Canadian Legal Remedies for Technology-Enabled Violence Against Women

Safety Net Canada 2013

SAFETY NET CANADA

Safety Net Canada is a national initiative of the British Columbia Society of Transition Houses and the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic. Safety Net Canada addresses how technology impacts and can enhance safety, privacy, accessibility, autonomy, justice and human rights for women, youth, and other survivors of family and domestic violence, sexual and dating violence, stalking, harassment, and abuse.

Safety Net Canada est une initiative nationale de la Colombie-Britannique Society des Maisons de Transition (BCSTH) et la Clinique d'intérêt public et de politique d'Internet du Canada Samuelson-Glushko (CIPPIC). Safety Net Canada étudie l'impact de la technologie et la façon d'accroitre la sécurité, la confidentialité, l'accessibilité, l'autonomie, la justice et les droits de l'homme à l'égard des femmes, des jeunes, des enfants et des victimes de violence familiale et conjugale, de violence sexuelle, de harcèlement et d'abus.

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Canadian Legal Remedies for Technology-Enabled Violence Against Women

EXECUTIVE SUMMARY

Communities across Canada have been working steadily to strengthen and deepen legal and justice system responses to violence against women and girls. These dedicated efforts have helped to improve safety and wellbeing for many women and children. However, Canada still has unacceptably high rates of domestic violence, sexual assault, harassment and stalking. Women and youth are also reporting increasingly traumatic and intense experiences of technology-enabled abuse. This report discusses the Canadian legal remedies needed to hold perpetrators accountable for technology-enabled violence against women.

Technology-Related Domestic Violence Homicides

Domestic violence offenders are using a wide array of technologies to help locate and murder a woman and sometimes her children as well. The Canadian femicide rate (homicides of women) has not decreased since 2000.[1] In fact, the rate of intimate partner homicides committed against women increased by 19% in 2011, the third increase in four years[2].

The Ontario Office of the Chief Coroner's 8th annual Domestic Violence Death Review Committee (DVDRC)[3] report underscores the dangerous consequences of perpetrators' increasing misuse of technology to stalk and find victims.

In a review of Ontario's 2010 domestic violence fatalities cases, the DVDRC identified "the utilization of information and communication technologies to further abuse victims of domestic violence[4]" as a recurring theme. The DVDRC summarized some ways that perpetrators misused technology to stalk and threaten a woman prior to murdering her, reporting:
Some cases involved victims that met through online dating forums. The perpetrator in one case used the dating site to threaten and harass his victim(s). In other cases reviewed, perpetrators were known to tamper with the victim's email, including the

A review of Ontario 2010 domestic violence fatalities found "the utilization of information and communication technologies to further abuse victims of domestic violence" was a reoccurring theme leading up to the femicides.

[1] Statistics Canada. (2013 Feb 25) Violence against women, 2011. www.statcan.gc.ca
[2] Canadian Women's Foundation. (2013) Fact Sheet. Moving Women Out of Violence.
[3] Office of the Chief Coroner. (2011). Domestic Violence Death Review Committee - 2010, Eighth Annual Report. Toronto: Province of Ontario.
[4] Office of the Chief Coroner. (2011). Domestic Violence Death Review Committee - 2010, Eighth Annual Report. Toronto: Province of Ontario.

dissemination of slanderous messages to individuals on the victim's address list and the distribution of threatening, abusive and/or excessive messages to the victim and others using email and text services. Other cases reviewed by the DVDRC identified perpetrators that downloaded tracking devices and/or "spyware" to monitor their victim's activities[5]. Additional cases reviewed by the DVDRC identified perpetrators who monitored their victim's online journal and other social networking activities.[6]

Technology-enabled sexual violence can have severe impacts

Technology-enabled sexual violence and harassment is having a significant impact, particularly on the lives of young women and girls. Canada and the United States have mourned too many deaths by suicide of young women age 15 – 17. These young women were forced to endure highly traumatic and sexist bullying, harassment and technology-enabled sexual violence, including having their peers or assailants record and disseminate photos taken while the young woman being sexually assaulted. These cases are just the tip of the iceberg.

- **In 2011, Rehtaeh Parsons** was sexually assaulted at age 15 by four boys. A photo of her rape was sent around her school. She reported the gang rape to law enforcement who felt there was insufficient evidence to charge the boys. In April 2013, Rehtaeh took her own life.
- **Amanda Todd** was relentlessly bullied online and in-person for years after someone distributed topless pictures of her across the Internet. She switched schools but the picture and harassment followed her to her new school, where schoolmates cruelly called her degrading names and suggested she take her own life. In October 2012, Amanda committed suicide.
- In 2010, **a 16-year-old girl** was drugged and raped repeatedly by half a dozen men at a rave in rural BC. Onlookers recorded her being gang raped and posted photos on Facebook and she was tormented at school[7]. Two men who posted photos on Facebook were sentenced: a youth got one year's probation and an adult pled guilty to "distributing obscene material" [8]. Sexual assault charges were laid then dropped.
- In **Steubenville, Ohio**, high school football players carried around an unconscious 16-year-old girl at a party while boasting about rape videos, tweeting[9] jokes about violating her and joking about "how dead is she?" Videos and pictures of them assaulting her

[5] Office of the Chief Coroner. (2011). Domestic Violence Death Review Committee - 2010, Eighth Annual Report. Toronto: Province of Ontario.
[6] Office of the Chief Coroner. (2011). Domestic Violence Death Review Committee - 2010, Eighth Annual Report. Toronto: Province of Ontario.
[7] Photos of gang rape go viral on Facebook. (2010 September 16). The Globe and Mail. www.globeandmail.com
[8] Man sentenced over B.C. rave rape photos. (2013 Mar 4) CBC News. www.cbc.ca/news/canada/british-columbia/story/2013/03/04/bc-rave-rape-photos-sentencing.html
[9] Text messages that led to the convictions in the Steubensville Rape trial. www.mobilebroadcastnews.com/NewsRoom/Don-Carpenter/Text-Messages-led-convictions-Steubenville-Rape-Trial

were sent to friends. Her schoolmates tweeted she was a "whore", but others in the community stood beside her. Still, in 2013, when the two football players were found guilty of raping her, she received death threats via twitter from some peers.

These stories speak for themselves. These girls experienced online slut-shaming; "a form of victim blaming for rape and sexual assault, such as claiming the crime was caused (either in part or in full) due the woman wearing revealing clothing or previously acting in a forward, sexual manner before not consenting to sex" [10].

After Rehtaeh Parsons' suicide in April 2013, her father, the group Anonymous and others called for Nova Scotia law enforcement to reopen the investigation of the sexual assault Parsons reported to the police in 2011. On April 25, 2013, Nova Scotia announced it is establishing the first Canadian cyber bullying investigative unit with a mandate to pursue and penalize cyberbullies, while making parents liable for their child's bullying, if necessary.

Cyberbullying and technology-enabled sexual violence has the full attention of Canadians. In reference to the technology-enabled sexual abuse and bullying Rehtaeh Parsons experienced Canadian Prime minister Harper said, "It is a youth criminal activity. It is a violent criminal activity. It is a sexual criminal activity and it is often Internet criminal activity." [11]

Do laws need to be changed or added?

Does Canada need any new laws to address the impact and harms that can result from technology-enabled abuse such as cyberbullying? Or, from having your nude or seminude picture disseminated without your consent to other people?

Canada has many strong criminal and civil laws that address and provide redress for technology-enabled abuse such as Criminal Harassment. Sometimes the main gap is in awareness of the law; this can be addressed by providing training to law enforcement and educating the public about underutilized laws.
However, some laws would be strengthened if they were updated. There are some gaps in federal statutory text due to the rapid evolution of technologies. Some laws were created before we could possibly anticipate how rapidly technology is continuing to evolve. For example, the Criminal Code Defamatory Libel sections [297-317] does not address online publication; if it were reexamined, it might become an effective current day legal remedy.

The phenomenon of sexting is a great example of how technology innovations can significantly impact and change our social interactions, relationships, and the implementation of law. Sections of the Canadian Criminal Code addressing Child Pornography [163.1], Voyeurism [162],

[10] McCormack, Clare; Prostran, Nevena (2012). "Asking for It". International Feminist Journal of Politics **14** (3): 410–414.
[11] Auld, Alison. (2013 April 12). "Don't 'Respond with Violence', Rehtaeh Parsons' Mother Tells Vigil Through Tears" The Canadian Press.

and Harassing/indecent telephone calls [372] need to be reexamined to identify gaps and desired exceptions to broad language in order to prevent problematic application that is not the intent of that law. For example, Voyeurism [162] only prohibits surreptitious recording, but might be able to be broadened to also include situations where the distribution of private video/images was done without consent, regardless of whether the original recording was surreptitious, coerced or consensual.

It is important that we examine and address these legislative gaps, exceptions, and unintended interpretations so that our laws can be used to effectively prosecute perpetrators for a wide range of technology-enabled violence and abuse.

Victims' Rights to Privacy and Safety

Safety-related privacy protections are an essential component the Canadian justice system providing an environment that will encourage and support victims of technology-enabled abuse to seek legal remedies, by ensuring that the actual court process does not create new and increased risks of subsequent abuse.

The legal system needs robust and viable options for protecting the privacy of women and youth fleeing and/or living with the effects of domestic violence, sexual assault, stalking and harassment. Publishing of court records online can increase the safety risks for women and youth and can even result in a stalker/ex-partner locating and harming their victim.

Whenever someone reports technology-enabled abuse as part of a case, the courts should automatically assume that any information related to that case is or might become highly sensitive case information and require strong privacy protections.

Additionally, if women and youth fleeing a violent stalker or abuser need to appear in courts for other matters-- be it a landlord-tenant, traffic, adoption, property, etc. – the courts should describe a process that the individual can request to flag at filing the proceeding as including "sensitive case file" information that might or will require enhanced privacy protections.

For victims of sexual and domestic violence, stalking, cyberbullying and harassment, the necessary level of privacy protections to all or portions of the court records is often a prerequisite to ensuring the proper administration of justice. Privacy protections for sensitive case file information in such cases include: pseudonyms, Jane Doe anonymity, sealing all or portions of the record placing limitations on public access, redacting sensitive portions of the record, and banning online publication or publication all together. These are options that most courts are familiar with but that are not necessarily discussed in the breadth of court situations that have been identified as high-risk by survivors of technology-enabled abuse.

The 2012 ruling by the Supreme Court of Canada (SCC) in A.B. v. Bragg Communications Inc.[12] speaks to the modern day importance of these protections. The SCC ruled that a 15 year old girl was entitled to proceed anonymously in her legal efforts to identify who is cyberbullying her. As SCC Justice Rosalie Abella wrote: "The girl's privacy interests in this case are tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying."

When better ways to protect the privacy of victims of technology-enabled violence against women are created, women and youth will increasingly access the justice system.

Justice System Personnel Need More Training and Tools

In this digital age, all members of the Canadian justice system should be provided with basic training on the misuse of technology by perpetrators of domestic and sexual violence, harassment and stalking. Judges, crown attorneys, legal aid, police, probation and parole officers would all be able to better protect women and children who are being abused, assaulted, stalked and/or harassed if they had specific resources and training on technology-enabled abuse. Too many police officers have not had the opportunity to be adequately trained in the proper collection of admissible technology evidence. Additionally, Canada's "…police-reported data, self-reported data, and criminal court data on criminal harassment do not capture the use of technology in committing this offence"[13] Thus, Canadians do not even have a good sense of the extent to which police and crown attorneys are identifying, investigating and prosecuting technological factors in criminal harassment cases.

This report responds to the significant gap in legal resources addressing technology-enabled domestic violence, sexual assault, stalking and harassment. We discuss many Canadian laws that can be used when prosecuting technology-enabled violence against women and consider implications to privacy, confidentiality and safety. This report is part of a set of three reports addressing technology-enabled violence against women. The other two are titled "Assessing Technology in the Context of Violence Against Women & Children. Examining Benefits & Risks" and "Organizational Technology Practices for Anti-Violence Programs. Protecting the Safety, Privacy & Confidentiality of Women, Youth & Children".

[12] A.B. v. Bragg Communications Inc., 2012 SCC46, [2012] 2 S.C.R.567. Available at http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/10007/index.do

[13] McDonald, S. (May 2012) p. 14.

Recours judiciaires contre les pratiques abusives de la technologie utilisée à des fins de violence envers les femmes au Canada

SOMMAIRE DE GESTION

Des regroupements canadiens travaillent sans cesse pour renforcer et approfondir les réactions de l'appareil judiciaire envers la violence faite aux femmes et aux filles. Leur dévouement a contribué à améliorer la sécurité et le bien-être de beaucoup de femmes et d'enfants. Au Canada toutefois, il existe encore un taux élevé de cas de violence conjugale, de maltraitance sexuelle, de harcèlement et de traque furtive. Les femmes et les jeunes rapportent aussi de plus en plus de cas d'abus générés par la technologie, une expérience grave et traumatisante. Le présent sommaire examine les recours judiciaires nécessaires dirigés contre les responsables d'abus de la technologie utilisée à des fins de violence envers les femmes.

Homicides conjugaux reliés à la technologie

Les auteurs de violence conjugale se servent beaucoup de moyens technologiques pour arriver à localiser puis à tuer une femme et parfois même ses enfants. Le taux d'homicides de femmes au Canada n'a pas diminué depuis l'année 2000[1]. En réalité, le taux d'homicides conjugaux commis contre une femme a augmenté de 19% en 2011, la troisième augmentation en quatre ans[2].

Le 8e rapport annuel du *Domestic Violence Death Review Committee* (DVDRC) (comité d'examen des décès dûs à la violence) du bureau du coroner en chef de l'Ontario souligne les conséquences dangereuses des abus de la technologie à des fins de traque furtive et de localisation des victimes.

Dans un rapport ontarien de 2010 sur les cas de violence conjugale ayant causé la mort, le DVDRC a souligné que « l'utilisation des technologies de l'information et de la communication à des fins de violence conjugale[4] » est un thème récurrent. Le DVDRC a présenté certains moyens utilisés par les auteurs de crimes pour traquer et menacer une femme avant de la tuer :

> Une revue des cas de décès dans les cas de violence conjugale en Ontario en 2010, indique que « l'utilisation abusive de la technologie de l'information et de la communication envers les personnes déjà victimes de violence conjugale » était un thème récurrent dans les cas d'homicides de femmes.

Certains cas impliquaient des personnes ayant communiqué entre elles par l'entremise de forums de rencontres. L'un des auteurs a menacé et harcelé ses victimes par le biais d'un site

de rencontre. Dans d'autres cas, les individus trafiquaient les courriels de leurs victimes, envoyaient des messages diffamatoires à des contacts trouvés dans le carnet d'adresses de celles-ci et envoyaient des courriels ou des textos de menaces à une victime ou autres personnes. D'après le DVDRC on a identifié des cas de téléchargement de dispositifs de repérage (*tracking devices*) et/ou d'un logiciel espion pour contrôler les activités de la victime[5]. D'autres cas rapportés par le DVDRC font état d'individus qui infiltrent le journal en ligne ou autres activités de réseautage social de leur proie.[6]

La technologie utilisée à des fins de violence envers les femmes peut avoir des conséquences importantes

La violence et le harcèlement sexuels perpétrés par le biais de la technologie ont un impact grave sur la vie des jeunes femmes et des jeunes filles. Le Canada et les États-Unis ont vu trop de jeunes filles de 15-17 ans s'enlever la vie. Ces dernières ont dû subir les traumatismes de l'intimidation, du harcèlement à caractère sexiste et de la violence sexuelle par moyens technologiques, en plus d'avoir vu la diffusion de photos de leurs agressions par leurs pairs ou leurs assaillants. Ces cas ne représentent que la pointe de l'iceberg.

- En 2011, à l'âge de 15 ans, **Rehtaeh Parsons** a été agressée sexuellement par quatre garçons. Une photo du viol a été diffusée à son école. Elle a rapporté ce viol collectif aux représentants de l'ordre qui ont jugé qu'il n'y avait pas de preuves suffisantes pour inculper les auteurs. En avril 2013, **Rehtaeh Parsons** s'enlevait la vie.
- **Amanda Todd** était constamment intimidée en ligne et en personne pendant des années après que quelqu'un eut distribué sur Internet des photos d'elle la montrant les seins nus. Même après avoir changé d'école les photos et le harcèlement ont continué et les compagnons de classe l'humiliaient en plus de la pousser au suicide. En octobre 2012, elle passait à l'action.
- En 2010, **une jeune fille de seize ans** a été droguée et violée à répétition par une demi-douzaine d'hommes lors d'une fête techno (*rave*) en C.-B. Des spectateurs témoins de l'événement l'ont enregistré puis ont affiché des photos de ce viol collectif sur Facebook. Elle a été tyrannisée à l'école[7]. Deux des hommes qui ont fait circuler les photos sur Facebook ont été condamnés : un jeune a reçu une ordonnance de probation d'une année et un adulte a plaidé coupable à « la distribution de matériel obscène »[8]. Des accusations d'agression sexuelle ont été déposées puis abandonnées.
- À **Steubenville, Ohio**, des joueurs de football d'un collège se sont amusés à transporter une jeune fille de seize ans, inconsciente, lors d'une fête tout en se vantant d'avoir des vidéos d'un viol, en diffusant sur Twitter des farces à l'effet qu'ils la violeraient ou se demandant si elle était vraiment morte. Des vidéos et des photos les montrant en train de l'agresser ont été envoyées à ses amis. Alors que des compagnons d'école ont réagi sur Twitter disant qu'elle était une « pute », d'autres ont plutôt pris sa défense. En 2013, les joueurs de football ont été reconnus coupables de viol alors que la victime recevait des menaces de mort sur Twitter de la part de certains de ses pairs.

Ces histoires parlent d'elles-mêmes. Ces jeunes filles ont connu « la stigmatisation des salopes » (slut-shaming) : on dénonce la victime de viol ou d'agression sexuelle en affirmant par exemple que le crime est la responsabilité (partielle ou totale) de la femme qui portait des tenues provocantes ou qui avait des comportements de nature sexuelle avant de refuser d'avoir des relations[10].

Suite au suicide de Rehtaeh Parsons en avril 2013, son père, le groupe Anonymous et d'autres personnes ont réclamé auprès des autorités la réouverture de l'enquête sur l'agression sexuelle qu'avait rapportée Parsons à la police en 2011. Le 25 avril 2013, la Nouvelle-Écosse annonçait qu'elle créait la première unité d'enquête au Canada sur la cyberintimidation avec mandat de poursuivre et de punir les intimidateurs en ligne tout en tenant leurs parents responsables de l'intimidation de leur enfant si nécessaire.

La cyberintimidation et la violence sexuelle issues de la technologie retiennent toute l'attention des Canadiens. Selon le premier ministre canadien Stephen Harper, l'abus sexuel et l'intimidation issue de la technologie qu'a subi Rehtaeh Parsons sont une activité criminelle de jeunes, une activité criminelle violente, une activité criminelle sexuelle et souvent une activité criminelle en ligne.[11]

Les lois doivent-elles être changées ou doit-on adopter de nouvelles lois ?

Le Canada doit-il se doter de nouvelles lois pour faire face aux conséquences et aux torts résultant des abus de la technologie à des fins de violence comme la cyberintimidation ou la diffusion sans permission de photos de victimes, nues ou partiellement nues ?

Le droit pénal et civil canadien prévoit la réparation dans les cas d'abus de la technologie comme le harcèlement criminel. Parfois, la principale lacune réside dans la connaissance de la loi ; on peut y remédier en offrant une formation aux représentants de l'ordre et en informant le public de l'existence des lois qui ne sont pas adéquatement utilisées.

Toutefois, certaines lois seraient appliquées si elles étaient mises à jour. Il existe des lacunes dans le texte légal au fédéral en raison de la rapidité avec laquelle évolue la technologie. Certaines lois existaient déjà avant que nous puissions prévoir cette situation. Par exemple, les sections sur le libelle diffamatoire du code criminel (297-317) ne touchent pas les publications en ligne ; si elles étaient réexaminées, elles pourraient couramment servir de recours judiciaires.

Le phénomène du sextage est un bon exemple d'impact significatif des innovations technologiques sur nos interactions, nos relations et sur l'application de la loi. On doit réexaminer les sections du code criminel canadien en ce qui a trait à la pornographie juvénile (163.1), le voyeurisme (162) et les appels téléphoniques obscènes ou malveillants afin d'identifier les lacunes et les exceptions souhaitées au langage général afin de prévenir les problématiques qui ne sont pas souhaitées par de cette loi. Par exemple, la section sur le

voyeurisme (162) qui n'interdit que l'enregistrement clandestin, pourrait être élargie pour inclure les situations où la distribution de vidéos/images privées a été faite sans autorisation, que l'enregistrement original ait été fait ou non clandestinement, avec ou sans consentement.

Il est important d'examiner et de régler les lacunes législatives, les exceptions et les mauvaises interprétations afin que nos lois soient utilisées de façon efficace pour poursuivre les auteurs de crimes qui utilisent la technologie à des fins de violence et d'abus.

Les droits des victimes à la vie privée et à la sécurité

La protection de la vie privée reliée à la sécurité est une composante essentielle du système de justice canadien qui fournit un environnement d'aide aux victimes d'abus de la technologie et les encourage à chercher des recours judiciaires en s'assurant que les procédures actuelles n'entraînent pas une récidive et une augmentation subséquente des risques d'abus.

Le système judiciaire a besoin d'options solides et viables pour protéger la vie privée des femmes et des jeunes qui doivent fuir et/ou qui vivent dans un milieu où il y a de la violence conjugale, de l'agression sexuelle, de la traque et du harcèlement. La publication des rapports de cour en ligne peut augmenter les risques d'atteinte à la vie privée pour les femmes et les jeunes et peut faire en sorte qu'un traqueur/ex-partenaire peut localiser sa victime et chercher à lui nuire.

Lorsque quelqu'un rapporte un cas d'abus par la technologie, le tribunal devrait automatiquement déduire que toute information reliée à ce cas est, ou pourrait, devenir très délicate et exiger une protection accrue de la vie privée.

De plus, si des femmes et des jeunes fuyant un traqueur ou un abuseur violent doivent se présenter en cour pour d'autres raisons – problèmes avec son propriétaire, contraventions, adoption, propriété, etc. – les tribunaux devraient offrir des procédures permettant au requérant de signaler, lors de sa déposition, qu'il s'agit d'une « affaire sensible » dont les informations nécessitent une protection accrue de la vie privée.

Pour les victimes de violence sexuelle et conjugale, de traque, de cyberintimidation et de harcèlement, le degré nécessaire de protection de la vie privée, touchant partiellement ou totalement les rapports de cour, est souvent un prérequis pour assurer la bonne administration de la justice. La protection de la vie privée dans les cas d'information d'une affaire sensible inclut : les pseudonymes, l'anonymat au nom de Jane Doe, le scellage partiel ou total du dossier limitant l'accès à l'information, la révision de certaines parties sensibles du dossier et l'interdiction de publication en ligne ou de publication, point à la ligne. Ces options sont déjà connues de la plupart des tribunaux sans toutefois être abordées dans le cadre de situations qui ont été identifiées comme étant à haut risque par les survivants\tes d'abus de la technologie.

En 2012, la décision de la Cour suprême du Canada (CSC) dans l'affaire A.B. contre Bragg Communications Inc.[12] montre bien l'importance actuelle de cette forme de protection. La CSC a décidé qu'une jeune fille de 15 ans avait le droit de procéder dans l'anonymat, en toute légalité, pour arriver à identifier les auteurs de la cyberintimidation dont elle était victime. Comme la juge Rosalie Abella a écrit : « En l'espèce, les intérêts de l'adolescente en matière de vie privée se rattachent à son âge et à la nature de la victimisation contre laquelle elle demande la protection. Il ne s'agit pas simplement d'une question de protection de sa vie privée, mais de sa protection contre l'humiliation constamment envahissante liée à l'intimidation à caractère sexuel en ligne. »

Lorsqu'on mettra sur pied les moyens de protéger la vie privée des victimes de violence faite aux femmes issue de la technologie, les femmes et les jeunes auront de plus en plus accès à notre système de justice.

Les membres de notre système judiciaire a besoin d'une formation accrue et de plus en plus de ressources.

À l'époque du numérique, tous les membres du système judiciaire canadien devraient bénéficier d'une formation de base sur l'abus de la technologie par les auteurs de violence conjugale et sexuelle, de harcèlement et de traque. Les juges, les procureurs, les assistants juridiques, la police, les officiers de libération conditionnelle, les agents de surveillance devraient tous être en mesure de protéger les femmes et les enfants victimes d'abus, d'agressions, de traque et/ou de harcèlement s'ils avaient les ressources spécifiques et la formation sur les abus de la technologie. Nombreux sont les policiers qui n'ont pas eu l'occasion d'être formés adéquatement dans la collecte de preuves admissibles relatives à la technologie. De plus, au Canada, « …les données signalées par la police, les données auto signalées et les données d'un tribunal criminel sur le harcèlement ignorent la dimension technologique du crime »[13]. Ainsi, les Canadiens ne sont pas au fait de l'importance que les policiers et les procureurs doivent accorder à la dimension technologique, dans les cas de harcèlement criminel, au moment de l'identification, de l'enquête et de la poursuite.

Ce rapport répond à la grande lacune qui existe au sein des ressources juridiques concernant la violence conjugale, l'agression sexuelle, la traque et le harcèlement issus de la technologie. Nous traitons de plusieurs lois canadiennes qui peuvent être utilisées lors de poursuites dans des cas de violence faite aux femmes issue d'abus de la technologie et considérons son implication sur la vie privée, la confidentialité et la sécurité. Ce rapport fait partie d'une série de trois sommaires traitant de la violence faite aux femmes issue de la technologie. Les deux autres s'intitulent « Les avantages et les risques de la technologie dans un contexte de violence faite aux femmes et aux enfants » et « Pratiques organisationnelles de la technologie pour les programmes de prévention de la violence. Comment protéger la sécurité, la vie privée et la confidentialité des femmes, des jeunes et des enfants ».

Canadian Legal Remedies for Technology-Enabled Violence Against Women

INTRODUCTION

This resource describes various Canadian legal remedies available to address technology-facilitated violence against women especially sexual violence, domestic violence, harassment and stalking. It outlines Canadian criminal offences and civil (private) law remedies.

The document has the following key sections:

A. Criminal offences
B. Civil (private) law remedies
C. Restraining orders
D. Technology-enabled Risks upon Separation
E. Appendices: Legal Glossary

Each section can be read as a standalone document. There is also a glossary that explains some of the more commonly used terms in their legal context.

Scope

This report addresses technology-enabled violence against women and youth with a focus on domestic violence, sexual assault, harassment and stalking. Women and youth are reporting increasingly traumatic and intense experiences of technology-enabled abuse and stalking. Although stalking occurs in a number of contexts, Intimate partner stalking is the largest category of stalking cases[14]-[15]-[16] Two-thirds of the female victims of stalking (66.2%) reported stalking by a current or former intimate partner in their lifetime.[17] In Canada, 76% of all criminal harassment and stalking victims are women.

[14] Mohandie, K., J. Meloy, M. McGowan and J. Williams, "The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers," *Journal of Forensic Science* 51(1) (2006): 147-155.
[15] Spitzberg, B., and W. Cupach, "The State of the Art Stalking: Taking Stock of the Emerging Literature," *Aggression and Violent Behavior* 12 (2007): 64-86.
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Terminology

Gender: The vast majority of those impacted by domestic violence and sexual violence are women and children, and adult men are usually the assailants. However, it is important to note that men are also victims of violence (in a smaller proportion of cases). Domestic violence and other forms of abuse are not confined to heterosexual relationships; partners (of either gender) in same-sex relationships can also be victims.

This document uses female pronouns to describe victims/survivors, and male pronouns to describe assailants/perpetrators. This is *not* to suggest that other scenarios are not possible.

Survivor vs Victim: Criminal law tends to use the terms "victim" or "complainant" to label those who allege that someone else has committed a crime against them. The same terms continue to be used if the accused is subsequently convicted. The victim/complainant may or may not also be a witness in any criminal prosecution.

Some support/advocacy individuals and organizations who work in the fields of domestic and sexual violence prefer to use the term "survivor" rather than the more legalistic terms of "victim" or "complainant". Both terms are used inter-changeably in this document. No disrespect is meant to anyone by doing so.

Important Note: Legal Information vs. Legal Advice

This document provides general *legal information* about technology-enabled abuse, and the various remedies that may or may not be available to victims and those seeking to help them. The purpose of this document is to educate and inform the reader. It does not assume any prior legal or technical knowledge.

A person dealing with a specific technology-enabled abuse issue may wish to seek *legal advice* focused on their specific situation. Only a lawyer licensed in the relevant jurisdiction, who has been apprised of all relevant facts, may provide legal advice.

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A. CRIMINAL LAWS THAT MAY APPLY TO TECHNOLOGY-ENABLED VIOLENCE AGAINST WOMEN

INTRODUCTION

This section discusses relevant *Criminal Code* provisions[18] that *may* apply to technology-enabled violence against women. The provisions of each section are explained in lay terms, along with commentary that generally discusses which scenarios are captured, or not, by that particular provision. Relevant issues are noted for each provision (e.g. gaps in the law). Please note that some provisions mentioned may also apply in the context of physical violence.

Offences Listed

[18] There are no other criminal statutes in Canada that address stalking or similar behavior. The *Criminal Code of Canada* applies uniformly throughout the country.

Physical and Sexual Violence Offences

In addition to the offences discussed in this paper, there are a number of additional *Criminal Code* offences that may apply to actual physical or sexual violence:

- Homicide: murder, manslaughter
- Assault (all tiers)
- Sexual assault (all tiers)
- Kidnapping
- Forcible confinement
- Robbery
- Mischief (vandalism).

The above is not intended to be an exhaustive list.

Legislative Issues / Recommendations

The following is a brief summary of issues and recommendations regarding the current criminal law. Please refer to the analysis for each provision for further detail.

Voyeurism (§162): There is a major gap in that only *surreptitious* observation or recording is prohibited. A perhaps far more common scenario is a recording of nudity and/or sexual activity made consensually (perhaps even by the victim), but then shared with others or posted online without consent of all participants. Few people would likely want to learn that their "sex tape" was posted online for all the world to view and copy, yet this is not a criminal offence in Canada so long as a) the original recording was made consensually, and b) all participants are at least 18 years old. It would seem straightforward to expand §162 to include dissemination of objectively private video/images without consent.

Harassing / indecent telephone calls (§372): Subsections (2) and (3) criminalize harassing and indecent communications, but only when made by telephone. In the Internet age, these subsections should be amended to cover all such communications, irrespective of the specific technical means used. Such an amendment has been proposed on several occasions, most recently as part of Bill C-30.[19]

[19] Bill C-30: *An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts*

VOYEURISM § 162

This section criminalizes the *surreptitious* observation and/or visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, under either of two conditions:

- The person observed/recorded is nude or engaged in sexual activity, or
- The observation and/or recording is made for a sexual purpose.

Surreptitious observation is an offence whether or not a recording is made (i.e. "peeping Tom" scenario). Any recording must be visual in nature (i.e. photo or video) to come within the provisions of § 162; an audio-only recording may constitute an offence under Part VI of the *Criminal Code*.

Voyeurism

162. (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

(*a*) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;

(*b*) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or

(*c*) the observation or recording is done for a sexual purpose.

Definition of *"visual recording"*

(2) In this section, *"visual recording"* includes a photographic, film or video recording made by any means.

Exemption

(3) Paragraphs (1)(*a*) and (*b*) do not apply to a peace officer who, under the authority of a warrant issued under section 487.01, is carrying out any activity referred to in those paragraphs.

Printing, publication, etc., of voyeuristic recordings

(4) Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available.

Punishment

(5) Every one who commits an offence under subsection (1) or (4)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) is guilty of an offence punishable on summary conviction.

Defence

(6) No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good.

Question of law, motives

(7) For the purposes of subsection (6),

(*a*) it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good; and

(*b*) the motives of an accused are irrelevant.

Comment

The applicability of §162 is limited to circumstances where a) there is a reasonable expectation of privacy, b) nudity, sexual activity, or a sexual purpose is involved, *and* c) there is surreptitious observation and/or recording. A classic example would be a video camera secreted in a public washroom stall, or in someone's bedroom.

Whether the "reasonable expectation of privacy" exists is determined objectively against the circumstances in which the observation or recording was made. This would include consideration of the location and circumstances, and possibly also the subjective expectations of the person(s) recorded.

Surreptitious audio recordings are addressed in the *Criminal Code* in Part VI ("Invasion of Privacy").

A major gap is that §162 addresses only the *surreptitious* recording (or observation) of nudity or sexual activity. A recording made consensually is not a crime (e.g. a "sex tape" where *both* parties are aware that a recording is being made). It would still be an offence if one participant knew about the recording, but the other did not, even if the sexual activity itself was fully consensual.

Nothing in §162 prohibits the subsequent *dissemination* of a voyeuristic video (e.g. sex tape) that was created consensually. Numerous online pornography sites accepted video uploads from anyone without requiring informed consent by all those depicted in the recorded activities. Once uploaded, videos can be readily replicated to other sites and to viewers' own computers. A malicious (ex-)partner thus faces no criminal sanctions for disseminating "made-at-home" pornography without the consent of all concerned, so long as it was originally consensually recorded.

A key exception is if any person depicted is a minor. Any such recording that was not made consensually would be child pornography from the moment of creation, in addition to being voyeuristic. A recording made consensually may not be child pornography if kept strictly private for the exclusive use of the creator(s), but would become child pornography if provided to anyone else.

A blackmail-type threat to disseminate a sex tape or other voyeuristic recording in order to compel behavior may constitute extortion under §346, or criminal intimidation under §423. It would not matter whether the recording does in fact exist, or whether any such recording was originally made consensually.

Section 162 does not criminalize surreptitious recording or observation of someone in everyday circumstances where nudity or sexual activity is not involved. One can readily imagine a broad range of circumstances where surreptitious video recording could occur that did not fall within both a) and b) above, but would nonetheless be very troubling for the person targeted (e.g. "dash cam" hidden in her car). Repeated watching a person may constitute criminal harassment under §264, but the victim would need to be aware of the surveillance in order for it to be harassment.

A variety of small and relatively inexpensive video cameras ("spy cams") are readily available for purchase by anyone. These are designed for concealment, and can be hidden in a wide range of everyday objects or locations (e.g. a book on a bookshelf, or in the corner of a car dashboard). Many "spy cams" use "pinhole" lenses, in which the camera body is hidden (e.g. behind a wall) while the separate lens is so small that it can be easily overlooked or concealed; these offer additional concealment options.

A stalker can conceal one or more of these cameras in any location to which he can obtain physical access. Many of these cameras transmit their video to a remote user via radio signals or the Internet. In other words, the person who installed the camera may not need to have direct access to it again in order to obtain the video.

Spy cameras can be installed in numerous places inside a person's home. Cameras may have been previously installed any point in time that the stalker did have, or could have obtained, physical access to the premises (e.g. via a dating or conjugal relationship). An intimate partner could thus have installed cameras long before the other person in the relationship developed concerns about his behavior.

Some surveillance camera models come pre-packaged in forms that resemble objects commonly found in the home (e.g. smoke detector, clock radio, book, teddy bear). Other people in the home may have no reason to suspect that such devices may contain a hidden camera.

It is relatively easy to gain entry into most vehicles without a key, by using a “slider” to unlock a door. A camera can then be concealed in a corner of the dash to record who is in the vehicle, and possibly to assist in identifying where the driver goes (by capturing the scene outside of the car). As noted above, a camera secreted in a car is unlikely to constitute an offence against §162.

Many mobile phones and tablets now include cameras, some of which can record video in addition to still images. These devices may not necessarily provide an indication that the camera is recording. The camera on a victim’s own phone could be activated surreptitiously through “spyware” installed by a stalker.

TRESPASSING AT NIGHT § 177

This section criminalizes loitering or prowling at night on another person's property in the vicinity of a residence. The *Criminal Code* defines "night" as the hours between 9pm and 6am (irrespective of the actual hours of darkness).

> **Trespassing at night**
>
> **177.** Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

Comment

The Crown does not need to prove specific intent (malicious or otherwise) on the part of the accused only that he was loitering or prowling during the hours defined as "night". The accused can offer a defense of lawful excuse, but has the burden to prove this.

The accused must be on private property in order to be charged with this offence; it is not a crime to be on public property (e.g. a municipal sidewalk). This has severe impact on those being stalked by perpetrators.

INVASION OF PRIVACY (PART VI, §§ 184-193.1)

This Part of the *Criminal* Code prohibits wiretapping in general, while also implementing the regime whereby law enforcement can conduct lawful surveillance under a judicial warrant. It contains significant complexity, much of which is centered on the portions that provide for lawful surveillance.

The specific sections that define relevant criminal offences include §184 (interception of private communication), §184.5 (interception of radio-based private communication, i.e. mobile telephone conversations)), §191 (possession of interception device), §193 (unauthorized use or disclosure of interception), and §193.1 (unauthorized use or disclosure of radio-based interception).

The entire text of Part VI is not replicated here due to its length and complexity; only the specific offences mentioned above are extracted.

Interception

184. (1) Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Saving provision

(2) Subsection (1) does not apply to

(*a*) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

(*b*) a person who intercepts a private communication in accordance with an authorization or pursuant to section 184.4 or any person who in good faith aids in any way another person who the aiding person believes on reasonable grounds is acting with an authorization or pursuant to section 184.4;

(*c*) a person engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication,

(i) if the interception is necessary for the purpose of providing the service,

(ii) in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks, or

(iii) if the interception is necessary to protect the person's rights or property directly related to providing the service;

(*d*) an officer or servant of Her Majesty in right of Canada who engages in radio frequency spectrum management, in respect of a private communication intercepted by that officer or

servant for the purpose of identifying, isolating or preventing an unauthorized or interfering use of a frequency or of a transmission; or

(*e*) a person, or any person acting on their behalf, in possession or control of a computer system, as defined in subsection 342.1(2), who intercepts a private communication originating from, directed to or transmitting through that computer system, if the interception is reasonably necessary for

(i) managing the quality of service of the computer system as it relates to performance factors such as the responsiveness and capacity of the system as well as the integrity and availability of the system and data, or

(ii) protecting the computer system against any act that would be an offence under subsection 342.1(1) or 430(1.1).

Use or retention

(3) A private communication intercepted by a person referred to in paragraph (2)(*e*) can be used or retained only if

(*a*) it is essential to identify, isolate or prevent harm to the computer system; or

(*b*) it is to be disclosed in circumstances referred to in subsection 193(2).

Interception of radio-based telephone communications

184.5 (1) Every person who intercepts, by means of any electro-magnetic, acoustic, mechanical or other device, maliciously or for gain, a radio-based telephone communication, if the originator of the communication or the person intended by the originator of the communication to receive it is in Canada, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Other provisions to apply

(2) Section 183.1, subsection 184(2) and sections 184.1 to 190 and 194 to 196 apply, with such modifications as the circumstances require, to interceptions of radio-based telephone communications referred to in subsection (1).

Possession, etc.

191. (1) Every one who possesses, sells or purchases any electro-magnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Exemptions

(2) Subsection (1) does not apply to

(*a*) a police officer or police constable in possession of a device or component described in subsection (1) in the course of his employment;

(*b*) a person in possession of such a device or component for the purpose of using it in an interception made or to be made in accordance with an authorization;

(*b.1*) a person in possession of such a device or component under the direction of a police officer or police constable in order to assist that officer or constable in the course of his duties as a police officer or police constable;

(*c*) an officer or a servant of Her Majesty in right of Canada or a member of the Canadian Forces in possession of such a device or component in the course of his duties as such an officer, servant or member, as the case may be; and

(*d*) any other person in possession of such a device or component under the authority of a licence issued by the Minister of Public Safety and Emergency Preparedness.

Terms and conditions of licence

(3) A licence issued for the purpose of paragraph (2)(*d*) may contain such terms and conditions relating to the possession, sale or purchase of a device or component described in subsection (1) as the Minister of Public Safety and Emergency Preparedness may prescribe.

Disclosure of information

193. (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(*a*) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(*b*) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Exemptions

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

(*b*) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

(*c*) in giving notice under section 189 or furnishing further particulars pursuant to an order under section 190;

(*d*) in the course of the operation of

(i) a telephone, telegraph or other communication service to the public,

(ii) a department or an agency of the Government of Canada, or

(iii) services relating to the management or protection of a computer system, as defined in subsection 342.1(2),

if the disclosure is necessarily incidental to an interception described in paragraph 184(2)(*c*), (*d*) or (*e*);

(*e*) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or

(*f*) where the disclosure is made to the Director of the Canadian Security Intelligence Service or to an employee of the Service for the purpose of enabling the Service to perform its duties and functions under section 12 of the *Canadian Security Intelligence Service Act*.

Publishing of prior lawful disclosure

(3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(*a*).

Disclosure of information received from interception of radio-based telephone communications

193.1 (1) Every person who wilfully uses or discloses a radio-based telephone communication or who wilfully discloses the existence of such a communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, if

(*a*) the originator of the communication or the person intended by the originator of the communication to receive it was in Canada when the communication was made;

(*b*) the communication was intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator of the communication or of the person intended by the originator to receive the communication; and

(*c*) the person does not have the express or implied consent of the originator of the communication or of the person intended by the originator to receive the communication.

Other provisions to apply

(2) Subsections 193(2) and (3) apply, with such modifications as the circumstances require, to disclosures of radio-based telephone communications.

Comment

Although named "Invasion of Privacy", Part VI actually applies only to the interception of oral communications or telecommunications.

§184 prohibits interception by a third party of private communications (i.e. electronic "bugging" and "wiretapping" of telecommunications). It is not a crime under this section to record one's own telephone calls.[20]

A "communication" is legally defined as a discussion between two or more parties; merely recording the numbers called or received by a telephone is *not* a communication within the meaning of this section.

§184.5 prohibits interception of private radio-based telephone communications (e.g. marine radio-telephone services), but only when the interception is made maliciously or for gain. Non-malicious use of a radio "scanner" is not a crime.

§191 criminalizes possession of any device that could be used to commit a violation of §§ 184 / 184.5. This section may also apply to video surveillance equipment used in circumstances where someone has a reasonable expectation of privacy (per §487.01(5)).

In reality, covert surveillance equipment is widely available for purchase by anyone, in both retail stores and online.

§§ 193 / 193.1 prohibit the disclosure of the existence or contents of any intercept, whether obtained lawfully or not. This creates an additional crime if the perpetrator of an illegal wiretap uses or discloses the intercept in any way. There are exceptions if the disclosure is made in evidence in a civil proceeding (§193(2)(a)), or if it is provided to CSIS (§193(2)(f)).

Per §194, a person convicted of an offence under §§ 193 / 193.1 may be ordered to pay punitive damages.

[20] The relevant provincial privacy law, if any, should be consulted to ensure there is no other prohibition against recording one's own telephone calls (or other verbal communications) without the consent of all parties. For example, §1(4) of BC's *Privacy Act* states "privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass."

CRIMINAL HARASSMENT § 264

The *Criminal Code* defines harassment as repeatedly following someone, repeatedly communicating with someone (whether directly or indirectly), besetting or watching another person's home or workplace, or engaging in threatening conduct towards a person or his/her family. Harassment becomes a criminal offence when it causes another person to reasonably, in all the circumstances, fear for their own safety, or the safety of another person known to them.

Criminal harassment

264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

Prohibited conduct

(2) The conduct mentioned in subsection (1) consists of

(*a*) repeatedly following from place to place the other person or anyone known to them;

(*b*) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

(*c*) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or

(*d*) engaging in threatening conduct directed at the other person or any member of their family.

Punishment

(3) Every person who contravenes this section is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(*b*) an offence punishable on summary conviction.

Factors to be considered

(4) Where a person is convicted of an offence under this section, the court imposing the sentence on the person shall consider as an aggravating factor that, at the time the offence was committed, the person contravened

(*a*) the terms or conditions of an order made pursuant to section 161 or a recognizance entered into pursuant to section 810, 810.1 or 810.2; or

(*b*) the terms or conditions of any other order or recognizance made or entered into under the common law or a provision of this or any other Act of Parliament or of a province that is similar in effect to an order or recognizance referred to in paragraph (*a*).

Reasons

(5) Where the court is satisfied of the existence of an aggravating factor referred to in subsection (4), but decides not to give effect to it for sentencing purposes, the court shall give reasons for its decision.

Comment

Conduct listed in sub-sections (2)(a) ("following") and (2)(b) ("communicating") must occur "repeatedly" in order to constitute harassment; "repeatedly" has been judicially defined in this context to mean "more than once". For the conduct mentioned in the other sub-sections (i.e. besetting or watching a place, and threatening conduct), a single episode can constitute harassment if sufficiently egregious.

As with uttering threats (see §264.1 below), whether conduct amounts to "threatening" will be assessed objectively under all the circumstances. Whether the complainant is justifiably in fear of her own or someone else's safety will similarly be assessed objectively. An indirect threat could also constitute counseling to commit an offence under §22 or §464.

The Crown must show that the perpetrator knew, or was reckless, that the other person was being harassed by their conduct. In some situations, this may require the perpetrator first be given a clear warning, ideally by an independent party such as the police or a lawyer, that their behavior is unwelcome by the complainant, and thus will attract criminal liability if it continues.

A person can be convicted of criminal harassment even if the following, watching, or other harassing activity was carried out by a third party (e.g. private detective) on the perpetrator's behalf.

The federal Department of Justice has published a detailed handbook on §264 for police and prosecutors.[21]

[21] "Criminal Harassment: A Handbook for Police and Crown Prosecutors", March 2004: http://www.justice.gc.ca/eng/pi/fv-vf/pub/har/index.html

UTTERING THREATS § 264.1

This section criminalizes a) threats of death or bodily harm made against any person, b) threats to burn, damage, or destroy any property, and c) threats to harm any animal belonging to a person. The threat can be communicated in any manner; whether words or behavior constitute a threat is assessed objectively against the circumstances in which the alleged threat was communicated. In other words, would a reasonable person understand the message to be a threat?

Uttering threats

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(*a*) to cause death or bodily harm to any person;

(*b*) to burn, destroy or damage real or personal property; or

(*c*) to kill, poison or injure an animal or bird that is the property of any person.

Punishment

(2) Every one who commits an offence under paragraph (1)(*a*) is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Idem

(3) Every one who commits an offence under paragraph (1)(*b*) or (*c*)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(*b*) is guilty of an offence punishable on summary conviction.

Comment

This section is generally straightforward, with a crime occurring anytime that a message is conveyed in any manner that would reasonably be understood to constitute a threat against a person, property, or owned animal. The intended victim need not be aware of the threat.

"Bodily harm", as defined in the *Criminal Code* and related jurisprudence, includes both physical and psychological integrity, as well as health and well-being. A threat to commit a sexual assault will constitute a threat of bodily harm in most circumstances.

Threatening conduct made for the purpose of compelling behavior may also constitute intimidation under § 423 / 423.1. An indirect threat may constitute counseling to commit an offence under §22 or §464.

DEFAMATORY LIBEL §§ 297-317

These sections criminalize the communication of any defamatory libel that is "likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person".

§§ 299-301 define the specific offences that prohibit the publication of defamatory libel. § 302 describes the offence of extortion by libel. Subsequent sections provide various defenses, and clarify the circumstances under which someone may or may not be convicted of the crime of defamatory libel.

Definition of *"newspaper"*

297. In sections 303, 304 and 308, *"newspaper"* means any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding thirty-one days, that contains advertisements, exclusively or principally.

Definition

298. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

Mode of expression

(2) A defamatory libel may be expressed directly or by insinuation or irony

(*a*) in words legibly marked on any substance; or

(*b*) by any object signifying a defamatory libel otherwise than by words.

Publishing

299. A person publishes a libel when he

(*a*) exhibits it in public;

(*b*) causes it to be read or seen; or

(*c*) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.

Punishment of libel known to be false

300. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Punishment for defamatory libel

301. Every one who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Extortion by libel

302. (1) Every one commits an offence who, with intent

(*a*) to extort money from any person, or

(*b*) to induce a person to confer on or procure for another person an appointment or office of profit or trust,

publishes or threatens to publish or offers to abstain from publishing or to prevent the publication of a defamatory libel.

Idem

(2) Every one commits an offence who, as the result of the refusal of any person to permit money to be extorted or to confer or procure an appointment or office of profit or trust, publishes or threatens to publish a defamatory libel.

Punishment

(3) Every one who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Proprietor of newspaper presumed responsible

303. (1) The proprietor of a newspaper shall be deemed to publish defamatory matter that is inserted and published therein, unless he proves that the defamatory matter was inserted in the newspaper without his knowledge and without negligence on his part.

General authority to manager when negligence

(2) Where the proprietor of a newspaper gives to a person general authority to manage or conduct the newspaper as editor or otherwise, the insertion by that person of defamatory matter in the newspaper shall, for the purposes of subsection (1), be deemed not to be negligence on the part of the proprietor unless it is proved that

(*a*) he intended the general authority to include authority to insert defamatory matter in the newspaper; or

(*b*) he continued to confer general authority after he knew that it had been exercised by the insertion of defamatory matter in the newspaper.

Selling newspapers

(3) No person shall be deemed to publish a defamatory libel by reason only that he sells a number or part of a newspaper that contains a defamatory libel, unless he knows that the number or part contains defamatory matter or that defamatory matter is habitually contained in the newspaper.

Selling book containing defamatory libel

304. (1) No person shall be deemed to publish a defamatory libel by reason only that he sells a book, magazine, pamphlet or other thing, other than a newspaper that contains defamatory matter, if, at the time of the sale, he does not know that it contains the defamatory matter.

Sale by servant

(2) Where a servant, in the course of his employment, sells a book, magazine, pamphlet or other thing, other than a newspaper, the employer shall be deemed not to publish any defamatory matter contained therein unless it is proved that the employer authorized the sale knowing that

(*a*) defamatory matter was contained therein; or

(*b*) defamatory matter was habitually contained therein, in the case of a periodical.

Publishing proceedings of courts of justice

305. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

(*a*) in a proceeding held before or under the authority of a court exercising judicial authority; or

(*b*) in an inquiry made under the authority of an Act or by order of Her Majesty, or under the authority of a public department or a department of the government of a province.

Parliamentary papers

306. No person shall be deemed to publish a defamatory libel by reason only that he

(*a*) publishes to the Senate or House of Commons or to the legislature of a province defamatory matter contained in a petition to the Senate or House of Commons or to the legislature of a province, as the case may be;

(*b*) publishes by order or under the authority of the Senate or House of Commons or of the legislature of a province a paper containing defamatory matter; or

(*c*) publishes, in good faith and without ill-will to the person defamed, an extract from or abstract of a petition or paper mentioned in paragraph (*a*) or (*b*).

Fair reports of parliamentary or judicial proceedings

307. (1) No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons or the legislature of a province, or a committee thereof, or of the public

proceedings before a court exercising judicial authority, or publishes, in good faith, any fair comment on any such proceedings.

Divorce proceedings an exception

(2) This section does not apply to a person who publishes a report of evidence taken or offered in any proceeding before the Senate or House of Commons or any committee thereof, on a petition or bill relating to any matter of marriage or divorce, if the report is published without authority from or leave of the House in which the proceeding is held or is contrary to any rule, order or practice of that House.

Fair report of public meeting

308. No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, in a newspaper, a fair report of the proceedings of any public meeting if

(*a*) the meeting is lawfully convened for a lawful purpose and is open to the public;

(*b*) the report is fair and accurate;

(*c*) the publication of the matter complained of is for the public benefit; and

(*d*) he does not refuse to publish in a conspicuous place in the newspaper a reasonable explanation or contradiction by the person defamed in respect of the defamatory matter.

Public benefit

309. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.

Fair comment on public person or work of art

310. No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments

(*a*) on the public conduct of a person who takes part in public affairs; or

(*b*) on a published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if the comments are confined to criticism thereof.

When truth a defense

311. No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.

Publication invited or necessary

312. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

(*a*) on the invitation or challenge of the person in respect of whom it is published, or

(*b*) that it is necessary to publish in order to refute defamatory matter published in respect of him by another person,

if he believes that the defamatory matter is true and it is relevant to the invitation, challenge or necessary refutation, as the case may be, and does not in any respect exceed what is reasonably sufficient in the circumstances.

Answer to inquiries

313. No person shall be deemed to publish a defamatory libel by reason only that he publishes, in answer to inquiries made to him, defamatory matter relating to a subject-matter in respect of which the person by whom or on whose behalf the inquiries are made has an interest in knowing the truth or who, on reasonable grounds, the person who publishes the defamatory matter believes has such an interest, if

(*a*) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries;

(*b*) the person who publishes the defamatory matter believes that it is true;

(*c*) the defamatory matter is relevant to the inquiries; and

(*d*) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.

Giving information to person interested

314. No person shall be deemed to publish a defamatory libel by reason only that he publishes to another person defamatory matter for the purpose of giving information to that person with respect to a subject-matter in which the person to whom the information is given has, or is believed on reasonable grounds by the person who gives it to have, an interest in knowing the truth with respect to that subject-matter if

(*a*) the conduct of the person who gives the information is reasonable in the circumstances;

(*b*) the defamatory matter is relevant to the subject-matter; and

(*c*) the defamatory matter is true, or if it is not true, is made without ill-will toward the person who is defamed and is made in the belief, on reasonable grounds, that it is true.

Publication in good faith for redress of wrong

315. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter in good faith for the purpose of seeking remedy or redress for a private or public wrong or grievance from a person who has, or who on reasonable grounds he believes has, the right or is under an obligation to remedy or redress the wrong or grievance, if

(*a*) he believes that the defamatory matter is true;

(*b*) the defamatory matter is relevant to the remedy or redress that is sought; and

(*c*) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.

Proving publication by order of legislature

316. (1) An accused who is alleged to have published a defamatory libel may, at any stage of the proceedings, adduce evidence to prove that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or the legislature of a province.

Directing verdict

(2) Where at any stage in proceedings referred to in subsection (1) the court, judge, justice or provincial court judge is satisfied that the matter alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or the legislature of a province, he shall direct a verdict of not guilty to be entered and shall discharge the accused.

Certificate of order

(3) For the purposes of this section, a certificate under the hand of the Speaker or clerk of the Senate or House of Commons or the legislature of a province to the effect that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate, House of Commons or the legislature of a province, as the case may be, is conclusive evidence thereof.

Verdicts in cases of defamatory libel

317. Where, on the trial of an indictment for publishing a defamatory libel, a plea of not guilty is pleaded, the jury that is sworn to try the issue may give a general verdict of guilty or not guilty on the whole matter put in issue on the indictment, and shall not be required or directed by the judge to find the defendant guilty merely on proof of publication by the defendant of the alleged defamatory libel, and of the sense ascribed thereto in the indictment, but the judge may, in his discretion, give a direction or opinion to the jury on the matter in issue as in other criminal proceedings, and the jury may, on the issue, find a special verdict.

Comment

These sections may apply in cases where a perpetrator uses libel as a means to bring hatred, contempt, or ridicule to the victim, or where libel is threatened in the course of extortion.

It is apparently very rare for charges to be brought under these sections.[22] The victim would nonetheless have the option of filing a civil lawsuit for the tort of defamation.

[22] A 2009 sentencing appeal in a defamatory libel case mentioned that counsel collectively could identify only three prior cases, all from the 1990s: *R v Knight*, 2009 ABCA 86 at ¶16.

UNAUTHORIZED USE OF COMPUTER § 342.1

This section criminalizes any unauthorized use of or entry into any computer system. §342.2 criminalizes the possession of any device that could be used to commit an offence under §342.1.

Unauthorized use of computer

342.1 (1) Every one who, fraudulently and without colour of right,

(*a*) obtains, directly or indirectly, any computer service,

(*b*) by means of an electro-magnetic, acoustic, mechanical or other device, intercepts or causes to be intercepted, directly or indirectly, any function of a computer system,

(*c*) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (*a*) or (*b*) or an offence under section 430 in relation to data or a computer system, or

(*d*) uses, possesses, traffics in or permits another person to have access to a computer password that would enable a person to commit an offence under paragraph (*a*), (*b*) or (*c*)

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or is guilty of an offence punishable on summary conviction.

Definitions

(2) In this section,

"computer password" means any data by which a computer service or computer system is capable of being obtained or used;

"computer program" means data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function;

"computer service" includes data processing and the storage or retrieval of data;

"computer system" means a device that, or a group of interconnected or related devices one or more of which,

(*a*) contains computer programs or other data, and

(*b*) pursuant to computer programs,

(i) performs logic and control, and

(ii) may perform any other function;

"data" means representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer system;

"electro-magnetic, acoustic, mechanical or other device" means any device or apparatus that is used or is capable of being used to intercept any function of a computer system, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing;

"function" includes logic, control, arithmetic, deletion, storage and retrieval and communication or telecommunication to, from or within a computer system;

"intercept" includes listen to or record a function of a computer system, or acquire the substance, meaning or purport thereof;

"traffic" means, in respect of a computer password, to sell, export from or import into Canada, distribute or deal with in any other way.

Possession of device to obtain computer service

342.2 (1) Every person who, without lawful justification or excuse, makes, possesses, sells, offers for sale or distributes any instrument or device or any component thereof, the design of which renders it primarily useful for committing an offence under section 342.1, under circumstances that give rise to a reasonable inference that the instrument, device or component has been used or is or was intended to be used to commit an offence contrary to that section,

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(*b*) is guilty of an offence punishable on summary conviction.

Forfeiture

(2) Where a person is convicted of an offence under subsection (1), any instrument or device, in relation to which the offence was committed or the possession of which constituted the offence, may, in addition to any other punishment that may be imposed, be ordered forfeited to Her Majesty, whereupon it may be disposed of as the Attorney General directs.

Limitation

(3) No order of forfeiture may be made under subsection (2) in respect of any thing that is the property of a person who was not a party to the offence under subsection (1).

Comment

This is a relatively straightforward provision that criminalizes unauthorized entry (including "hacking") into any private account or computer system, which would include services such as Facebook and e-mail. Prosecution would be problematic in cases where a couple shared joint access to a computer or a particular service (e.g. e-mail account), or otherwise shared passwords, since that would negate the requirement that access be "unauthorized".

§430(1.1) (“data mischief”) may also apply in circumstances where unauthorized use is followed by data destruction or interference with legitimate use.

§342.2 criminalizes possession of any device that could be used to commit an offence under §342.1.

Nonetheless, hardware and software “keyloggers” are readily available at retail and online ”spy shops”. These can be surreptitiously installed in seconds to capture all keystrokes made on a computer, copy e-mail sent and received, duplicate web browser history, etc., providing the “hacker” with a complete record of all use of a computer (usually surreptitiously transmitted to him by e-mail). Some software keyloggers can be installed from afar by masquerading as a genuine e-mail attachment; the “hacker” sends the keylogger program to the target via e-mail, with the target unwittingly installing the keylogger when she opens the apparently innocuous attachment. This means the stalker doesn’t even require physical access to the computer. The victim may not even suspect that her computer has now been compromised.

In addition to being able to see a duplicate of everything done on the victim’s computer, use of a keylogger means all bank, e-mail, and other accounts accessed from that computer are also compromised. The stalker could then create false evidence (e.g. send threatening e-mails to himself that apparently came from the victim), access the victim’s bank accounts, see most of her communications, and possibly track some of her movements (e.g. know when and where she was meeting someone).

It can be very difficult to detect the use of keyloggers. Anyone concerned about a current or former intimate partner may want to err on the side of caution, and assume that any computer to which he may have had access has already been compromised by a keylogger. Passwords for accounts accessed from a potentially compromised computer should be changed from a safer (i.e. different) computer to which the stalker does not have access.

EXTORTION § 346

Extortion occurs when someone uses threats or violence with the intent to obtain anything.

Extortion

346. (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

Saving

(2) A threat to institute civil proceedings is not a threat for the purposes of this section.

Comment

"Anything" has a broad, unrestricted definition, and includes extorting sexual favours. Any threat that is unlawful is sufficient (e.g. the threat of an unlawful job termination). Per subsection (2), a threat to institute civil proceedings does not constitute extortion.

The accused's subjective belief that he was entitled to whatever he was seeking to obtain is irrelevant, as is whether he actually was so entitled. The threat or violence itself creates the offence. The victim does not need to acquiesce for the offence to be complete.

See also extortion by libel (§302) and intimidation (§423).

BREAKING AND ENTERING §348

Breaking and entering is commonly known as "burglary", although the *Criminal Code* does not use the latter term.

Breaking and entering with intent, committing offence or breaking out

348. (1) Every one who

(*a*) breaks and enters a place with intent to commit an indictable offence therein,

(*b*) breaks and enters a place and commits an indictable offence therein, or

(*c*) breaks out of a place after

(i) committing an indictable offence therein, or

(ii) entering the place with intent to commit an indictable offence therein,

is guilty

(*d*) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life, and

(*e*) if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

Presumptions

(2) For the purposes of proceedings under this section, evidence that an accused

(*a*) broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein; or

(*b*) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after

(i) committing an indictable offence therein, or

(ii) entering with intent to commit an indictable offence therein.

Definition of "place"

(3) For the purposes of this section and section 351, *"place"* means

(*a*) a dwelling-house;

(*b*) a building or structure or any part thereof, other than a dwelling-house;

(*c*) a railway vehicle, a vessel, an aircraft or a trailer; or

(*d*) a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

Comment

Breaking and entering is a distinct criminal offence only when it is combined with the intended or actual committal of another *indictable* offence (e.g. theft over $5000) on the premises. While this is presumed in the absence of evidence to the contrary, the accused could offer the defense that he was on the premises for some lawful purpose, or intended nothing beyond a summary offence. In that case, other laws may still apply (e.g. mischief).

§349 (listed in the following section) creates the separate offence of being unlawfully in a residence, which can be used in any situation where a stalker unlawfully enters the victim's home but when the separate indictable offence required by §348 cannot be established on the evidence.

Nothing needs to be physically broken in order for the offence of breaking and entering to be complete. Per §321, "break" means:

(*a*) to break any part, internal or external, or

(*b*) to open any thing that is used or intended to be used to close or to cover an internal or external opening;

The meaning of "entering" is provided in §350:

Entrance

350. For the purposes of sections 348 and 349,

(*a*) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; and

(*b*) a person shall be deemed to have broken and entered if

(i) he obtained entrance by a threat or an artifice or by collusion with a person within, or

(ii) he entered without lawful justification or excuse, the proof of which lies on him, by a permanent or temporary opening.

For example, sliding open a window and climbing in would constitute "breaking and entering" per the above definitions.

BEING UNLAWFULLY IN A DWELLING-HOUSE §349

Places of residence have an additional level of protection in the *Criminal Code*, in that, unlike a business or other structure, any unlawful entry is a serious crime. The onus is on the accused to establish that he was in the residence lawfully.

Being unlawfully in dwelling-house

349. (1) Every person who, without lawful excuse, the proof of which lies on that person, enters or is in a dwelling-house with intent to commit an indictable offence in it is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

Presumption

(2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence therein.

Comment

Section §349 can be used to prosecute a stalker/abuser who enters the victim's residence "without lawful excuse" (i.e. an express invitation), but without intending to or actually committing the separate indictable offence required by §348. For example, a stalker may "inspect" the victim's home or rearrange objects to show that he was there, but not commit any theft or other offence.

While the Crown must prove the accused entered the home, the onus is on the accused to establish that he was in the residence lawfully (i.e. had the permission of the owner or occupant to be there), or that he did not intend to commit an indictable offence therein. A civil protection (restraining) order or appropriate peace bond conditions may be conclusive evidence that he was not entitled to be on the premises (this may be relevant if the stalker once lived with the victim at the place in question).

Thermal imaging cameras[23] have been used to record proof that a stalker was on the premises. This may be a much more cost-effective investigatory approach than attempting 24/7 physical surveillance of a premises or suspected stalker.

"Dwelling-house" is defined in §2:

> *"dwelling-house"* means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes
>
> > (*a*) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passage-way, and
> >
> > (*b*) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence;

[23] A thermal imaging camera, sometimes called a forward-looking infrared (FLIR) camera, displays heat sources using analysis of the infrared spectrum emitted by objects relative to their background. These cameras can operate even in total darkness.

HARASSING/INDECENT TELEPHONE CALLS § 372

This section prohibits a) the conveyance of false information by telephone, letter, etc. with the intent to alarm or injure someone, b) indecent telephone calls made with the intent to alarm or annoy the recipient, and c) repeated telephone calls made with the intent to harass the recipient.

False messages

372. (1) Every one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio or otherwise information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Indecent telephone calls

(2) Every one who, with intent to alarm or annoy any person, makes any indecent telephone call to that person is guilty of an offence punishable on summary conviction.

Harassing telephone calls

(3) Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to that person is guilty of an offence punishable on summary conviction.

Comment

This section can be used to prosecute a stalker/abuser who uses the telephone to communicate with the victim in one or more of the ways described above.

It is still harassment if the target receives the impugned message / telephone calls indirectly by means of message(s) left on her personal voice mail. Repeatedly telephoning someone and hanging up without saying anything has been held to constitute harassment.

Harassing or indecent communication by means other than a telephone is not captured by subsections (2) or (3); only subsection (1) applies to communications by means other than telephones. In the Internet age, these subsections should be amended to cover all such communications, irrespective of the technical means used. The proposed Bill C-30 (*An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts)* does precisely that.

Depending on the content of any harassing messages, other charges that may be applicable include uttering threats (§264.1), criminal harassment (§264), and/or intimidation (§423).

IDENTITY THEFT & FRAUD §§ 402.1 / 402.2 / 403

§402.2 prohibits the possession of another person's identity information in circumstances giving rise to a reasonable inference that the information will be used to commit an indictable offence involving fraud or deceit.

"Identity information" is defined in §402.1, and includes standard demographic data about a person (e.g. name, address, date of birth), biological information (e.g. DNA and fingerprints), signature, credit card numbers, personal data from identity documents (e.g. driver's license number), passwords, and actual identity documents.

§403 prohibits fraudulent impersonation with the intent to obtain any property or gain an advantage, or to cause disadvantage to any person (it also prohibits impersonation for the purpose of obstructing justice).

Definition of *"identity information"*

> **402.1** For the purposes of sections 402.2 and 403, *"identity information"* means any information — including biological or physiological information — of a type that is commonly used alone or in combination with other information to identify or purport to identify an individual, including a fingerprint, voice print, retina image, iris image, DNA profile, name, address, date of birth, written signature, electronic signature, digital signature, user name, credit card number, debit card number, financial institution account number, passport number, Social Insurance Number, health insurance number, driver's licence number or password.

Identity theft

> **402.2** (1) Everyone commits an offence who knowingly obtains or possesses another person's identity information in circumstances giving rise to a reasonable inference that the information is intended to be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.
>
> **Trafficking in identity information**
>
> (2) Everyone commits an offence who transmits, makes available, distributes, sells or offers for sale another person's identity information, or has it in their possession for any of those purposes, knowing that or being reckless as to whether the information will be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.
>
> **Clarification**
>
> (3) For the purposes of subsections (1) and (2), an indictable offence referred to in either of those subsections includes an offence under any of the following sections:
>
> (*a*) section 57 (forgery of or uttering forged passport);
>
> (*b*) section 58 (fraudulent use of certificate of citizenship);

(*c*) section 130 (personating peace officer);

(*d*) section 131 (perjury);

(*e*) section 342 (theft, forgery, etc., of credit card);

(*f*) section 362 (false pretence or false statement);

(*g*) section 366 (forgery);

(*h*) section 368 (use, trafficking or possession of forged document);

(*i*) section 380 (fraud); and

(*j*) section 403 (identity fraud).

Jurisdiction

(4) An accused who is charged with an offence under subsection (1) or (2) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody. However, no proceeding in respect of the offence shall be commenced in a province without the consent of the Attorney General of that province if the offence is alleged to have been committed outside that province.

Punishment

(5) Everyone who commits an offence under subsection (1) or (2)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or

(*b*) is guilty of an offence punishable on summary conviction.

Identity fraud

403. (1) Everyone commits an offence who fraudulently personates another person, living or dead,

(*a*) with intent to gain advantage for themselves or another person;

(*b*) with intent to obtain any property or an interest in any property;

(*c*) with intent to cause disadvantage to the person being personated or another person; or

(*d*) with intent to avoid arrest or prosecution or to obstruct, pervert or defeat the course of justice.

Clarification

(2) For the purposes of subsection (1), personating a person includes pretending to be the person or using the person's identity information — whether by itself or in combination with identity information pertaining to any person — as if it pertains to the person using it.

Punishment

(3) Everyone who commits an offence under subsection (1)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(*b*) is guilty of an offence punishable on summary conviction.

Comment

A stalker/abuser, especially if he has been in an intimate relationship with the victim, may be able to obtain a considerable amount of identity information belonging to the victim. The identity information may have been obtained prior to any relationship ending. Use of a keylogger on the victim's computer may provide even more identity information to the perpetrator.

This information can then be used to fraudulently obtain goods or services under the name of the victim (e.g. placing an online order using the victim's credit card number), obtain the victim's property fraudulently (e.g. online access to the victim's bank account), or to cause disadvantage to the victim (e.g. ruin their credit rating by running up debts).

While much identity information (e.g. birthdate) may be readily available to an intimate partner, people can protect themselves from impersonation by others by not freely disclosing personal details in public forums such as social media sites.

Recovering from identity theft can be very time-consuming for a victim, especially as the extent of the problem may take some time to become apparent. A person leaving a relationship in circumstances where they are concerned about the possibility of identity theft may wish to act proactively by changing passwords *on a safe computer*, obtaining new credit cards, and/or by activating a "fraud alert" with banks and credit reporting agencies.

Password changes may not block the perpetrator if made or used on a computer that has been compromised by a keylogger, as the new passwords will be forwarded (like everything else) to the "hacker".

INTIMIDATION §§ 423 / 423.1

Criminal intimidation occurs when someone uses violence or threats for the purpose of compelling someone to either do something that they have the lawful right to abstain from, or to refrain from doing something they have the lawful right to do.

§423(1) outlines a variety of conduct that constitutes "intimidation" for the purposes of this section, including violence or threats of violence to the person or family member, injury to or hiding of property, persistently following the person, and watching or besetting the person's residence or workplace.

§423.1 outlines a similar prohibition against intimidation of a "justice system participant", who includes any informant, witness or prospective witness in a criminal proceeding. Repeated communication, whether direct or indirect, can constitute intimidation for this section (but not for §423). Most of the types of intimidating conduct defined in §423(1) also apply to §423.1.

Intimidation

423. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,

(*a*) uses violence or threats of violence to that person or his or her spouse or common-law partner or children, or injures his or her property;

(*b*) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged;

(*c*) persistently follows that person;

(*d*) hides any tools, clothes or other property owned or used by that person, or deprives him or her of them or hinders him or her in the use of them;

(*e*) with one or more other persons, follows that person, in a disorderly manner, on a highway;

(*f*) besets or watches the place where that person resides, works, carries on business or happens to be; or

(*g*) blocks or obstructs a highway.

Exception

(2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

Intimidation of a justice system participant or a journalist

423.1 (1) No person shall, without lawful authority, engage in conduct referred to in subsection (2) with the intent to provoke a state of fear in

(*a*) a group of persons or the general public in order to impede the administration of criminal justice;

(*b*) a justice system participant in order to impede him or her in the performance of his or her duties; or

(*c*) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.

Prohibited conduct

(2) The conduct referred to in subsection (1) consists of

(*a*) using violence against a justice system participant or a journalist or anyone known to either of them or destroying or causing damage to the property of any of those persons;

(*b*) threatening to engage in conduct described in paragraph (*a*) in Canada or elsewhere;

(*c*) persistently or repeatedly following a justice system participant or a journalist or anyone known to either of them, including following that person in a disorderly manner on a highway;

(*d*) repeatedly communicating with, either directly or indirectly, a justice system participant or a journalist or anyone known to either of them; and

(*e*) besetting or watching the place where a justice system participant or a journalist or anyone known to either of them resides, works, attends school, carries on business or happens to be.

Punishment

(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than fourteen years.

Comment

In general terms, these sections prohibit conduct intended to intimidate anyone from making their own choices in life (§423(1)), or of fully participating in the criminal justice system (§423.1). The intimidating conduct must fall within the specific definitions enumerated in §423(1) or §423.1, as appropriate.

From a technology-enabled abuse perspective, these sections would capture both online threats (and repeated communication in the case of §423.1), as well as physical behavior such as persistently following someone or watching/besetting their home or workplace.

Unlike the criminal harassment provisions (§264), there is no need to establish that the intimidating conduct reasonably led someone to be in fear. However, the intimidating conduct must be proven to be for the purpose of altering the victim's behavior or choices in life (i.e. doing something they don't want to, or not doing something they would like to).

The distinction between extortion (§346) and intimidation is that extortion a) requires threats or violence, and b) requires the perpetrator to have the intent to obtain something. Intimidation can include coercing the victim to refrain from exercising a lawful choice.

Depending on the nature of the conduct or communications, other relevant provisions may be uttering threats (§264.1), criminal harassment (§264), or extortion (§346). Any threatened dissemination of embarrassing video may give rise to charges for voyeurism (§162) or invasion of privacy (Part VI). An indirect threat may constitute counseling to commit an offence (§22 or §464).

DATA MISCHIEF § 430(1.1)

The *Criminal Code* broadly defines "mischief" as damage to or destruction of property (conventionally known as "vandalism"), and any interference with the lawful use or enjoyment of property. §430(1.1) specifically extends these general provisions to data systems, and prohibits the destruction or alteration of data, or interference with any person's lawful use of data.

Mischief

430. (1) Every one commits mischief who wilfully

(*a*) destroys or damages property;

(*b*) renders property dangerous, useless, inoperative or ineffective;

(*c*) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(*d*) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

Mischief in relation to data

(1.1) Every one commits mischief who wilfully

(*a*) destroys or alters data;

(*b*) renders data meaningless, useless or ineffective;

(*c*) obstructs, interrupts or interferes with the lawful use of data; or

(*d*) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.

Punishment

(2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and liable to imprisonment for life.

Punishment

(3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(*b*) is guilty of an offence punishable on summary conviction.

Idem

(4) Every one who commits mischief in relation to property, other than property described in subsection (3),

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(*b*) is guilty of an offence punishable on summary conviction.

Mischief relating to religious property

(4.1) Every one who commits mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin,

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(*b*) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Mischief in relation to cultural property

(4.2) Every one who commits mischief in relation to cultural property as defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on May 14, 1954, as set out in the schedule to the *Cultural Property Export and Import Act*,

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(*b*) is guilty of an offence punishable on summary conviction.

Idem

(5) Every one who commits mischief in relation to data

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(*b*) is guilty of an offence punishable on summary conviction.

Offence

(5.1) Every one who wilfully does an act or wilfully omits to do an act that it is his duty to do, if that act or omission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to property or data,

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) is guilty of an offence punishable on summary conviction.

Saving

(6) No person commits mischief within the meaning of this section by reason only that

(*a*) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment;

(*b*) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree on any matter relating to his employment; or

(*c*) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.

Idem

(7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

Definition of *"data"*

(8) In this section, *"data"* has the same meaning as in section 342.1.

Comment

This section directly criminalizes destructive "hacking", addressing alteration or destruction of information ("data") stored within a computer system, as well as interference with any user's legitimate access to such a system. This section can be used to prosecute a perpetrator who a) "hacks" into someone else's Facebook or email account, *and* alters or destroys data there, or b) does something to prevent or otherwise interfere with someone's legitimate access to such a system (e.g. by maliciously changing the login password).

Illegitimate access to a system, by itself, is not captured by this section, but rather by §342.1 (unauthorized use of computer). Alteration/destruction of data or interference with a legitimate user is required to come within this section (§430(1.1)).

COUNSELLING TO COMMIT AN OFFENCE §§ 22 / 464

Canadian law broadly defines criminal liability to include all those who have incited, encouraged, assisted, or participated in a crime. In general terms, one's specific role in a criminal enterprise is irrelevant to the question of criminal liability. The get-away driver waiting out front with the engine running is equally guilty of robbery as those who actually enter the bank.

Person counselling offence

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of *"counsel"*

(3) For the purposes of this Act, *"counsel"* includes procure, solicit or incite.

Counselling offence that is not committed

464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

(*a*) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and

(*b*) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

Comment

Section 22 provides that anyone who encourages, procures, or incites someone else to commit a crime becomes a party to (i.e. equally guilty of) that crime if it is in fact committed. The crime need not be committed precisely as the person counseling suggested, nor be limited in scope to what was suggested.

Section 464 creates the separate crime of counseling an offence when that offence is not actually committed.

These sections can be used to prosecute someone who does not directly threaten the victim, but instead encourages or incites another party to bring harm to her. This addresses the situation whereby an online perpetrator posts information about a person (e.g. where his "ex" lives), and advocates that someone should assault or cyberbully her.

The Crown must establish that the accused intended that the offence counseled be committed. Recklessness is insufficient as this could include counseling that was merely casual or accidental. The accused must positively advocate, procure, or incite the crime, not merely describe it. In other words, the accused must engage in more than "wishful thinking".

Depending on the context of what was said, other relevant offences could include uttering threats (§264.1), criminal harassment (§264), and/or intimidation (§423).

PEACE BONDS § 810

Peace bonds are the Canadian version of a restraining order issued by a criminal court. Any person who fears harm to themself or immediate family, or to their property, or anyone acting on their behalf, can apply to a Justice of the Peace to initiate the process.

A hearing is then conducted between the parties. The respondent has the right to be fully heard at this hearing. If the court agrees there are reasonable (i.e. objective) grounds for the complainant to be fearful of the respondent, the respondent may be ordered to enter into a recognizance.

In general terms, this recognizance (peace bond) obliges the respondent to keep the peace for a period of up to 12 months. Specific conditions may be included, for example, a "no contact" order.

Where injury or damage feared

810. (1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property.

Duty of justice

(2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.

Adjudication

(3) The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the person on whose behalf the information was laid has reasonable grounds for his or her fears,

(*a*) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance, including the conditions set out in subsections (3.1) and (3.2), as the court considers desirable for securing the good conduct of the defendant; or

(*b*) commit the defendant to prison for a term not exceeding twelve months if he or she fails or refuses to enter into the recognizance.

Conditions

(3.1) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited

ammunition or explosive substance, or all such things, for any period specified in the recognizance and, where the justice or summary conviction court decides that it is so desirable, the justice or summary conviction court shall add such a condition to the recognizance.

Surrender, etc.

(3.11) Where the justice or summary conviction court adds a condition described in subsection (3.1) to a recognizance order, the justice or summary conviction court shall specify in the order the manner and method by which

> (*a*) the things referred to in that subsection that are in the possession of the accused shall be surrendered, disposed of, detained, stored or dealt with; and
>
> (*b*) the authorizations, licences and registration certificates held by the person shall be surrendered.

Reasons

(3.12) Where the justice or summary conviction court does not add a condition described in subsection (3.1) to a recognizance order, the justice or summary conviction court shall include in the record a statement of the reasons for not adding the condition.

Idem

(3.2) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the informant, of the person on whose behalf the information was laid or of that person's spouse or common-law partner or child, as the case may be, to add either or both of the following conditions to the recognizance, namely, a condition

> (*a*) prohibiting the defendant from being at, or within a distance specified in the recognizance from, a place specified in the recognizance where the person on whose behalf the information was laid or that person's spouse or common-law partner or child, as the case may be, is regularly found; and
>
> (*b*) prohibiting the defendant from communicating, in whole or in part, directly or indirectly, with the person on whose behalf the information was laid or that person's spouse or common-law partner or child, as the case may be.

Forms

(4) A recognizance and committal to prison in default of recognizance under subsection (3) may be in Forms 32 and 23, respectively.

Modification of recognizance

(4.1) The justice or the summary conviction court may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

Procedure

(5) The provisions of this Part apply, with such modifications as the circumstances require, to proceedings under this section.

Breach of recognizance

811. A person bound by a recognizance under section 83.3, 810, 810.01, 810.1 or 810.2 who commits a breach of the recognizance is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

Comment

The peace bond process does not involve laying or prosecuting any criminal charges against the respondent. It is not a trial. If the complainant is successful at the hearing, the respondent will be ordered to enter into a recognizance, which is essentially a promise to "keep the peace" (i.e. not break the law). Getting conditions imposed such as "no contact" may provide greater value to the complainant than the mandatory promise to keep the peace that comes with every recognizance.

The respondent is entitled to contest the application for a peace bond, and be fully heard (i.e. hire a lawyer, lead evidence, and argue to the contrary) at the hearing. The complainant will need to lead evidence that demonstrates she is reasonably afraid of the respondent, thus demonstrating that it is appropriate for the court to order the respondent to enter into a peace bond. It is ideal if a Crown prosecutor will agree to lead this effort on behalf of the complainant.

If the respondent subsequently fails to keep the peace (assuming a peace bond was imposed), or breaches any condition of the recognizance (e.g. communicates with the complainant despite a "no contact" order), he will then have committed the criminal offence of "breach of recognizance" (§811), and can be arrested for that.

A peace bond can be imposed for any time period up to one year. While there is no provision for an extension, a complainant could theoretically start the process anew each year. This would require a fresh application and a new hearing. However, if the respondent has indeed kept the peace during the previous year, this may minimize any argument that he continues to objectively pose a threat.

Similar provisions (not listed above) can be used in cases where there is concern that someone may be associating with organized crime or potential terrorists (§810.01), may commit a sexual offence against someone under 16 (§810.1), or may commit a serious personal injury offence (§810.2). These provisions are normally employed only by the Crown (often in the context of a plea bargain involving other criminal charges), and require the consent of the Attorney General due to the more onerous conditions that may be imposed.

It will likely take time, often weeks or months, to schedule a hearing once the original application is made. There is no provision for a "temporary" peace bond in the interim. It is possible for a respondent to consent to a peace bond, negating the need to have a hearing.

Most provinces and territories have laws that allow a judge to issue a civil protective (restraining) order in certain cases. The process and circumstances under which such an order may be obtained varies from province to province, as are the consequences if a person bound by such an order subsequently violates it. Some provinces allow for a temporary protective order to be obtained on an *ex parte*[24] basis. In some provinces, a victim must initiate the process, in others the police or victim services may do so on their behalf. Some of these laws apply only to people who are currently or previously co-habited, or had children together, so such orders may not be available to every victim.

[24] An *ex parte* order is one that is obtained by the applicant without notice to the respondent. These are available only in case of emergency, and are always temporary in nature. The respondent is provided with the opportunity to contest the *ex parte* order at a later hearing.

B. CIVIL (PRIVATE) LAW REMEDIES

INTRODUCTION

This section describes a number of private law remedies that may be useful tools for victims of technology-enabled abuse. Private law is different from criminal law in that the punishment for bad behaviour is to pay money to the victim, rather than spend time in jail. Also, anyone who wants to use private law to solve a problem will have to do this themselves (with the help of a lawyer) and will have to pay the legal fees themselves as well. None of these private law suggestions are guaranteed to succeed, and some are long shots.

The purpose of this section is to provide additional tools to victims of technology-enabled abuse, to improve their ability to act independently to stop abusive behaviour. As described earlier in this report, the criminal law has some gaps that allow bad behaviour online to go unpunished. These private law tools may fill some of those gaps. Also, private law requires less proof than criminal law, so it may be possible for victims of technology-enabled abuse to get compensation or put a stop to harassment, in cases where criminal law can't help them.

INVASION OF PRIVACY

Description

Invading someone else's private affairs is called *invasion of privacy*[25] or *intrusion upon seclusion*[26] in private law. Examples of invading private affairs include: reading faxes addressed to someone else,[27] surreptitiously recording someone in the bathroom,[28] intercepting cordless phone calls,[29] repeatedly accessing someone else's banking records,[30] or using video surveillance in an apartment building to watch the entrance of a particular apartment.[31]

[25] *Privacy Act*, RSBC 1996 c 373. Manitoba, Saskatchewan and Newfoundland also have statutory *invasion of privacy* torts.
[26] 2012 ONCA 32 [*Tsige*]. *Intrusion upon seclusion* is a new common law tort in Ontario, as of January, 2012.
[27] *Fillion v Fillion*, 2011 BCSC 1593 at paras 160, 162 [*Fillion*].
[28] *L.A.M. v J.E.L.I.*, 2008 BCSC 1147 at para 2.
[29] *Watts v Klaemt*, 2007 BCSC 662 at paras 3-4.
[30] *Tsige*, *supra* note 26 at paras 4-7.
[31] *Heckert v 5470 Investments Ltd*., 2008 BCSC 1298 at para 6.

To make a claim for *invasion of privacy* it must be shown that:

1. The defendant invaded the private affairs of the plaintiff;
2. The actions of the defendant were intentional;[32] and
3. The defendant has no legal justification or excuse for the invasion.[33]

Proof of harm to the plaintiff is not required for a successful claim.[34]

The level of privacy that is legally protected differs in each province. For example, in BC, the "reasonable expectation of privacy" is protected. [35] In Ontario, only invasions that a reasonable person would consider highly offensive can be the basis for a claim.[36] This means that in Ontario, only "deliberate and significant" invasions of privacy will be punished. Examples of matters that, if invaded, could be considered highly offensive include: banking records, medical records, diaries and sexual practices.[37]

Comment

The law of *invasion of privacy* is well developed in BC. The courts have elaborated on the language of the *Privacy Act*, removing uncertainties. The number of cases has increased substantially in recent years.

The law in Ontario is less well developed, because i*ntrusion upon seclusion* is new to private law in Ontario. However, Ontario law relies in part on invasion of privacy legislation in other provinces.[38] As a result, the law of *intrusion upon seclusion* should be on stable ground.

The right to privacy in Canadian law is normally evaluated based on whether an individual has a "reasonable expectation of privacy" in a given situation.[39] In Ontario *intrusion upon seclusion* requires that "a reasonable person would consider the invasion highly offensive".[40] This is an area where there may be some development in the future.

[32] *Privacy Act*, *supra* note 25 s 1(1).
[33] *Ibid* s 1(1).
[34] *Ibid* s 1(1) and *Tsige*, *supra* note 26 at para 71.
[35] *Privacy Act*, *supra* note 25 s 1(2).
[36] *Tsige*, *supra* note 26 at para 71.
[37] *Ibid* at para 72.
[38] *Tsige*, *supra* note 26 at paras 52-53.
[39] *Ibid* at paras 40-41.
[40] *Ibid* at para 71.

Application

Because of the well-developed law of *invasion of privacy*, this could be a useful tool for victims of technology-enabled abuse. Typical behaviour of a perpetrator using technology as tool to abuse, such as reading someone else's email, using spyware to monitor computer activity, surreptitious video surveillance or recording phone calls, can all be punished by the law of *invasion of privacy*. This provides a fairly concrete basis for claims against a perpetrator and relatively good probability of success.

The courts have already dealt with some interesting cases that may be relevant. For example, individuals' personal documents, physical or electronic are protected, even if someone else has legitimate access to where the documents are stored.[41] Also, anonymous online identities are protected from being connected with the poster's real identity.[42]

[41] *Fillion*, *supra* note 27. *Pacific Northwest Herb Corp. v Thompson*, [1999] BCJ no 2772 at para 30. *Nesbitt v Neufeld*, 2010 BCSC 1605 at paras 92, 94.
[42] *Griffin v Sullivan*, 2008 BCSC 827 at paras 81, 113.

INTENTIONAL INFLICTION OF MENTAL SUFFERING

Description

Intentionally causing *mental suffering* to someone else is called *intentional infliction of mental suffering* in Canadian law.[43]

To make a claim for *intentional infliction of mental suffering* it must be shown that:

1. The defendant's actions were flagrant or outrageous;
2. The actions of the defendant were calculated to produce harm; and
3. The result of the defendant's actions is a visible and provable medical illness.[44]

To meet these requirements, it is not necessary for the actions to include physical contact.[45]

Flagrant actions are those done with clear disregard for the rights of others and for the law. Outrageous actions are unacceptable or grossly cruel violations of someone else's rights.

For the actions to be calculated, they must be done so as to produce harm, even if the actual harm produced is not exactly what was intended. If the harm was foreseeable and the defendant acted disregarding the foreseeable harm, then this can also be considered calculated.[46]

Harm must be medically proven. *Mental suffering* that causes physical illness is easier to prove, while courts may be more sceptical of symptoms which are easier to fake, for example, depression.[47] The *Diagnostic and Statistical Manual of Mental Disorders* (*DSM IV*)[48] is considered a reliable guide for mental suffering that can be medically proven.[49] Pure mental or emotional distress does not meet the legal requirement for harm. Examples of pure mental or emotional distress include: grief, anxiety, anger, or outrage.[50]

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[43] Allen Linden & Bruce Feldthusen, *Halsbury's Laws of Canada – Torts* (LexisNexis Canada, 2012), ch II [*Feldthusen*].
[44] *Feldthusen*, *supra* note 43. *Frame v Smith*, 1987 CanLII 74 (SCC). *Rahemtulla v Vanfed Credit Union*, 1984 CanLII 689 (BC SC) [*Rahemtulla*].
[45] See *Boothman v Canada*, [1993] 3 FC 381.
[46] *Rahemtulla*, *supra* note 44 at paras 34, 47, 50, 55.
[47] *Feldthusen*, *supra* note 43.
[48] IV (Washington: American Psychiatric Association, 1994).
[49] Peter Handford, Philip Mitchell & Nicholas Mullany, *Mullany and Handford's Tort Liability for Psychiatric Damage*, 2d ed (Sydney: Lawbook Co, 2006) at para 3.40 [*Handford*].
[50] *Ibid* at para 2.30, 2.40. *McDermott v Ramadanovic*, 1988 CanLII 2840 (BC SC) [*McDermott*]. *Rhodes Estate v Canadian National Railway*, 1990 CanLII 5401 (BC CA) [*Rhodes*]. *Beaulieu v Sutherland*, [1986] BCJ No 2325.

Comment

It can be difficult to medically prove the harm caused by harassment (online or otherwise). The problem is that the harm may not cause an easily proven physical illness, but instead will cause depression or something that resembles emotional distress. Even though depression is defined in the *DSM IV*, it is more difficult to prove, its diagnosis is controversial among experts, and the courts may be more sceptical. The courts expect people to "develop thick skins".[51] This may be bias the courts against recognizing harm which is controversial or difficult to prove.

If the requirement for a "provable medical illness" is relaxed, it may be easier to demonstrate harm in harassment cases. Some Canadian cases have ignored the requirement for a "provable medical illness"[52]. In these cases, the courts have generally said that there should be no difference between physical injury and mental injury.[53] If the law continues to move in this direction, the scope of harms recognized by the courts may be expanded to more easily include the typical harm caused by harassment and stalking. This line of judgements is not conclusive and the law remains uncertain.[54]

Similarly, if Canadian law recognizes, as American law does, liability for intentionally caused pure mental distress,[55] then it may be easier to demonstrate harm in harassment and stalking cases. Liability is limited to behaviour that is so outrageous that it goes beyond "all possible bounds of decency".[56] This is another direction in which Canadian law may develop in the more distant future.[57]

Application

Because *intentional infliction of mental suffering* does not require physical contact, online harassment and stalking which result in harm (that can be medically proven) could be the basis for a claim. Cyber-stalking and other forms of technology-enabled abuse has the same kind of impact on victims as real-world stalking, so it should be possible to demonstrate the same kind of harm.[58] Harassing someone via email or Facebook, or using GPS to track their movements, can be very upsetting and could cause *mental suffering*. If the harm can be demonstrated, then the law of *intentional infliction of mental suffering* may be a useful too for victims of cyber-stalking to win compensation and prevent future intrusions into their lives.

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[51] *Feldthusen*, *supra* note 43.
[52] *McDermott*, *supra* note 50 and *Rhodes*, *supra* note 50. *Mason v Westside Cemeteries Ltd*., 1996 CanLII 8113 (ON SC). See also *Cox v Fleming*, 1995 CanLII 3127 (BC CA), *Vanek v Great Atlantic & Pacific Company of Canada Limited*, 1999 CanLII 2863 (ON CA) and *Anderson v Wilson*, 1999 CanLII 3753 (ON CA).
[53] *Handford*, *supra* note 49 at paras 2.120, 2.140, 2.150, 2.160.
[54] *Ibid* at para 2.180.
[55] *Ibid* at para 28.330. *Barnett v Collection Service Co*, 242 NW 25 (la 1932).
[56] *Handford*, *supra* note 49 at para 28.340.
[57] *Ibid* at para 28.380. *Tran v Financial Debt Recovery Ltd*, (2000) 193 DLR (4th) 168 rev'd [2001] OJ No 4103.
[58] L Sheridan & T Grant, "Is cyberstalking different?" (2007) 13:6 Psychology, Crime & Law 627.

HARASSMENT

Description

In private law, *harassment* involves repetitive behaviour that is seriously annoying, distressing, pestering and embarrassing.[59] It is not clear whether private law in Canada includes the ability to sue for *harassment*.[60]

In theory, to make a claim for *harassment*, it must be shown that:

1. The defendant's actions were outrageous;
2. The defendant intended to cause emotional distress;
3. The plaintiff suffered severe emotional distress; and
4. The plaintiff's emotional distress was caused by the defendant's actions.[61]

Outrageous actions are unacceptable or grossly cruel violations of someone else's rights. The emotional distress suffered must be severe. That is, it must be so serious that no one would reasonably be expected to endure it.[62]

Unlike the private law concept of *intentional infliction of mental suffering*, it is not necessary to prove that the plaintiff suffered a visible medical illness, but it is necessary to prove the defendant suffered severe emotional distress.[63]

Comment

The uncertainty surrounding the law of *harassment* in Canadian private law presents a significant challenge. Some courts in Canada have said that *harassment* is a solid basis for a claim, and others have disagreed.[64]

The law of *harassment* overlaps with that of *intentional infliction of mental suffering*. Both require intentional and outrageous actions by the defendant, and an intention to cause harm to the plaintiff. The main difference is that *harassment* does not require proof of a visible mental illness. For this reason a claim of *harassment* should be easier to prove. On the other hand, the

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[59] *Passo Services*, 2008 SKQB 356 at para 49 [*Passo Services*]. Philip Osborne, *The Law of Torts*, 3d ed (Toronto: Irwin Law Inc., 2007) at 260, 261 [*Osborne*].
[60] *Mainland Sawmills*, 2006 BCSC 1195 at para 13 [*Mainland Sawmills*].
[61] *Ibid* at para 17.
[62] *Ibid* at para 19.
[63] *Ibid*.
[64] *Ibid* at para 14.

courts may think that due to the overlap, claims for *harassment* should be handled under the law of *intentional infliction of mental suffering*, and subject to the higher proof requirement.[65]

The law of harassment has been described as similar to the American law of intentional infliction of pure emotional distress.[66] This is one possible direction Canadian law may go in the future.

Application

The definition of *harassment* in the law matches that typically understood outside legal circles, and also matches typical harassing behaviour seen online. Because it is not necessary to prove that a visible mental illness resulted from the harassment, this may be a useful tool for victims of cyber-stalking. Repetitive harassing messages sent via email or social networks, for example Twitter or Facebook, may be covered by the law of *harassment*.

[65] See *Passo Services*, *supra* note 59 at para 50.
[66] *Mainland Sawmills*, *supra* note 60 at paras 14-15.

TRESPASS TO CHATTELS AND CONVERSION

Description

There are two ways of interfering with property owned or possessed by someone else. One is called *trespass to chattels* and the other is *conversion (of chattels)*. "Chattels" or "goods" are physical property. Intellectual property and land are not chattels.[67] *Trespass to land* happens when someone intrudes on the land of another.[68] *Trespass to chattels* and *conversion* applies the same idea to goods.

There is some overlap in these two areas of law, but in general interference includes: touching, damaging, destroying or refusing to return goods.[69] The main difference between the two is that *conversion* focuses on total deprivation of possession, while *trespass to chattels* focuses on mere interference.

To make a claim for *trespass to chattels* it must be shown that:

1. The plaintiff had possession of the goods at the time trespass happened;[70]
2. The interference was intentional, though there need not be an intention to harm;[71] and
3. There was a direct interference with the goods.[72]

To make a claim for *conversion* it must be shown that:

1. The plaintiff had possession or a right to possess the goods;[73]
2. The interference was intentional;[74] and
3. The interference was so serious as to justify full compensation for the value of the goods.[75]

Harm refers to harm caused to the goods or to the economic interests of the possessor Interference refers to interference with the rights of the possessor, but does not necessarily mean there was harm to the goods or to economic interests.

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[67] *Feldthusen*, supra note 43.
[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid*.
[71] Robert Solomon et al, *Cases and Materials on the Law of Torts*, 7th ed (Scarborough: Thomson Canada Limited, 2007) at 112 [*Solomon*].
[72] *Ibid*.
[73] *Feldthusen*, *supra* note 43.
[74] *Ibid* and *Solomon*, *supra* note 71 at 292.
[75] *Ibid*.

For both, interference with the possessory right must be proven. It is not clear whether proof of harm is necessary for either tort.[76] This is a significant uncertainty in the law.

Comment

The application of these areas of the law to "virtual" goods is controversial. One American court said there had been a *trespass to chattels* (the chattel being a mail server) by a spammer who spammed a particular Internet service provider's customers.[77] Another court said there had been a *trespass to chattels* (the chattel being a web server) through "scraping" another company's website.[78] The most recent case in American law reversed this trend.[79] In that case, using a company's mail servers to spam its employees was not considered to be *trespass to chattels* since the spamming did not completely prevent the proper functioning of the server.[80] In the only similar Canadian case, a case of scraping a website, the court dismissed the claim because the plaintiff did not have possession of the server.[81]

The lack of clarity in Canadian law about whether proof of harm is required presents additional challenges for making a claim. The American cases rely on there being no requirement for proof of harm.[82] This would be the same for most cases of *trespass* or *conversion* of "virtual" goods, since unauthorized use of computers typically does not result in physical damage to the machine. If the law has not settled whether physical damage to physical goods is required for a claim, then it is not at all clear what the requirement would be for virtual goods.

Application

If either of these areas of law could be applied to "virtual" goods, they could be useful tools for victims of technology-enabled abuse. Examples of "virtual" activities that might be described as "interfering" with virtual goods include: use of a computer (by means of spyware or otherwise); accessing a private email account; or using someone else's Wi-Fi router.

A claim based on this area of law might be more likely to succeed if the interference impairs completely the possessor's rights. The latest American case suggests this may be possible and Canadian law doesn't deny the possibility. "Bricking" a cell phone or locking someone out of

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[76] Regarding trespass to chattels, see *Osborne*, *supra* note 59 at 289 and *Solomon*, *supra* note 72 at 117. Regarding conversion, see *Solomon*, *supra* note 72 at 120.
[77] *CompuServe Inc. v Cyber Promotions, Inc*., 962 F Supp 1015 (SD Ohio 1997).
[78] *eBay, Inc. v Bidder's Edge, Inc*., 100 F Supp 2d 1058 (ND Cal 2000).
[79] *Intel v Hamidi*, 30 Cal 4th 1342, 71 P.3d 296 (Cal Sup Ct 2003).
[80] Wendy Adams, "There is no There There: *Intel Corp v Hamidi* and the Creation of new Common Law Property Rights Online", (2004) 40 Can Bus LJ 87 at 87.
[81] *Century 21 Canada Ltd. Partnership v Rogers Communications Inc*., 2011 BCSC 1196.
[82] See *Compuserve*, *supra* note 77 and *eBay*, *supra* note 78.

their email account are actions that would completely interfere with the possessor's rights. These might be the subject of a successful claim.

There remains substantial uncertainty in this area of the law. Canadian application of the law to "virtual" goods has been limited. As a result, use of this area of the law to help victims of technology-enabled abuse would be an uphill battle.

C. RESTRAINING ORDERS IN CANADA

A restraining order, sometimes known as a protection order, is a court order that prohibits a named person from doing one or more things with respect to another person, for the purpose of protecting the latter. For example, a restraining order could prohibit a person's "ex" from contacting her.

Many restraining orders are issued under civil or family law. Civil restraining orders are only available when the applicant can establish past violence or other genuine fear about another person's behavior. The applicant must meet any other requirement of the enabling legislation. For example, many statutes that authorize restraining orders only cover people who are or were legally married or living together; anyone else cannot obtain a restraining order under that legislation, regardless of the legitimate concerns for their safety,

Persons accused of or convicted of a crime may be subject to various restrictions, including conditions of bail, probation, or parole. These are imposed by the criminal courts, probation or parole officers, or the National Parole Board. The *Criminal Code of Canada also* provides for "peace bonds", which are a form of restraining order that anyone can apply for.

While no piece of paper can guarantee someone's safety, a restraining order puts the person named in the order on notice that their behavior is, at minimum, of concern to the legal system, and there will be consequences if the conditions of the restraining order are not respected.

The following outlines how restraining orders work: who can obtain them, how they are obtained, what they do and don't cover, and what happens if they are violated.

Restraining orders against abusers are only as powerful as the law enforcement and courts that enforce them. Law enforcement also needs to understand the dynamics the woman is facing as part of the abuse. When asking frontline anti-violence workers how technology is used against women as 'evidence' in court cases, one worker said that:

> *The most common is as a breach of "no contact" on her part (often see cases where if she does not acknowledge a text/email then he has no contact (gets more desperate) and will try to show up himself in person (or send a contact person) and this is more dangerous and threatening to her and her family.*
>
> *After she has been harassed by her ex and finally replies, he will use this to show that she has been communicating with him, [and he will claim she is] therefore is not afraid of him.*

Over half of the VAW programs surveyed have worked with women who got technology included in domestic violence and other protection/restraining orders; 40% knew of cases where the judge had mandated technology be used for communication between the perpetrator with the survivor/woman.

ENABLING LEGISLATION

In Canada, civil and family law is the constitutional domain of the provinces, while the federal government is responsible for the criminal law. Each province and territory has its own civil and family laws. While often conceptually similar, the details behind these various statutes can vary considerably.

Each province and territory has one or more family law statutes that address property division in the event of marital breakdown, child custody, child support, and spousal support.[83] Most family laws provide for some type of civil restraining orders. Family legislation generally applies only in the following situations:

- A couple were legally married
- A couple had a child together (whether or not they were legally married)

In *some* provinces/territories, family law may also apply to couples who were cohabiting for a specified amount of time. Canadian law does not distinguish between heterosexual and same-sex relationships.

In other words, family laws often do not apply to couples who don't have children and were never legally married (i.e. they were dating or living together without being married).

Many provinces and territories now also have specific laws that provide for civil restraining orders to protect victims of domestic and family violence. These may apply to a broader range of people than do family law, but still do not cover all relationships. Those who come within a province's family law may be able to obtain a restraining order under either or both the relevant family law(s), and any domestic violence legislation.

The *Criminal Code of Canada* contains provisions (in §810) that allow anyone to apply for a "peace bond", which is conceptually similar to a civil restraining order. The process to obtain a peace bond is similar to that used to obtain a civil restraining order under provincial legislation, however peace bonds cannot be obtained on an *ex parte*[84] or interim basis. Violation of a peace bond is a criminal offence.

The person who applies for a restraining order (to protect themselves) is called the **applicant**. The person against whom the restraining order is sought is the **respondent**.

[83] Divorce comes under the federal *Divorce Act*.

[84] An *ex parte* order is one that is obtained without prior notice to or participation by the respondent. An *ex parte* order is always temporary in nature, as a later hearing will be scheduled to provide the respondent with an opportunity to be heard.

IMPORTANT NOTE

This document outlines the basic principles behind Canadian restraining orders and their enabling legislation. A brief summary is provided in the attached table.[85] As the specific details vary from province to province, **it is essential that a lawyer be consulted to determine the specific options that a person may have in any particular situation and jurisdiction**.

WHO CAN APPLY FOR A CIVIL RESTRAINING ORDER?

Every statute that provides for civil restraining orders specifies who may apply for such an order under that law. There are usually two pre-conditions:

- The applicant must come within one of the defined classes of people who may seek a restraining order. For example, many such laws require the applicant and respondent to have lived together (co-habited), be married, or be related in specific ways as defined by the legislation. An applicant who is in a dating relationship with the respondent may not qualify for a restraining order unless they previously lived together.

- The applicant must have experienced violence or otherwise be in genuine fear of the respondent. Merely disliking someone or unilaterally wishing to sever all contact is usually not sufficient.

In some provinces, the applicant must personally apply for the restraining order. A person may hire a lawyer to represent them in this regard, but would still be required to personally authorize the application and give evidence in support of it. In other jurisdictions, someone else may initiate the application on the applicant's behalf. Some statutes permit only certain classes of people to do so (e.g. shelter workers and police officers), while in other provinces anyone can do so (e.g. a friend or family member). Depending on the circumstances, the applicant may still need to give evidence in support of the application.

Anyone may apply for a peace bond under §810 of the *Criminal Code*, regardless of the nature of their relationship (if any) with the respondent.

[85] The table does not list provincial family law legislation if separate domestic violence legislation provides for restraining orders. Married couples or those who otherwise come under family law legislation may have additional restraining order remedies available.

APPLICATION PROCESS

A restraining order can be obtained on a temporary (interim) or permanent basis. "Permanent" may be limited to a finite duration. The enabling legislation for a restraining order will specify on which basis the order may be obtained; not all possibilities are necessarily available in every jurisdiction.

A *temporary* restraining order is typically available on an *ex parte,* or uncontested, basis. The applicant applies to a Justice of the Peace (JP) or judge, providing the required information explaining why s/he is afraid of the respondent. The applicant would also need to show that s/he comes within the specified class(es) of people who may apply for a restraining order (e.g. the applicant and respondent are or were co-habiting). The respondent need not be present or even be aware of the application.

An applicant seeking an *ex parte* order must provide the JP or judge with all relevant information, both favorable and unfavorable, to the request. This is an element of basic fairness since the respondent is not present to present his side of the story. Failure of the applicant to make full and frank disclosure may result in the order later being voided.

If the JP or judge is satisfied that the applicant meets the legal onus to obtain a civil restraining order, a *temporary* restraining order will be issued with one or more conditions. This temporary restraining order takes effect once it is served on (brought to the attention of) the respondent.

Whenever a temporary restraining order was obtained on an *ex parte* basis, an opportunity is always provided for the respondent to challenge the order in a subsequent hearing before the court. This is a scheduled hearing whereby the applicant would once again explain why s/he was seeking the restraining order, coupled with the opportunity for the respondent to contest that evidence or otherwise make an argument as to why a restraining order should not be granted (or continued).

A permanent restraining order can only be obtained with prior notice to the respondent, who is entitled to be present at the hearing.

Peace bonds under §810 of the *Criminal Code* can be obtained by anyone, but cannot be obtained on an *ex parte* or interim basis. Peace bonds have a maximum duration of one year.

The burden of proof always rests with the applicant. This is assessed on the balance of probabilities. In other words, is the applicant's version of events more probable than the respondent's version?

The court could also decide to grant a restraining order (assuming the applicant has met the legal onus required), but with fewer or different conditions than those requested by the applicant. The applicant must justify each condition sought.

RESTRAINING ORDER CONDITIONS AND DURATION

The enabling statute under which a restraining order is obtained will specify the possible scope of any order, including the duration and the conditions that may be imposed on the respondent. All jurisdictions provide for conditions that prohibit the respondent from communicating with the applicant (i.e. a "no contact" order), and may permit a range of other conditions.

Some of the common conditions that may be imposed against the respondent in a restraining order include:

- Prohibition against communicating, directly or indirectly, with the applicant. As an alternative, communication may be limited to specified means or subject matter (e.g. e-mail communications only, and then only to exchange information about the couple's children).
- Prohibition against attending at the applicant's home, workplace, school, place of worship, or other place where the applicant is or regularly known to be (e.g. favorite coffee shop).
- Prohibition against following the applicant from place to place.
- Prohibition against possessing a firearm or other weapon, even if licensed to do so under the *Firearms Act*. The police may be ordered to seize any weapons currently in the respondent's possession.
- The applicant may temporarily be granted exclusive possession of the family home. The police may be ordered to remove the respondent from the home with or without advance notice. Some jurisdictions also allow the court to order the respondent to continue contributing to the rent or mortgage and other costs of the family home.
- If the applicant will be living elsewhere, the police may be ordered to accompany the applicant to the family home in order that s/he may peacefully retrieve her personal belongings.
- The applicant may be granted temporary possession of specified property, if required for the basic necessities of life (e.g. the family mini-van, in order to be able to take the children to school).
- The applicant may be granted temporary custody of any children of the relationship.
- Following a hearing, the respondent may be ordered to compensate the applicant for financial losses resulting from threats or abuse (e.g. moving and legal costs).
- Counseling may be ordered for the respondent and/or the couple's children (usually at the respondent's expense).
- The respondent may be ordered to post a bond that will be forfeited if he violates the restraining order or otherwise breaches the peace.

As noted earlier, the specific legislation must be consulted to understand what a restraining order may and may not include in any given jurisdiction. Legal advice may be helpful in this regard. Most jurisdictions do NOT include every item on the list above. Not every restraining

order will contain every possible condition, as the conditions imposed will be dependent upon the facts of each particular situation, including the nature and history of the relationship between the applicant and respondent.

Some jurisdictions allow for restraining orders to grant *temporary* custody of children to the applicant, generally until such time as a custody claim may be heard in Family Court. If the civil restraining order legislation does not provide for child custody, a parent would need to apply separately for custody in Family Court (according to the provisions of that jurisdiction's relevant family law).

A restraining order will not address *ownership* of property, but in some jurisdictions may grant interim but exclusive *possession* of property to the applicant until ownership can be adjudicated in court.

DURATION OF A RESTRAINING ORDER

The maximum duration of a restraining order is specified in the enabling legislation. An *ex parte* order is always temporary in nature, often only for a few days, until a hearing can be scheduled. The legislation will also specify whether a restraining order can be renewed.

CONFLICTS

Different court proceedings may result in more than one type of restraining order being issued against a respondent, and/or result in conflicting decisions being made by different courts. Some of these proceedings may include:

- The applicant may have obtained a civil restraining order against the respondent under domestic violence provisions.
- Family court proceedings may result in one or more different restraining order(s) under family law legislation, or other judicial decisions may determine entitlement to possession of the family home, child custody, child support, and/or spousal support. Restraining orders issued under family legislation may be temporary or permanent in nature.
- A respondent facing criminal charges (e.g. assault or criminal harassment) may have bail conditions imposed that impact his ability to communicate with the applicant and/or their children, and/or his access to the family home. For example, a person charged with assault in a domestic violence context will often be forbidden from contacting the alleged victim or returning to the family home. Unless varied by a subsequent court

order, bail conditions remain in effect until the charge(s) are resolved through the criminal justice system.

- A respondent already convicted of criminal charges involving the applicant may be under probation or parole conditions that similarly limit communication, access to the family home, etc. The sentencing court may order probation for up to three years (commencing with the date of sentencing, or release from custody, whichever is later).[86] Any offender serving federal prison time (i.e. two years or more) comes under the jurisdiction of the National Parole Board if released early, which almost all are.[87]
- A criminal offender subject to a Long-Term Sentencing Order (LTSO) is under the supervision of the National Parole Board for the duration of the LTSO, which can be for up to 10 years following release from prison. A person designated as a Dangerous Offender is on parole for life, assuming s/he is ever released from prison at some point.[88]
- A respondent may be bound by a peace bond issued under §810 of the *Criminal Code of Canada*. A peace bond has a maximum duration of one year.
- Weapons prohibition orders may be imposed under all of the above, as well as under the federal *Firearms Act.*

As a common example of conflicts that may result between different court orders, a couple that have separated may have already obtained interim child custody and access orders from family court. Perhaps one spouse, who remains in the family home, has custody of the children, while the other has access (visitation) rights. The latter is then arrested for allegedly assaulting the former. The criminal court, as part of the bail conditions imposed, would typically order the accused spouse to have no contact with the other spouse, and not to attend at the family home. The spouse awaiting trial for assault is thus now subject to arrest simply for coming to the family home to pick up the children for his weekly visit, even though he already has a (different) court order (from family court) authorizing this access.

Restraining orders issued under criminal laws (e.g. the *Criminal Code of Canada* or the *Firearms Act*) cannot be superseded or negated by a civil restraining order, unless the criminal order allows otherwise. A civil restraining order may impose terms over and above conditions imposed under the criminal law. Some provincial laws will specify that the latest order issued takes precedence in case of conflict.

Bail conditions in family violence cases will often prohibit contact between the accused and alleged victim, until and unless custody and other matters are subsequently addressed in family

[86] Probation is a sentencing option for anyone sentenced to less than two years in jail (or no jail time), and for conditional sentences.

[87] Most inmates are eligible to apply for day parole after serving 1/6 of their sentence, and for full parole after serving 1/3. Almost all inmates are released after serving 2/3 of their sentence. Parole remains in effect for the duration of the original sentence (e.g. if the offender is sentenced to 5 years in prison but is released after serving 2 years, parole remains in effect until the 5 years is up).

[88] Long-term offenders serve a fixed sentence (of up to 7 years), and thus are always released at some point (at which point the LTSO parole supervision begins). Many Dangerous Offenders are never released.

court. This allows the better-placed family court to deal with *all* communication and custody issues emanating from the relationship.
Some civil restraining order legislation specifies the legal hierarchy by which conflicts between restraining orders issued under different provincial legislation will be resolved. Legal ambiguities may result where this clarity is not provided in the statutes, or otherwise addressed in the actual restraining order(s).

WHAT HAPPENS IF A RESTRAINING ORDER IS VIOLATED?

Enabling legislation provides different consequences and processes for addressing any allegation that the respondent has violated a civil restraining order:

- Some jurisdictions define violation of a civil restraining order to be a provincial offence, in which case the respondent can be arrested by the police and prosecuted by the Crown. A provincial offence is not the same as a criminal offence.[89]
- Some jurisdictions will prosecute violation of a civil restraining order as a criminal offence per §127(1) of the *Criminal Code*, and as such the police may arrest the respondent.[90]
- In other jurisdictions, the applicant is responsible for bringing a contempt motion against the respondent when a breach of a restraining order is alleged. A formal hearing is then held, at which the applicant would present evidence that the respondent is guilty of contempt of court, and the respondent may argue that s/he is not. The judge hearing the motion will decide, on a balance of probabilities, whether the applicant has proven the respondent is in contempt of court, and, if so, what the sanction will be.[91] The entire onus is on the applicant to institute and prosecute contempt proceedings against the respondent.

A violation of a §810 peace bond, or any condition of a bail, probation, or parole order is a criminal offence (unlike civil contempt). The respondent is subject to immediate arrest by the police, and will likely face criminal prosecution by the Crown.

[89] Criminal offences are specified in the *Criminal Code of Canada* and a handful of other federal statutes (none of which are relevant here). The provinces/territories are constitutionally barred from defining new or additional crimes.
[90] §127(1) specifically excludes court orders that require the payment of money, so non-payment of child or spousal support is not a criminal offence.
[91] If the penalty being sought is incarceration, the standard of proof becomes the higher "beyond a reasonable doubt" used in criminal law.

CANADIAN RESTRAINING ORDER LEGISLATION

CANADIAN RESTRAINING ORDER LEGISLATION

Jurisdiction	Statute	Section	Available to relationships defined as: Married	Co-Habitants	Dating	Stalking	Restraining Order	Possession of Family Home	Interim Child Custody	Interim Support	Compensation	Notes
British Columbia	*Family Law Act*	Part 9	Y	Y	N	N	Y	Y	Y*	Y*	Y*	The *Family Law Act* is BC's comprehensive family law legislation. Child custody, support, etc. may be ordered under the Act, but not through a Part 9 protection order.
Alberta	*Protection Against Family Violence Act*		Y	Y	N	N	Y	Y	N	N	Y	
Saskatchewan	*The Victims of Domestic Violence Act*		Y	Y	N	N	Y	Y	N	N	Y	
Manitoba	*The Domestic Violence and Stalking Act*		Y	Y	Y	Y	Y	Y	N	N	Y	Orders made under the *Family Maintenance Act* or the *Family Property Act* prevail in case of conflct.
Ontario	*Family Law Act*	46	Y	Y	N	N	Y	N	N	N	N	Similar restraining order provisions may be found in s. 35 of the *Children's Law Reform Act*. The former *Domestic Violence Prevention Act* was repealed in 2009.
Quebec	none											Quebec does not have any legislation that specifically addresses domestic violence or stalking. Victims can seek a §810 peace bond.
New Brunswick	*Family Services Act*	128	N	partial	N	N	Y	Y*	Y*	Y*	N	Restraining orders are available only to legally married but currently *separated* spouses. The *Family Services Act* is NB's comprehensive family law legislation. Child custody, support, etc. may be ordered under the Act, but not through a section 128 protection order.
Nova Scotia	*Domestic Violence Intervention Act*		Y	Y	N	N	Y	Y	Y	N	N	An emergency protection order prevails over any order respecting custody of or access to a child made under the *Divorce Act* (Canada) or the *Maintenance and Custody Order Act,* but does not prevail over any order made under the *Children and Family Services Act* respecting custody of or access to a child.
Prince Edward Island	*Victims of Family Violence Act*		Y	Y	N	N	Y	Y	Y	Y*	N	Interim support is limited to rent/mortgage payments for the family home.
Newfoundland & Labrador	*Family Violence Protection Act*		Y	Y	N	N	Y	Y	Y	Y*	N	Interim support is limited to rent/mortgage payments for the family home.
Yukon	*Family Violence Prevention Act*		Y	Y	Y	N	Y	Y	N	N	Y	
Nunavut	*Family Abuse Intervention Act*		Y	Y	partial	N	Y	Y	Y	N	N	Applicability to dating couples is restricted to those defined in the statute as being in an "intimate relationship". An emergency protection order prevails over any existing order made under the *Child and Family Services Act*, *Children's Law Act*, *Family Law Act* or *Divorce Act* (Canada), to the extent necessary to provide for the immediate or imminent protection of the applicant or a child of or in the care of the applicant. An emergency protection order is subject to and varied by any subsequent order made under the *Child and Family Services Act*, *Children's Law Act*, *Family Law Act* or *Divorce Act* (Canada) against or affecting the applicant, respondent or child of or in the care of either of them.
Northwest Territories	*Protection Against Family Violence Act*		Y	Y	N	N	Y	Y	N	N	Y	
Canada	*Criminal Code of Canada*	810	Y	Y	Y	Y	Y	N	N	N	N	Anyone may apply for a §810 peace bond under any circumstances where they fear another person. Interim or *ex parte* orders are not available.

D. TECNOLOGY-ENABLED RISKS UPON SEPARATION

Separation is often the time that poses most risks to the safety of women, youth and children. This section is meant as a guide to safety-planning which:

- Summarizes some key moments in a couple's split, and technology-enabled abuse that may come into play at each point.
- Suggestions for anti-violence workers, legal advocates, family court lawyers, judges and survivors to consider when women are separating from an abusive or potentially abusive spouse.

When planning for one's safety, it is important to remember that:

- Technology can offer both risks and benefits in each of the situations listed below.
- A decision by a judge to order the use of one particular technology and/or prohibit the use of another may be helpful, but neither should be seen as a guarantee of protection. For example, prohibiting contact by email does not prevent someone from using impersonated ("spoofed") accounts or malicious web pages to infect a person's computer with spyware.

INITIAL SEPARATION

De facto separation may be

- Planned or unplanned.
- Initiated by either party, or by a third party (e.g. the police arresting one spouse).
- Accompanied by physical separation, as the couple may still be sharing the family home, but are in reality already separated.
- A person may or may not have had time to gather belongings and personal effects.
- A restraining order (or equivalent, such as a bail order with conditions) may or may not be imposed around the time of separation.
- The person who leaves may be the victim or may be the abuser.
- There may or may not be an immediate issue with respect to exclusive possession of the family home (i.e. who stays and who leaves).

Technology-Enabled Risks for Abuse

- When a breakup occurs, women are often at highest risks of being seriously attacked by an abusive ex/partner/husband. Abuse often escalates and perpetrators try many tactics to control or harm her. It is very common for abusers to misuse technology to locate, monitor, threaten, harass, coerce and stalk during a breakup. Email, text

messaging, social networks, and location-enabled devices are examples of technologies that might impose risk to women's safety.

- Do both parties accept that the relationship has ended? Are both willing to "let go", or is the abuser likely to "lash out" in some way? Any communication technology may be misused to target a woman and increase risks to her safety.
- Does the couple need to continue to communicate? If they have children together, they will likely need to communicate as parents for years to come. If there are no children, necessary communication may be restricted to only what is required to complete the formalities of their split (e.g. equalization of property), and what can possibly can be accomplished through counsel.

Threatening women's safety through technology used by children is common. Perpetrators download spyware on children's computers, put location tracking devices on or inside children's property such as toys and mobile phone, and, find new information about the mother on the children's social media pages.

POSSESSION OF FAMILY HOME

Depending upon the couple's legal status (e.g. married vs. common-law) and living arrangements (e.g. shared vs. separate homes), one or both may be seeking exclusive possession of the family home. In certain cases this will require a court order, absent voluntary agreement.

Technology-Enabled Risks for Abuse

If a couple is married, the matrimonial home is considered joint property regardless of who is registered on title, so one spouse cannot exclude the other without a court order. By comparison, partners who are co-habiting outside of a legal marriage may not have the same legal rights as a married couple, in which case one may already have the legal authority to exclude the other. If a perpetrator has access to common property they can, download spyware and keyloggers onto computers, place spy cameras around the home and place recording devices in discreet locations.

DIVISION/EQUALIZATION OF PROPERTY

Although the specific legal scheme details vary from province and territory, each has a statutory regime for division or equalization of property following the end of a marriage. These laws do not necessarily apply to common-law couples (in some jurisdictions, a common-law relationship of a specified duration may qualify).

Technology-Enabled Risks for Abuse

Regardless of the statutory regime, and whether the couple falls within it, a couple who has cohabited may have property in common, or may disagree on who owns what. Some communication may be required to resolve these issues, although this can be directed through counsel if a party is represented. Women may receive threats and harassing messages through the misuse of email, text message or relay technology. They may also receive impersonated or "spoofed" phone calls or emails from the perpetrator changing the dates or cancelling meetings where the division of property will be discussed.

CHILD CUSTODY, ACCESS & VISITATION

A couple who have children together may not be able to entirely sever all communication, as in most cases, the children will continue to maintain a relationship in some form with both parents. The parents may also have to communicate with each other about the children.

Custody, access, and visitation options are normally assessed from the perspective of what is best for the children, not from what the parents think of each other. Typical scenarios include:

- Both parents may share custody. This is often divided based on time-sharing (e.g. weekdays versus weekends) or based on specific responsibilities for the child (e.g. health, education, religion). Either time or responsibility may be allocated to each parent.
- Even in sole custody arrangements, the non-custodial parent (and perhaps other family members, such as grandparents) may have substantial visitation and access. At least while the children are younger, the parents will need to coordinate exchanges at each other's home, or perhaps in a neutral location. When the children are with one parent, the other may have virtual access through electronic communications (e.g. telephone calls, Skype, and/or email). Parents may be prohibited from interfering with or monitoring communications between the children and the other parent.

- Even non-custodial parents will likely be entitled to information about the children (e.g. school reports, medical issues), and will need to have this provided either directly from the source, or through the custodial parent.
- The desire of one parent to later relocate (perhaps to take a new job or to cohabit with a new partner) may reopen custody, access, and visitation issues that had been previously resolved.

Technology-Enabled Risks for Abuse

Perpetrators can misuse technology to install surveillance technology. Spyware can be secretly downloaded on the woman/child's computers if certain links and attachments are opened. Perpetrators can misuse communication technology like Skype and webcams to monitor the living situations of the mother and her children remotely. By having to communicate with a perpetrator, women are forced to share personal contact information even if this puts her safety at risk. For more examples of technology-enabled risks in the context of custody, access and children please see **Section A.**

E. APPENDIX: LEGAL GLOSSARY

The following terms are defined in the Canadian *legal* context, to assist in the interpretation of criminal, family, and other statutes that may apply in circumstances of domestic violence, intimate partner violence, and cyber-stalking.

As the law is highly contextual, a lawyer should always be consulted if legal advice is required in the context of a particular situation or particular set of facts. As family and civil law is different in every province and territory, there may also be jurisdictional considerations that need to be included in the legal analysis.

Access: The legal opportunity for the non-custodial parent to spend time with the child(ren) of the relationship. Access cannot be legally denied even if the non-custodial parent is not meeting their child support obligations.

A court may order access on specified days and/or times, or on a percentage basis (e.g. X days per week, with the specific days/times to be negotiated by the parents). Access may also be ordered in the form of communications time (e.g. telephone calls, e-mail, or video-conferencing) between the parent and child(ren).

Access is normally unsupervised; the non-custodial parent's time with the child(ren) is not supervised by a third party. Supervised access means access must occur under the direct supervision of a third party designated in the access order. This could be a trusted friend or family member (not the custodial parent), or a supervised access facility where social workers monitor access in a structured setting.

Accused: A person charged with (accused of) a criminal offence. An accused person is presumed innocent unless and until proven guilty in court.

Age of Sexual Consent: The age at which someone can legally consent to sexual activity, as defined in the *Criminal Code*. "Sexual activity" is broadly defined, and includes everything from kissing to sexual intercourse. The general age of sexual consent in Canada is 16. There are several important exceptions:

- A person must be 18 in order to consent to sexual activity with someone who is in a position of trust or authority (e.g. teacher, doctor, priest, camp counselor).
- A person must be 18 in order to consent to anal sex.
- A person who is 12 or 13 can consent to sexual activity with someone who is less than 2 years older.

- A person who is 14 or 15 can consent to sexual activity with someone who is less than 5 years older.
- No one under 12 can legally consent to any sexual activity, nor can anyone who is mentally disabled or intoxicated to the point of incapacity.

See also *sexual consent*.

Applicant: The person who applies for a court order. See also *respondent*.

Bail: see *Judicial Interim Release*

Bodily Harm: The *Criminal Code of Canada* (§2) defines "bodily harm" to mean "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". "Bodily harm" includes both physical and psychological harm.

Burden of Proof (civil law): The *plaintiff* must prove his or her case on a balance of probabilities. In other words, is the *plaintiff*'s version of events more likely to be true than the *defendant*'s? The *plaintiff* must also prove that their claim is a claim recognized in law, and meets the relevant legal requirements. The *defendant* will win the case if the *plaintiff* cannot do any of this.

Applications for *restraining orders* are assessed under the balance of probabilities standard used in civil law.

Burden of Proof (criminal law): The prosecution (i.e. government) must prove that the *accused* is guilty of the crime(s) charged beyond a reasonable doubt. This is a much higher standard than the balance of probabilities standard used in civil law, but is not the same as requiring absolute certainty that the accused is guilty. An *accused* is considered innocent unless and until found guilty in criminal court.

Child Custody: A parent may have sole custody of the child(ren) resulting from a relationship, or the parents may share custody under a variety of frameworks. Each parent may be individually responsible for making key decisions in the child's life (e.g. education, religion, medical care), or both parents may jointly share this responsibility. The custodial parent may be required to share certain information with the non-custodial parent.

Child Support: Financial support paid by a non-custodial parent to the custodial parent, in order to provide for a child's necessities of life, education, health care, and other standard matters (e.g. sports). Child support is normally required until a child turns 18 (i.e. becomes an adult), but may be required longer if the child is pursuing post-secondary education or is disabled and unable to provide for him/herself.

Child support is the legal right of the child (not the custodial parent). Both parents are required to support their children, regardless of whether they were ever married, lived together, or even dated. Child support may also be ordered against an adult who performed a parental role to the child, even if not the child's biological parent.

Any parent who has the children <40% of the time is normally responsible for paying child support. Child support is normally calculated by using tables published by the federal government or the appropriate provincial/territorial government.

See also *spousal support*.

Civil Law: The laws that apply to private relationships between people, including contract law, *family law*, property, and *tort* law. In Canada, civil law is the constitutional responsibility of the provinces and territories. While the general principles are often similar, the civil law differs from province to province, often in significant ways.

The civil law in all provinces and territories *other than Quebec* is based upon English law, and is conceptually similar to the civil law of the United Kingdom, United States, Australia, and New Zealand. Civil law in Quebec is based upon French (Napoleonic law), and is thus very different from civil law elsewhere in Canada.

While the public courts adjudicate civil law claims, the *plaintiff* has the responsibility to prosecute his or her own claim (the state has no role).

Cohabit: A couple engaged in a *conjugal relationship* while living together in the same residence. Sharing a residence with friends, family, or roommates (outside of a *conjugal relationship*) does not qualify.

Common Law Marriage: A *conjugal relationship* in which the couple *cohabits* while not being legally married. In some provinces/territories, a common law couple who have cohabited for a specified amount of time (usually 1-3 years) may come under the jurisdiction of that province's/territory's *family law*. See also *marriage*.

Complainant: A person who alleges that someone else has committed a crime, whether or not they are a direct victim. See also *accused*, *victim* and *witness*.

Conjugal Relationship: A relationship in which two people live together while maintaining a sexual relationship. *Marriage* is one example of a conjugal relationship. A platonic (non-sexual) relationship with a friend, *family* member, or roommate is not a conjugal relationship. See also *cohabit*, *common law marriage*, and *marriage*.

Consent: see *sexual consent*.

Criminal Code of Canada: In Canada, there is a single set of criminal laws that applies uniformly across the country (unlike the US, where each state has its own criminal laws). Almost all Canadian criminal laws are found in the *Criminal Code of Canada* (the few exceptions are not relevant here).

Crown Prosecutor: A government lawyer who *prosecutes* people accused of committing crimes. Often referred to simply as "the Crown".

Dating Relationship: A couple who are or were engaged in some form of a romantic or sexual relationship, but were not married or cohabiting. See also *cohabit* and *marriage*.

Defamation: False or malicious statement(s) that would reasonably diminish a person's reputation. The statement(s) must have been communicated to a third party. Defamation in written form is called *libel*. Defamation in spoken form is called *slander*.

Defendant (civil law): The person against whom a lawsuit (civil law claim) is filed. See also *plaintiff*.

Defendant (criminal law): See *accused*.

Divorce: The legal termination of a *marriage*, which requires a court order under the provisions of the federal *Divorce Act*. Canada has "no-fault" divorce, available to anyone who has lived separate and apart from his or her *spouse* for at least one year. The consent of the other *spouse* is not required.

Domestic Violence: Violence that occurs between people who are related (i.e. family) or who live together (or once did). Also sometimes known as *family violence*.

Exclusive Possession of the Matrimonial Home: One spouse is granted the exclusive right to live in the family/*matrimonial home*, irrespective of who formally owns or leases it. The other spouse must vacate the home and live elsewhere, and is no longer allowed in the home (any more than any stranger would be). A court order is required for this.

***Ex Parte* Order**: A court order obtained without prior notice to the *respondent*. While the *applicant* must still meet the legal burden to obtain the order sought, the *respondent* is not present to challenge the *applicant*'s evidence or otherwise argue against the order. An *ex parte* order is always temporary (interim) in nature, and is always followed by a scheduled hearing where the *respondent* can be heard.

The *applicant* seeking an *ex parte* order must make full and frank disclosure to the court, since the *respondent* isn't present to defend himself. Failure to make full and frank disclosure is in itself grounds for the order to be set aside.

Family: People who are closely related by blood or adoption. While the legal definition of "family" may vary by context and jurisdiction, the most common definition includes grandparents, parents, siblings (brothers, sisters, half-brothers, and half-sisters), children and grandchildren. Whether or not stepchildren and stepparents are included in the legal definition of family is often contextual (one factor may be whether they are living in the same home). Cousins, aunts, and uncles are usually *not* included in the legal definition of "family".

Family Home: See *Matrimonial Home*

Family Law: Provincial/territorial *civil law* that addresses child custody and support, spousal support, and division of property when a couple splits up. In some provinces/territories, family law applies only to couples who are or were legally married. In other jurisdictions, family law may also apply to couples who lived common-law for a specified amount of time (usually 1-3 years). Family law generally also applies to couples who had a child together, regardless of whether they were ever married or co-habited.

Family Violence: See *domestic violence.*

Harassment: Threatening or annoying behavior that results in a person reasonably being in fear of another person. Harassing conduct can include repeatedly following someone from place to place, watching a place, or making threats. See also *intimidation*.

Hybrid Offence: A crime that the Crown can *prosecute* either as an *indictable offence* or as a *summary offence*. The decision is entirely at the discretion of the prosecutor. Typically a first offence with relatively less harm will be prosecuted as a *summary offence*, whereas a repeat offender or a crime that resulted in greater harm is more likely to be prosecuted as an *indictable offence*.

Indictable Offence: In Canada, crimes are divided into two categories: less serious *summary offences* and more serious *indictable offences*. For example, minor theft and vandalism are summary offences, while murder is an indictable offence. A rough comparison to US law would be that *summary offences* are conceptually similar to American misdemeanors, while *indictable offences* are conceptually similar to American felonies. *Indictable offences* are subject to relatively greater penalties, and prosecution and trials are more complex than those for *summary offences*. See also *hybrid offence* and *summary offence*.

Intimidation: Threatening conduct that is intended to alter a person's behavior, either by coercing them to do something that they don't wish to, or by coercing them to not do something they otherwise would be free to choose. See also *harassment*.

Judicial Interim Release: Commonly known as "bail", this occurs when the court releases an *accused* person pending their criminal trial. Specific conditions are often imposed, which may include a curfew, requirement to report regularly to the police or other bail supervisor, prohibition on contacting the victim(s) or witnesses, etc.

Libel: *Defamation* communicated in writing.

Marriage: A binding legal contract between two consenting adults who enter into a *conjugal relationship* for life. A married couple becomes an economic union under the law.

A marriage is equally valid whether performed in a religious or secular (civil) context, assuming the legal requirements are otherwise met. Canadian law does not differentiate between heterosexual and same-sex marriages.

A marriage can only be legally ended by death or divorce. Divorce requires a court order. It is a crime to be married to more than one person at a time.

Being married automatically brings a couple within the jurisdiction of relevant *family law*; couples who are not legally married may not be covered by their province's or territory's *family law*.

See also *common law marriage*.

Matrimonial Home: The home where a married couple jointly resides. The matrimonial home is considered joint property regardless of whose name is on the title or lease. One *spouse* cannot exclude the other *spouse* from the matrimonial home without a court order.

The shared residence of a *common-law* couple may or may not be considered a matrimonial home; this is determined by the provisions of the relevant province's/territory's *family law*.

Negligence: Carelessness that may amount to civil or criminal liability.

Parole: When a person convicted of a crime is sentenced to two years or more in federal prison, the later part of their sentence will usually be served in the community while on parole. An offender is eligible to apply for day parole after they have served 1/6 of their prison sentence, and for regular parole after having served 1/3. Almost all offenders are released on parole once they have served 2/3 of their sentence.

Whether or not an offender is actually released on parole, and when, is determined by the Parole Board of Canada. The Parole Board can impose a long list of conditions on offenders who are on parole.

Day parole means the offender is released from custody during the daytime, usually for the purposes of attending school or looking for work. The offender is kept in custody overnight.

Regular or full parole means the offender is released into the community, but still may be under strict conditions (e.g. reside in a half-way house).

The basic idea behind parole is to reintroduce the offender gradually into society, while still maintaining strict supervision over them. Without parole, an offender would go straight from the regimented life of prison to being back on the street again, without any supervision or support.

Parole officers who work for the Parole Board of Canada supervise offenders on parole. Offenders who violate any condition of their parole, or who commit another crime, are returned to prison.

See also *probation.*

Peace Bond: A *restraining order* obtained under §810 of the *Criminal Code*.

Plaintiff: The person who brings a civil law claim (lawsuit) against someone whom the plaintiff alleges has committed a *tort* or other civil wrong. The plaintiff must *prosecute* and prove his or her case.

See also *burden of proof (civil law), defendant (civil law), prosecute* and *tort*.

Probation: Probation may be ordered for any person convicted of a crime who is sentenced to less than two years in jail (or no jail). Probation can be for up to three years (as determined by the sentencing court). Probation is in addition to any other punishment imposed (e.g. fine or jail time).

Probation is intended to be rehabilitative, not punitive. An offender on probation is supervised by a probation officer (who works for the provincial government). Additional conditions may be imposed by the court (e.g. "no contact" order with respect to the *victim*).

See also *parole*.

Prosecute: To institute legal proceedings against a person. The government prosecutes accusations of criminal behavior. *Plaintiffs* are responsible for prosecuting their own accusations of *torts* or other *civil law* claims.

Reasonable: A reasonable belief is one that is the result of careful deliberation by a sober individual comprised of all the facts and relevant circumstances. Canadian law frequently distinguishes between *subjective* belief and what society as a whole would objectively consider as reasonable or rational under the circumstances. For example, a person might be genuinely afraid of birds (a subjective belief), while a reasonable person would understand that there is no rational reason to be afraid of robins and sparrows.

Some laws (e.g. criminal harassment) require that the victim be both subjectively (in her own mind) afraid of the accused, and that this fear be objectively reasonable (as determined by the court following a careful analysis).

Recognizance: A written promise by an *accused* person to appear in court as required. Most people who are arrested by the police are released on a recognizance, without requiring them

to be detained for a bail application. A recognizance may be with or without conditions (e.g. "no contact" order re the victim). See also *judicial interim release*.

Respondent: The person against whom a court order (e.g. *restraining order*) is sought or made. See also *applicant*.

Restraining Order: A court order that prohibits the *respondent* from doing one or more things with respect to the *applicant* (e.g. a "no contact" order). A restraining order may be obtained under civil or family law, or under §810 of the *Criminal Code* ("*peace bond*"). Conditions associated with a recognizance, bail, probation, or parole may be similar to a restraining order, but are not technically a restraining order since they are issued under the criminal law.

Separation: A separation occurs when one or both *spouses* choose to live separate and apart from each other. No court order is required, but proof of separation lasting at least one year may be required in order to obtain a *divorce*. *Spouses* can be considered separated even if continuing to live in the same home, provided they are no longer participating in a *conjugal relationship*.

Sexual Assault: Canadian law defines sexual assault as any touching of a sexual nature without consent. This includes everything from unwanted touching or kissing to rape. There is no exemption for spouses. Sexual assault is both a crime and a *tort*. See also *sexual consent* and *age of sexual consent*.

Sexual Consent: The voluntary agreement to participate in sexual activity with another person. "Sexual activity" is broadly defined, and includes everything from kissing to sexual intercourse. The consent must be for specific sexual activity with a specific person at a specific point in time. Consent to one or more sexual activities is not consent to anything else (e.g. someone who consents to kissing or "making out" does not also consent to sexual intercourse).

Consent cannot be coerced, must be unambiguous, and can be revoked at any time. A third party cannot provide consent. A person who is mentally disabled or intoxicated to the point of incapacity is legally incapable of consent. A person must be of the *age of sexual consent* in order to be legally able to provide consent.

Spouses are not exempt from the requirement to obtain consent in advance of all sexual activity.

Sexual Violence: *Sexual assault* and other violence that involves a sexual component.

Slander: *Defamation* communicated in spoken form.

Spousal Support: Financial support paid by a separated or divorced *spouse* to the other *spouse*. Spousal support may be finite or infinite in duration. The amount is normally calculated using the Spousal Support Advisory Guidelines. In some jurisdictions, *common-law* couples may be eligible for spousal support under some circumstances. See also *child support.*

Spouse: A person in a conjugal relationship, whether married or common-law. See also *common-law marriage* and *marriage*.

Stalking: "Stalking occurs when a person, without lawful excuse or authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, repeatedly engages in conduct that causes the other person reasonably, in all the circumstances, to fear for his or her own safety."[92] Such conduct may include repeatedly following someone from place to place; communicating directly or indirectly with them; watching or besetting any place where a person lives, works, or is known to be; or engaging in threatening conduct towards a person or anyone known to them.[93]

Subjective: What someone believes in his or her own mind. A subjective belief is not necessarily objectively *reasonable*.

Sue: To initiate a claim (prosecution) under *civil law*.

Summary Offence: In Canada, crimes are divided into two categories: less serious *summary offences* and more serious *indictable offences*. For example, minor theft and vandalism are *summary offences*, while murder is an *indictable offence*. A rough comparison to US law would be that *summary offences* are conceptually similar to American misdemeanors, while *indictable offences* are conceptually similar to American felonies. *Indictable offences*, being more serious, are subject to relatively greater penalties. See also *hybrid offence* and *indictable offence*.

Surreptitious: Something done secretly, likely because the other(s) involved would never consent.

[92] *The Domestic Violence and Stalking Act* (Manitoba), CCSM c D93, §2(2)
[93] *The Domestic Violence and Stalking Act* (Manitoba) §2(3), and *Criminal Code* §264 (criminal harassment).

Tort: A legal wrong (either a prohibited act or *negligence*) that a person may prosecute under *civil law*. Not everything bad in life is recognized as a legal wrong (e.g. rudeness or being stood up on a date).

By comparison, a crime is a prohibited act that is prosecuted and punished by the government. A prohibited act (e.g. assault) may constitute both a crime and a tort, and be prosecuted separately as such by the government and the victim, respectively.

Verdict: The decision of a court regarding the outcome of a case. In criminal court, the *accused* is either found "guilty" or "not guilty". In civil court, the verdict could be entirely in favor of the *plaintiff*, entirely in favor of the *defendant*, or somewhere in between.

Victim: A person who is directly harmed by a criminal act. A victim may also be a *witness*. See also *complainant*.

Voyeurism: *Surreptitious* observation and/or visual recording of someone in a private place when they are nude or engaged in sexual activity, whether or not the sexual activity itself is consensual, or whether the person making the recording is also one of the participants.

Witness: A person who testifies (gives evidence) at a trial or other court proceeding. In general terms, a witness may only testify about matters that they have first-hand knowledge of (i.e. saw or heard themselves).

Wiretap: A *surreptitious* recording of a telephone call