probable.<sup>1</sup>*

What is a material fact? A material fact is a fact that will affect the outcome of your case. You can also think of a material fact as a fact that will help you win your case. In order to be relevant, evidence must help establish the material facts of your case. There must be a connection between the evidence that you present and the material fact that you are trying to establish. Irrelevant evidence is evidence that has no connection to the material facts of your case. Evidence that is irrelevant will not be accepted by the court.

---

<sup>1</sup> Sopinka, Lederman & Bryant on The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)



## Preparing Your Evidence With Relevance in Mind

As mentioned above, only relevant evidence is accepted as proof in a court proceeding. When preparing for court, it is important to make sure you have not overlooked relevant evidence that could help your case. It is also important to avoid being sidetracked by irrelevant evidence. Irrelevant evidence can often distract you and the judge from the real issues of your case, making the case more complicated than it needs to be.

Below are some things to consider when determining the relevant evidence in your case.

1. What are the material facts of your case?
  - To figure out the material facts you must first understand the law that applies to your case. The law will require you to prove basic elements of your case in order to win. The elements that you must prove will depend on what the subject matter of your case.
    - For example, if you wish to obtain a protection order against a family member, the law requires you to prove that you are at risk of family violence. Thus, the basic element of your case that you must prove is that you are at risk of family violence.
      - A more in-depth Technology Safety tip sheet on relevant evidence in protection order applications can be found [here](#).
    - For family law cases, [Legal Aid BC](#) is a great resource that helps outline the basic elements that must be proved for various types of cases. It may also be helpful for you to seek legal advice.
  - Once you have determined the basic elements that must be proved, you can determine the material facts of your case. Material facts are facts that will help you prove the basic elements of your case.
    - As mentioned in the previous example, to obtain a protection order, the basic element that must be proved is the risk of family violence. The material facts in this case are facts that help prove the risk of family violence. For instance, if you have been threatened by the person you want a protection order against, this would be a material fact that helps prove the risk of family violence. A fact that does not help prove the risk of family violence would not be a material fact.



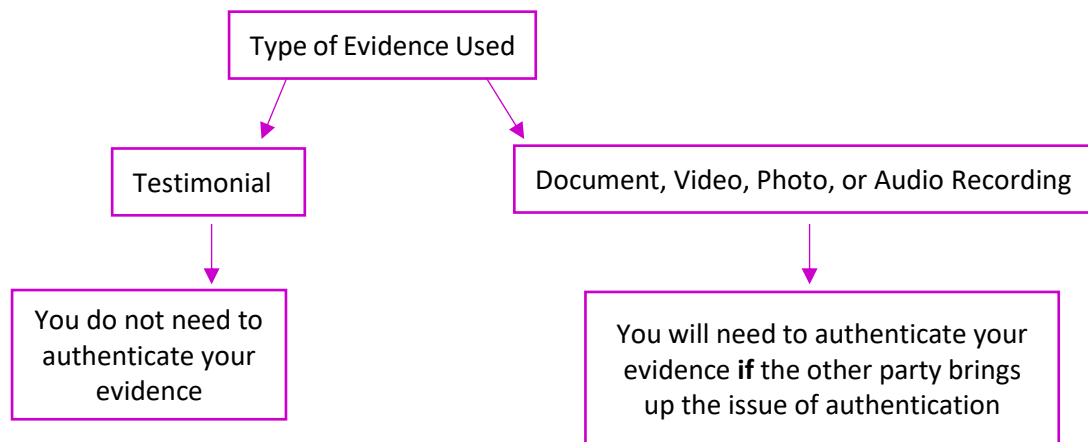
2. After figuring out the material facts of your case, what evidence are you going to use to establish the material facts?
  - Think about the information you are aware of that could help prove the material facts.
  - Think about other people who may have information regarding material facts and whether they could act as a witness for your case.
  - Remember that all material facts must be established through evidence. You cannot claim that a material fact has occurred without some evidence to back up that claim.
    - There are many different types of evidence that you can use in court, including your own testimony.
  - Evidence that you think will help establish the material facts of your case is relevant evidence that should be presented to the court.
  - However, be aware that even though you believe that a piece of evidence is relevant the court may not always agree.
3. Finally, you should try to limit the amount of irrelevant evidence that you present in court.
  - As previously mentioned, evidence that does not help establish a material fact is irrelevant and will not be accepted by the court.
  - As you prepare your evidence for court, keep in mind that you should not be bringing up everything the other party has ever done wrong. All you need to do is bring up evidence that establishes the material facts of your case.
  - It can be tempting to show the court evidence of all the ways the other party has wronged you. However, unless this evidence also helps prove the material facts of your case, it is likely not relevant.





## Authentication

Depending on the type of evidence you use, you may have to authenticate your evidence when you present it in court.



*If the other party does not question the authenticity of your evidence, you do not have to deal with authentication.*

## How to Authenticate Evidence

*To authenticate evidence you must prove that the evidence is what it purports to be.<sup>2</sup>*

What this means is that you will have to prove to the court that the evidence you are using is what you say it is.

The process of authenticating evidence is straight forward:

1. Tell the court exactly what your evidence is.
  - Examples:
    - *“This is a photocopy of my receipt for a purchase from Walmart on X date.”*
    - *“This is a printout of the messages I received from my ex-husband over Instagram.”*

---

<sup>2</sup> *R v Hamdan*, 2017 BCSC 676



- You will say this to the court through either oral testimony or an affidavit.
  - If the evidence is unusual in any way, then include this in your description of the evidence.
    - This includes if the evidence has been edited. For instance, if text messages have been deleted from a conversation that you are showing the court, you should say so.
  - You should also tell the court how the evidence has been processed.
    - Is the evidence a copy of an original document or video?
    - Have you used other applications to process the evidence? For instance, sometimes it may be easier to use a 3<sup>rd</sup> party application when you want to save large volumes of text messages. You will need to explain how any 3<sup>rd</sup> party application you use works.
  - If the evidence was created by another person, you should try and get that person to explain to the court what the evidence is.
    - For instance, if you use a video that was captured by someone else, it is best to ask the person who took the video to tell the court about it.
  - Finally, it is important you do not misrepresent your evidence. Do not say that your evidence is something that it is not.
2. Tell the court how you know that the evidence accurately represents what you say it represents.
- Examples:
    - *“This is a photocopy of my receipt for a purchase from Walmart on X date. I made the photocopy from the receipt I received after completing my purchase. I checked the photocopy against the original and the copy accurately depicts the original receipt.”*
    - *“This is a printout of the messages I received from my ex-husband over Instagram. I took a screenshot of the messages I received on my phone and then I printed out the screenshot. I checked the printout against the original messages I received, and the printout accurately depicts the messages I received.”*
  - Again, if the evidence was created by another person, you should try and get that person tell the court about the evidence and how the steps they took to ensure the evidence is accurate.



Authentication of evidence is usually not a complicated process; however, if you want a more in-depth explanation of authentication, this Technology Safety [tip sheet](#) goes into more detail on the authentication of digital evidence. Although the tip sheet focusses on authenticating digital evidence, the concepts still apply to the authentication of all evidence.

## Hearsay

Hearsay is a complicated subject. The guide provides some introductory information as what hearsay is and how it may affect your case in court. You can find more information about hearsay on the tip sheet on [objections](#).

### What is Hearsay?

Hearsay is usually defined in two parts. Hearsay is (1) an out-of-court statement, (2) that is being offered for the truth of its contents.<sup>3</sup> If your evidence is hearsay, the general rule is that it will not be accepted by the court. However, there are many exceptions to this rule. **One important exception is that hearsay is allowed if you are making an interim application.** You will likely not have to worry about hearsay if you are going to court for an interim application.

---

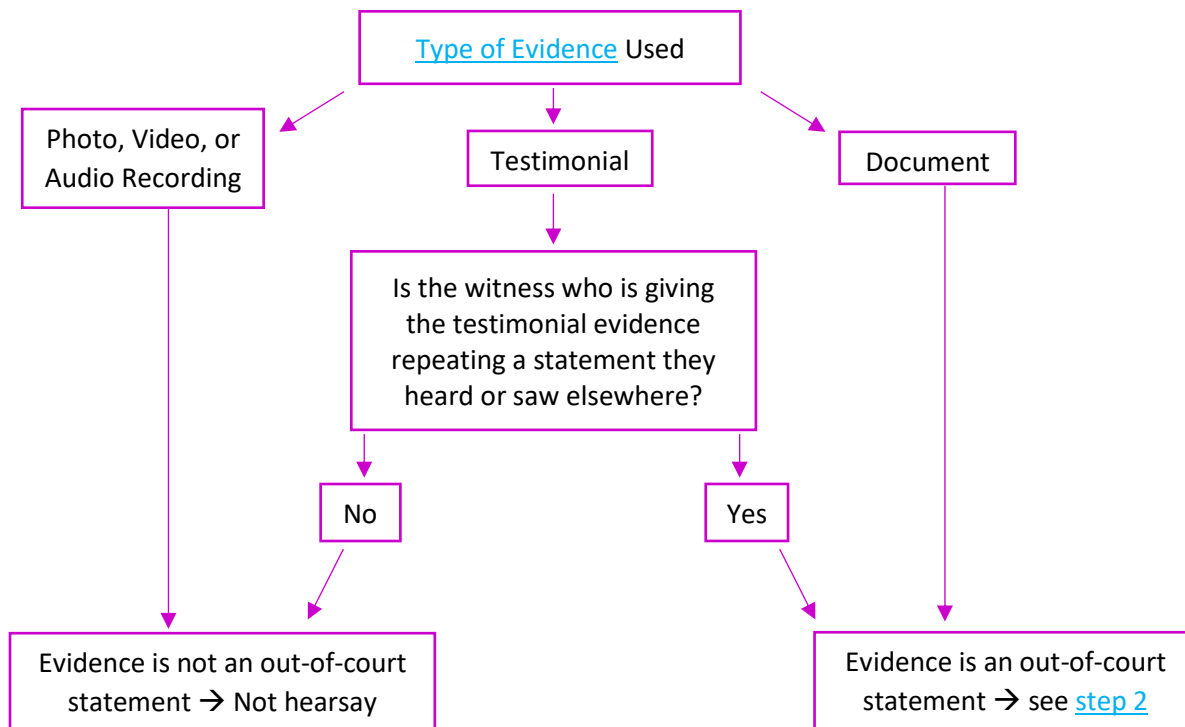
<sup>3</sup> Sopinka, Lederman & Bryant on The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)



## Is Your Evidence Hearsay?

There are two parts to determining whether your evidence is hearsay.

1. Is your evidence an out-of-court statement?



2. What are you trying to prove by using an out-of-court statement as evidence? An out-of-court statement is considered hearsay if you try to use it to prove the truth of its contents.

- Examples:

- Your witness testifies in court saying, *“Brian talked to me on Friday and told me that he stole a thousand dollars”*. Your witness is repeating an out-of-court statement made by Brian.
  - If you try to use this evidence to prove that Brian stole a thousand dollars, you are using an out-of-court statement to prove the truth of its contents. The evidence would be considered hearsay.
  - If you try to use this evidence to prove that Brian talked to your witness on Friday, you are not using an out-of-court statement to prove the truth of its contents. The evidence would not be considered hearsay



- You show the court a copy of *Brian's hundreds of text messages to you where he says that he is outside your house watching you*. The text messages are out-of-court statements made by Brian.
  - If you try to use this evidence to prove that Brian often watches you outside of your house and is stalking you, you are using an out-of-court statement to prove the truth of its contents. The evidence would be considered hearsay
  - If you try to use this evidence to prove that Brian is sending you hundreds of texts, you are not using an out-of-court statement to prove the truth of its contents. The evidence would not be considered hearsay.
- As mentioned earlier, if your evidence is hearsay, the general rule is that it will not be accepted by the court. It may seem like the hearsay rule prevents you from using a lot of evidence, but there are many exceptions to the hearsay rule.

### Exceptions to the Hearsay Rule

There are many exceptions to the rule against using hearsay as evidence. Listed below are two common exceptions that may be helpful for you to know when preparing your evidence for court.

#### 1. Admissions

- If the opposing party has made any statements related to your case outside of court, these statements are usually not subject to the hearsay rule.
- The admissions exception does not just include oral statements, written statements such as text messages and emails sent by the opposing party are also included.

#### 2. Business Records

- Documents created for the operation of a business may fall under the business records exception.
- Examples of business records include telephone records, hospital records such as doctor's notes, and receipts.
- A "business" under this exception does not have to be a for-profit business. Most social services, health care, or professional operations could be considered a "business".
- Be aware that there are limitations to the business records exception. Just because a business creates a record does not automatically mean that the record falls under the business record exception.



## Hearsay in Family Law Cases

For family law cases, there is a good chance that the court will accept hearsay as evidence even if it does not fall under an exception. However, once hearsay evidence is admitted, the judge may decide to give the evidence little [weight](#) because hearsay can be deemed unreliable evidence as it has not been tested in court. This means that hearsay may not be very convincing and may not be very helpful to your case even if it is admitted.

## Avoiding Hearsay Evidence

If none of the exceptions for hearsay apply to your evidence, it may still be possible to avoid the hearsay rule. Hearsay, by definition, must be an out-of-court statement. If you do not use an out-of-court statement, then the hearsay rule does not apply. You can avoid using an out-of-court statement by asking the person who made the out-of-court statement to act as a witness for you.

*For example, your witness says in court, “Adam told me that he saw Brian steal my car”, the witness is repeating an out-of-court statement made by Adam. You can avoid using the out-of-court statement by simply asking Adam to be a witness for you. As a witness, Adam can tell the court that he saw Brian steal your car.*

If an individual does not wish to be a witness in your case, you can consider issuing a subpoena to make them act as a witness. This [guide to family law trials in the BC Supreme Court](#) has a section on how to issue a subpoena, as does this [guide to family law trials in the BC Provincial Court](#). The same concepts apply to civil lawsuits, however, be aware that you must fill out different forms. You can find most BC court forms [here](#).

## Opinion Evidence

When you or your witnesses give [testimonial evidence](#) to the court, the evidence is supposed to be about the facts of the case. When witnesses start to talk about their own opinions, it is considered opinion evidence. Opinion evidence will not be accepted by the court.

This does not mean that a witness is never allowed to speak about their opinions in court. People regularly talk about their opinions without even noticing it. Witnesses are allowed to talk about their “lay opinions”. Lay opinion generally means an opinion that an ordinary person would naturally incorporate into their story.

*For example, it would likely be acceptable for a witness to say, “Brian was slurring his words, stumbling a lot, and drinking from a large bottle of vodka, to me he seemed drunk”.*



The witness does not actually know that Brian was drunk, thus it is still their opinion that Brian seemed drunk. However, an ordinary person observing Brian would likely come to the same conclusion and incorporate it into their story. This would be an example of “lay opinion” that is usually allowed in court.

Witnesses do not need to worry about accidentally talking about their opinions. The line between opinion and fact can often be blurry. The purpose of this section is to remind you that evidence is about facts, not opinions. Do not start talking about why you should win your case when giving evidence. You will have an opportunity to do this during the closing arguments after all the evidence has been presented.

## Settlement Privilege

When you and an opposing party have a legal dispute, sometimes the two of you may try to settle your disagreement outside of court. Settlement privilege is the right to keep any communications regarding a settlement private. This means that if you end up going to court, you cannot use settlement communications from the opposing party as evidence. At the same time, the opposing party cannot use settlement communications from you as evidence either. Settlement communications are not limited to oral communications. Written communications such as emails and text messages are also included.

There are a few exceptions to settlement privilege including:

- When the communication is a threat or involves something illegal.
- When you and the opposing party disagree on whether or not a settlement was reached.

Settlement communications can be used in court as evidence under these circumstances.

## Weight

After evidence has been admitted into court, the judge will determine how much weight to give each piece of evidence. The judge will determine how reliable and trustworthy the evidence is. Evidence that is given more weight will have a greater impact on the outcome of your case. Evidence that is given little to no weight will not affect the outcome of your case very much.

The credibility of your witnesses (i.e., how believable your witness is) will always affect how much weight the judge gives your evidence.



Factors that affect the credibility of a witness include:

- The ability of the witness to remember events accurately.
  - Was the witness intoxicated when they witnessed the event in question?
  - Does the witness have trouble keeping their story straight?
- Biases that the witness may have for one party.
  - For instance, if your mother acts as a witness in your case, it is possible that her testimony is biased towards you.
- Whether the witness' evidence matches up with other pieces of evidence.
  - For instance, if you tell the court that you have never been to Hawaii but the other party shows the court photos of you on Facebook vacationing in Hawaii, your credibility will suffer.

To increase your credibility, you should always tell the truth in court. If you do not know the answer to something, rather than making up an answer you can tell the court that you don't know. If you do not understand a question, you can ask for the question to be repeated or rephrased. You will want to make sure that you are properly answering the question asked. This includes being clear and direct when speaking, avoiding contradictions, and acting courteously towards the other party.

---

### *Technology Safety Project*

---

*This document is a part of a series that details how to preserve evidence related to the misuse of technology in experiences of domestic violence, sexual assault, and stalking. The series is part of the [Preserving Digital Evidence of Technology-Facilitated Violence Toolkit](#). This document, or any portion thereof, may be reproduced or used in any manner whatsoever as long as acknowledgment to the BC Society of Transition Houses is included in the product.*

*This document was published March 2021.*

*We gratefully acknowledge Sherry Xu, JD Candidate, Peter A. Allard School of Law, UBC, support by the [Pro Bono Students Canada Organization](#) for the creation of this information sheet. Date – March 2021*