

Abusive and Offensive Speech Online: An Overview of Canadian Legal Responses Focusing on the Criminal Law Framework¹

INTRODUCTION & OVERVIEW

- 1.1 Abusive and offensive attacks on individuals and on communities made vulnerable by racism, sexism, colonialism and other forms of oppression and their intersections were not created by the advent of digital communications technologies (DCTs). However, the widespread distributional capacity, immediacy and sense of anonymity associated with networked communications via the internet have amplified both the consequences and public awareness of offensive and abusive content. Canada had a relatively comprehensive framework of legal responses for addressing many types of abusive and offensive content prior to the advent of the internet, including human rights, civil, regulatory and administrative, and criminal law. As in other countries, since the mid-1990s, DCTs and other forms of technology have featured prominently in Canadian economic and social policy. Early parliamentary debate around what was then known as the “information super highway” was highly optimistic about its potential to improve the human condition generally and the Canadian economy specifically. However, very shortly thereafter concerns about offensive and abusive content arose, especially in relation to children.²
- 1.2 With these concerns have come both attempts to apply pre-internet law to abusive and offensive content online, as well as the creation of new kinds of legal responses. The latter include human rights remedies,³ proactive education law responses and public awareness campaigns aimed at addressing root causes of discriminatory and harassing content, as well as remedial responses such as: civil

¹ Professor Jane Bailey, University of Ottawa, Faculty of Law (Common Law), Co-Leader of [The eQuality Project](#).

² Jane Bailey, “Canadian Legal Approaches to Cyberbullying and Cyberviolence: An Overview”, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841413 [Bailey, Canadian].

³ Ironically, until 2013, Canada had a federal human rights provision aimed at addressing hatred spread through telecommunications that was amended in 2001 to clarify its application to internet-based communications. Its repeal in 2013 has left a serious gap in human rights protections, arguably at a time when they are needed most. Provinces and territories may be limited in their capacity to intervene since, among other things, telecommunications falls within the authority of federal parliament under Canada’s *Constitution Act: The Constitution Act, 1867*, 30 & 31 Vict, c 3, <<http://canlii.ca/t/lidsw>> retrieved on 2018-09-29, ss 91(28) and 92(10)a [Canada Constitution].

torts of “cyberbullying”,⁴ non-consensual distribution of intimate images, and privacy intrusions; and administrative and regulatory bodies in two provinces aimed at supporting targets of non-consensual distribution of intimate images and those targeted by “cyberbullying”.

- 1.3 A wide variety of criminal offences⁵ that pre-existed the internet have been applied to DCT-facilitated abusive and offensive content. Further, following a number of high profile federal and provincial reviews, as well as considerable media attention focused primarily on “cyberbullying”, certain pre-existing criminal provisions have been amended to address concerns raised by DCTs. In 2014 non-consensual distribution of intimate images was criminalised. In general, amendments to the criminal law related to perceived shortcomings in then-existing law (eg in relation to law enforcement powers of search and seizure, as well as judicial power to order seizure of systems used to distribute hateful content and deletion of offending content). Creation of the non-consensual distribution provision addressed at least two shortcomings in the pre-internet law. First, then-existing law left adults (particularly women) whose intimate images were disclosed largely unprotected (in part because the threshold for proving obscenity is high and the provision is rarely ever used). Second, pre-internet law exposed young people who distributed intimate photos of their peers subject to criminal prosecution for child pornography offences. Many argued that exposing young people to convictions for child pornography was inconsistent with that provision’s underlying purpose to *protect* children.
- 1.4 As specified in the British Law Commission’s terms of reference, this report focuses primarily on criminal law responses to offensive and abusive content, excluding terrorist offences committed online,⁶ sexual exploitation of children, and platform liability. However, numerous parliamentary bodies, community and youth groups, and academic research have emphasised the importance of multi-pronged approaches that also include proactive responses. As such, Part I of this report provides an overview of non-criminal Canadian legal responses, including

⁴ “Cyberbullying” is in quotation marks to signal the concerns about the term that I have expressed in previous writing: in particular, that “widespread use of the term ... to describe a remarkable variety of situations and behaviours risks obscuring fundamental differences between those situations and behaviours. In particular, its application to situations of sexual, racial, and other forms of identity-based online harassment can too easily eclipse underlying systemic structures of discrimination that disproportionately expose particular groups to attack and violence”: Jane Bailey, “A Perfect Storm: How the Online Environment, Social Norms and Law Constrain Girls’ Online Lives”, *eGirls, eCitizens*, Jane Bailey and Valerie Steeves, eds. (Ottawa: uOttawa Press, 2015) at 24.

⁵ Criminal law falls within the exclusive purview of the federal government: Canada Constitution, *supra* note 3 at 91(27).

⁶ While it does not fall within the scope of this report, it is noteworthy that in 2015 the Canadian *Criminal Code*, RSC 1985, c C-46 was amended to include a prohibition on advocating or promoting commission of terrorism offences: s 83.221. For further analysis see: Craig Forcese and Kent Roach, [“Criminalizing Terrorist Babble: Canada’s Dubious New Terrorist Speech Crime”](#) (2015) 53(1) *Alta L Rev* 35.

laws relating to human rights, education, civil litigation, and to other regulatory and administrative bodies. With the greater legal context laid out in Part I, Part II of this report then turns to focus specifically on criminal law responses. Part II is divided into three parts. Part II.A provides an overview of the four main changes in criminal law designed to respond to abusive and offensive online content. Part II.B discusses fourteen current criminal law provisions that could and/or have been applied to address situations involving abusive and offensive online content. Part II.C highlights two of the key stumbling blocks to applying pre-internet provisions to online content: (i) lack of institutional responsiveness; and (ii) interpretive challenges. The Conclusion summarises the contents of the report, highlighting areas which may necessitate future legislative response in order to effectively address abusive and offensive online content.

PART 1. NON-CRIMINAL LEGAL RESPONSES TO ABUSIVE AND OFFENSIVE CONTENT IN CANADA

- 1.5 “Cyberbullying” could be considered one form or source of abusive and offensive content online. Although there is no general agreement about how to define the term, in Canada the Promoting Relationships and Eliminating Violence Network (PREVNet) defines it as:

willful and repeated harm inflicted through electronic media [including] use of electronic devices or the internet to threaten, harass, embarrass, socially exclude, or damage reputations and friendships.⁷

- 1.6 Following international media coverage of several high profile instances of teen suicides that were connected with DCT-facilitated violence and harassment, between 2011 and 2013 a number of formal reviews relating to “cyberbullying” were convened in Canada.⁸ These included the proceedings of the Standing Senate Committee on Human Rights with respect to cyberbullying in 2011,⁹ the Nova Scotia Task Force on Bullying and Cyberbullying that reported in 2012,¹⁰ and the Coordinating Committee of Senior Officials, Cybercrime Working Group

⁷ PREVNet, *Electronic Bullying: Definition and Prevalence*, fact sheet (2009), online: <<http://www.prevnet.ca/research/fact-sheets>> at 1.

⁸ Jane Bailey, “Time to Unpack the Juggernaut?: Reflections on the Canadian Federal Parliamentary Debates on ‘Cyberbullying’” (2014) 37(2) Dal LJ 661 at 663 [Bailey, Juggernaut].

⁹ Senate, Standing Committee on Human Rights, *Cyberbullying Hurts: Respect for Rights in the Digital Age* (December 2012) (Chair: Hon Mobina SB Jaffer), online: www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf [Senate].

¹⁰ Nova Scotia, Task Force on Bullying and Cyberbullying, *Respectful and Responsible Relationships: There’s No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (29 February 2012) (Chair: A Wayne MacKay), online: <www.nssba.ca/archived-enews/doc_download/58-nova-scotia-task-force-on-bullying-and-cyber-bullying>.

that reported in 2013.¹¹ All of the reviewing bodies recommended, among other things, that a multi-pronged approach be taken, one that does not rely exclusively on law generally or criminal law specifically.¹² This was considered to be particularly important with respect to addressing abusive and offensive content posted by young people, due to the lasting negative effect that a criminal conviction can have on their future ability to be healthy and productive members of society. Moreover, recent research with young people suggests that, in many instances, those specifically targeted by these behaviours are seeking more immediate responses than criminal law alone can provide.¹³ Thus, while there are certainly instances of abusive and offensive content online that merit criminal censure, it will be important to expand legal and policy responses beyond the criminal law framework in order to insure that the needs of those targeted are fully addressed.

- 1.7 In Canada, in addition to the criminal prohibitions discussed below in Part II, abusive and offensive content online have been addressed at different points in time through human rights law, education law, civil litigation, and regulatory/administrative law.¹⁴

A. Human rights law

- 1.8 A considerable amount of abusive and offensive online content targets members of communities made vulnerable by racism, sexism and other oppressions and their intersections.¹⁵ Content of this kind therefore raises equality-based human rights issues, which were previously addressed in both federal and, arguably, provincial/territorial human rights legislation in Canada. While the provision is no longer in force, it nevertheless provides a helpful illustration of a human rights based approach to abusive and offensive online content that is grounded in discrimination.

¹¹ Coordinating Committee of Senior Officials, Cybercrime Working Group, *Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety: Cyberbullying and the Non-consensual Distribution of Intimate Images* (June 2013), online: www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn32485-eng.pdf [Cybercrime Working Group].

¹² The need for a multi-pronged approach has also been endorsed in academic research on these issues: Bailey Juggernaut, *supra* note 7; Elias Aboujaouade, et al. "Cyberbullying: Review of an Old Problem Gone Viral" (2015) 57(1) *Journal of Adolescent Health* 10; Sameer Hinduja and Justin Patchin, *School Climate 2.0: Preventing Cyberbullying and Sexting One Classroom at a Time*. (California: Corwin, 2012) at 12.

¹³ See, for example: Jane Bailey and Valerie Steeves, *Defamation Law in the Age of the Internet: Young People's Perspectives* (2017) *Law Commission of Ontario* 1, online: www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf.

¹⁴ The following discussion relies heavily upon and occasionally draws quotations from Bailey Canadian, *supra* note 2 at 9-41.

¹⁵ Bailey Canadian, *supra* note 2 at 9.

- 1.9 The *Canadian Human Rights Act (CHRA)* was passed in 1977, thereby creating federal legislation aimed at addressing human rights. One of its provisions, section 13, made it a discriminatory practice to repeatedly communicate (or cause to be communicated) *telephonically*, any matter likely to expose a person or persons to hatred or contempt by reason of their identifiability on a prohibited ground such as gender, race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, or disability.¹⁶ In 1990, section 13 survived a constitutional challenge when the Supreme Court of Canada concluded that it imposed a reasonable limit on free expression under section 2(b)¹⁷ of the *Canadian Charter of Rights and Freedoms*.¹⁸
- 1.10 The question of whether “telephonically” included communication via an internet website was first raised before a Canadian Human Rights Tribunal (CHRT) in *Citron v Zundel*.¹⁹ While the CHRT concluded in 2002 that communicating via an internet website constituted communicating “telephonically” within the meaning of the original provision,²⁰ in 2001 Parliament amended the provision to clarify that, “for greater certainty”, the section 13 prohibition
- applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.²¹
- 1.11 As hate propagation via the internet grew over the subsequent decade, section 13 was successfully applied to numerous instances of abusive and offensive online content that exposed members of vulnerable groups to hatred or contempt.²² It also survived a second constitutional challenge. In 2014, the Federal Court of

¹⁶ *Canadian Human Rights Act*, SC 1976, c 33, s 13.

¹⁷ Section 2(b) guarantees that everyone has the right to “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”: The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <<http://canlii.ca/t/lidsx>> retrieved on 2018-09-29 [Charter].

¹⁸ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892, 1990 CanLII 26 (SCC), <<http://canlii.ca/t/1fsp1>>, retrieved on 2018-09-18.

¹⁹ *Citron and Toronto Mayor's Committee v. Zundel*, 2002 CanLII 23557 (CHRT), <<http://canlii.ca/t/1q95g>>, retrieved on 2018-09-18. By way of full disclosure, the author of this report acted as co-counsel to the complainant Sabina Citron in that case.

²⁰ *Citron and Toronto Mayor's Committee v. Zundel*, 2002 CanLII 23557 (CHRT), <<http://canlii.ca/t/1q95g>> at para 88.

²¹ *Anti-Terrorism Act*, SC 2001, c. 41, s 88 [ATA].

²² Jane Bailey, “Twenty Years Later *Taylor* Still Has It Right: Section 13 of the *CHRA*’s Continuing Contribution to Equality” *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat*, Sheila McIntyre and Sanda Rodgers, eds. (Markham, Ontario: Supreme Court Law Review and LexisNexisCanada, 2010) [Bailey Twenty Years].

Appeal concluded that although the provision had been amended to extend its application to the internet, it still constituted an acceptable limit on freedom of expression under the *Charter*.²³ However, prior to the Federal Court of Appeal's decision, Parliament repealed section 13 following an onslaught of conservative criticism of the provision and a commissioned report from Professor Richard Moon.²⁴ With the repeal of section 13 Canada lost an important remedial tool for addressing the growing onslaught of abusive and offensive online content. The Committee on the Elimination of Discrimination against Women (CEDAW) recognised this loss in its 2016 country report on Canada and recommended reinstatement of section 13.²⁵ In January 2018 it was reported that the federal government was considering reinstating the provision.²⁶

- 1.12 All Canadian provinces and one territory “have human rights code provisions forbidding discriminatory displays, broadcasts, or publications, which might arguably be applicable to certain cases of online hate propagation.”²⁷ However, “at least one provincial human rights tribunal has ruled that only the federal government can regulate communication over the internet”, finding therefore that its provincial legislation was inapplicable to online hate.²⁸ In any event, provincial and territorial human rights codes might still be used to hold schools and other institutions accountable for failure to adequately address complaints of identity-based online harassment that are within their jurisdiction.²⁹

²³ *Lemire v. Canada (Human Rights Commission)*, 2014 FCA 18 (CanLII), <<http://canlii.ca/t/g2x2d>>, retrieved on 2018-09-19.

²⁴ Dax D’Orazio, *The Demise of Section 13 of the Canadian Human Rights Act: Reappraising the “Battle for Free Speech”*. MA Thesis. Carleton University, online: https://curve.carleton.ca/system/files/etd/8a57d182-8eaa-4024-a2ec-a90bab50fa44/etd_pdf/775518b19f1afab6292dd767efcb14d8/dorazio-thedemiseofsection13ofthecanadianhumanrights.pdf.

²⁵ Committee on the Elimination of Discrimination against Women, *Concluding Remarks (Advance Unedited Version)* 18 November 2016, online: https://www.etoconsortium.org/nc/en/404/?tx_drblob_pi1%5BdownloadUid%5D=194, para 24(g) and 25(g).

²⁶ Brian Platt, “Liberals reviewing option to revive controversial internet hate speech law repealed in 2013”, *National Post*. (22 January 2018), online: <https://nationalpost.com/news/politics/liberals-reviewing-option-to-revive-controversial-hate-speech-law-repealed-in-2013>.

²⁷ Bailey Canadian, *supra* note 2 at 10-11.

²⁸ Bailey Canadian, *supra* note 2 at 10-11. This decision reflects an interpretation of Canada’s *Constitution Act*, *supra* note 2, s 92(10a), which declares “Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province” to fall exclusively within federal jurisdiction.

²⁹ See *School District No. 44 (North Vancouver) v Jubran*, 2005 BCCA 201 for an example related to an offline case of bullying.

B. Education law

- 1.13 Schools are often called upon to deal with abusive and offensive online content involving their students, teachers and other staff members. As a result, education law and policy has a significant role to play in this area. It can spell out both punitive or reactive responses to abusive and offensive online content *after* it happens, as well as proactive measures aimed at preventing such content *before* it is posted. All Canadian provinces and territories (except for Nunavut, which has other provisions which would apply to “cyberbullying”) “specifically address, or require school boards and schools to address, bullying and cyberbullying” in school codes of conduct or other related policies (such as acceptable use of electronic communications systems policies).³⁰ This can include punishments (for example, suspension) that explicitly apply to students engaging in “cyberbullying” behaviours, as well as more general provisions that can be applied to those behaviours.³¹
- 1.14 Education law offers one of the most proactive legislative strategies for addressing offensive and abusive expression, particularly where it engages young people in dialogue about human rights and responsibilities in order to promote respect for diversity and equality. “[A]ll [Canadian] provinces and territories have explicitly committed themselves to promoting respect for equity and diversity through safe, caring, and accepting schools policies or through the articulation of principles requiring respect for difference. Newfoundland, Nova Scotia, Ontario, and Saskatchewan, in particular, have some of the most current and comprehensive approaches to bullying and cyberbullying, incorporating not just disciplinary provisions, but also respect for diversity initiatives.”³²
- 1.15 Most of the details of both punitive and proactive approaches are set out not only in education legislation, but also in a complex web of regulations, policies and program memoranda, and school and school board codes and policies.³³ The potential for jurisdictional issues to arise between schools and law enforcement agencies, which might both be involved in student-to-student offensive and abusive content is discussed below in Part II.

³⁰ Bailey Canadian, *supra* note 2 at 13.

³¹ For example, “Alberta, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia, Ontario, and Quebec explicitly refer to bullying and/or “cyberbullying” in their education legislation”, while the remaining provinces and territories have general provisions that could be applied: Bailey Canadian, *supra* note 2 at 14.

³² Bailey Canadian, *supra* note 2 at 13-14.

³³ Bailey Canadian, *supra* note 2 at 14. For more detail with respect to each province and territory, see *ibid* at 15-33.

C. Civil litigation

- 1.16 Civil litigation in Canada also allows targets of certain kinds of abusive and offensive online content to seek legal redress without having to engage with the criminal law process. The civil options include seeking remedies for:
- (1) privacy violations (eg where the abusive and offensive content involves non-consensual disclosure of intimate images) under: (i) privacy legislation in certain provinces;³⁴ (ii) *The Intimate Image Protection Act*³⁵ in Manitoba; (iii) 2018 amendments to Saskatchewan's *Privacy Act* that created a tort of non-consensual distribution of intimate images;³⁶ and (iv) common law torts of breach of confidence, invasion of privacy (public disclosure of private facts) and intentional infliction of mental suffering;³⁷
 - (2) defamation where the abusive and offensive content is untruthful and would tend to lower the target's reputation in the eyes of a reasonable person;³⁸
 - (3) copyright violation where the target's original work is distributed without their permission;³⁹
 - (4) non-consensual distribution of intimate images and cyber-bullying - legislation in Manitoba⁴⁰ and Alberta⁴¹ creates a statutory tort allowing targets of reckless or intentional non-consensual distribution of their intimate images to sue for damages and/or an injunction. In Nova Scotia,

³⁴ For example, the privacy legislation in British Columbia (RSBC 1996 c 373), Manitoba (RSM 1987, c P125), Newfoundland (RSN 1990, c P-22) and Saskatchewan (RSS 1978, c P-24) creates a right to sue for invasion of privacy.

³⁵ *The Intimate Image Protection Act*, CCSM c I87 [Manitoba IIPA].

³⁶ The amendments also allow targets to sue in small claims court and create a presumption that, once an action is commenced, the image was distributed without consent, subject to the defendant proving they reasonably believed they had consent for distribution: Bill No. 72, *An Act to amend the Privacy Act*, s 5, online: <http://www.publications.gov.sk.ca/freelaw/documents/english/FirstRead/2017/Bill-72.pdf>, which received royal assent on 9 May 2018.

³⁷ For example, in *Doe 464533 v ND*, 2016 ONSC 541 the Ontario Superior Court of Justice awarded a woman a default judgment of \$100,000 plus costs and an injunction against her ex-boyfriend for posting an intimate image of her online without her knowledge or consent. The default judgment was set aside and the parties are proceeding to litigate the case.

³⁸ "In the context of internet defamation, aggravating circumstances include recognition of the "ubiquity, universality, and utility of that medium"[*Lord Selkirk School Division v Warnock*, 2015 MBQB 195, citing *Awan v Levant*, 2014 ONSC 6890 at para 193]. In addition, where there has been an "ongoing campaign of defamation and a likelihood that it will continue," an ongoing order prohibiting further publication can be made" [*St Lewis v Rancourt*, 2015 ONCA 513 at para 16]: Bailey Canadian, *supra* note 2 at 36.

³⁹ Bailey Canadian, *supra* note 2 at 36-7.

⁴⁰ Manitoba IIPA, *supra* note 35.

⁴¹ *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, SA 2017 c P-26.9.

2017 legislation⁴² makes remedies such as injunctions and damages available to those targeted by non-consensual distribution of intimate images *and/or* by “cyber-bullying”,⁴³ and

- (5) negligence where an institution (such as a school) fails to abide by its legal duty to protect someone in its care from harms such as being targeted by offensive and abusive content.⁴⁴

1.17 The possibility of increased public notoriety can significantly deter targets of abusive and offensive content from bringing a civil action and obtaining a confidentiality order can be both expensive and onerous.⁴⁵ However, in *AB v Bragg* the Supreme Court of Canada helped to minimise that burden for young people suing in relation to sexualised “cyberbullying”.⁴⁶ The Court concluded that 15-year-old AB should be allowed to sue using a pseudonym rather than her real name because it could be presumed that young victims of sexualised “cyberbullying” “are particularly vulnerable to the harms of revictimisation upon publication”, which could in turn undermine their ability and willingness to access justice through the courts.⁴⁷

D. Regulatory/administrative law

1.18 In Canada, two areas of regulatory and administrative law are relevant to addressing abusive and offensive content online:

- (1) *offices of federal, provincial and territorial privacy commissioners* – many of these offices have become involved with complaints, educational initiatives and public outreach materials relating to abusive and offensive content that also constitutes a privacy violation (eg non-consensual disclosure of intimate images and doxing). Since their enabling legislation focuses on how public and/or private organisations handle data with which they are

⁴² The 2017 legislation was passed after Nova Scotian legislation from 2015 was struck down as an unconstitutional violation of free expression under the *Canadian Charter of Rights and Freedoms*: Bailey Canadian, *supra* note 2 at 41. The 2015 legislation defined “cyber-bullying” very broadly, while the 2017 legislation narrows the definition and specifies that defences similar to those for defamation are available to those responding to claims: *Intimate Images and Cyber-protection Act*, SNS 2017, c 7, ss 6-7 [Nova Scotia IICPA].

⁴³ *Intimate Images and Cyber-protection Act*, SNS 2017, c 7, ss 6-7 [Nova Scotia IICPA].

⁴⁴ Bailey Canadian, *supra* note 2 at 39.

⁴⁵ For further discussion, see: Jane Bailey and Jacquelyn Burkell, “Equality at stake: Connecting the privacy/vulnerability cycle to the debate about publicly accessible online court records” (2018) 4(1) *Canadian Journal of Comparative and Contemporary Law* 67.

⁴⁶ *AB v Bragg Communications Inc*, 2012 SCC 46.

⁴⁷ *AB v Bragg Communications Inc*, 2012 SCC 46 at para 27.

entrusted, they can become involved in requesting service providers (e.g. social networking sites) to take down violative content,⁴⁸ and

- (2) *specialised investigatory/support units* – both Manitoba and Nova Scotia have specialised units created by statute that are specifically authorised to address problematic online content, some of which could fall into the abusive and offensive category focused on in this report. Under Manitoba's *Intimate Image Protection Act*,⁴⁹ the Canadian Centre for Child Protection “may get involved with respect to removing and deleting images, contacting individuals who distributed an intimate image (or their parents), and engaging the police if appropriate”.⁵⁰ Nova Scotia's 2017 *Intimate Images and Cyber-protection Act* empowered the Minister of Justice to designate an agency to provide a variety of educational, informational and voluntary dispute resolution services relating to alleged incidents of non-consensual distribution of intimate images and “cyberbullying”.⁵¹ The Minister designated the CyberScan unit (which was previously created in 2015 legislation that was later struck down as unconstitutional)⁵² as the agency responsible for these functions.

1.19 There is certainly more work to be done in terms of offering comprehensive support for targets of abusive and offensive content in Canada.⁵³ This was specifically recognised in the context of racist expression in a 2007 report prepared by Dr Andrea Slane commissioned as part of *Canada's Action Plan Against Racism*.⁵⁴ Based on interviews with representatives of non-government organisations with respect to how Canadian efforts to combat hate on the internet could be improved, Dr Slane recommended:

- establishing a national tip line for online hate;

⁴⁸ Bailey Canadian, *supra* note 2 at 40.

⁴⁹ Manitoba IIPA, *supra* note 35, ss 3-4.

⁵⁰ Manitoba IIPA, *supra* note 35, at 40.

⁵¹ NSIICPA, *supra* note 42, s 12.

⁵² Nova Scotia Department of Justice, “Intimate Images and Cyber-protection Legislation Proclaimed”. Press Release. (5 July 2018), online: <https://novascotia.ca/news/release/?id=20180705004>.

⁵³ This was specifically recognized in the context of racist expression in a report by Dr Andrea Slane on *Combating Hate on the Internet: Current Canadian Efforts and the Recommendations of Non-Governmental Agencies to Improve Them* (December 2007), online: <https://shared.uoit.ca/shared/faculty/fssh/documents/Combating%20Hate%20on%20the%20Internet.pdf> [Slane]. For further discussion of CAPAR, see: Canada. Department of Justice, *Department of Justice Component of Canada's Action Plan Against Racism Formative Evaluation*. (June 2008), online: <http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/08/capar-paccr/capar.pdf>.

⁵⁴ Slane, *supra* note 53 at 3.

- court ordered take down or blocking of internet materials;
- voluntary take down of Canadian hosted websites;
- voluntary blocking of foreign hosted websites;
- improvements to the Canadian Human Rights Commission’s internet-based hate propaganda complaints process;
- improvements for law enforcement; and
- funding for community groups.

1.20 As is obvious from the discussion in Part I, many of these recommendations were not followed through, and currently existing non-criminal law responses vary significantly from jurisdiction to jurisdiction within Canada. As such, there remains much more that can and should be done for those targeted. Nonetheless, Part I has highlighted some possibilities that go beyond and can supplement criminal law responses in order to provide a greater range of remedial and support options for those targeted. This is in keeping with calls by international human rights bodies for more comprehensive approaches to “internet rights”.⁵⁵

PART 2. CANADIAN CRIMINAL LAW RESPONSES TO ABUSIVE & OFFENSIVE CONTENT⁵⁶

A. Summary of key post-internet criminal law amendments

1.21 A significant component of Canada’s criminal law response to problematic content on the internet has focused on protecting children from sexual exploitation and luring. However, technological change and innovation also spurred concerns around hate propagation (and terrorism), voyeurism, non-consensual distribution of intimate images and advertising sexual services that informed some of the more significant amendments to the *Criminal Code* between 2001 and 2015.⁵⁷

⁵⁵ For further discussion, see: Deborah Brown, Sidra Rizvi, and Kyung Min Kim, “Internet rights in focus: 38th session of the Human Rights Council” *Access Now*. (19 June 2018), online: <https://www.accessnow.org/internet-rights-in-focus-38th-session-of-the-united-nations-human-rights-council/>.

⁵⁶ The following discussion about criminal law responses draws heavily upon and occasionally quotes directly from Bailey Canadian, *supra* note 2, Jane Bailey and Carissima Mathen, “Technologically-facilitated Violence Against Women and Girls: Can Canadian Criminal Law Respond?” [unpublished], online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043506 [Bailey & Mathen] as well as the Cyberviolence Criminal Case Law Database created and maintained by The eQuality Project, online: <http://www.equalityproject.ca/cyberviolence-criminal-case-law/>.

⁵⁷ Many amendments have been made to the *Criminal Code* since the advent of the internet that, at least in some way, reflect adaptations and responses to internet-facilitated crime. The following discussion focuses only on those most directly related to offensive and abusive content.

1. Hate propaganda – expansion of procedural and remedial powers in 2001

- 1.22 Hate propagation offences were first added to the *Criminal Code* in 1970, following recognition that white supremacist and neo-Nazi groups were increasingly active in Canada.⁵⁸ As will be discussed in detail in subsection B below, these provisions prohibit advocating genocide (section 318), publicly inciting hatred toward (section 319(1)) and wilfully promoting hatred toward (section 319(2)) groups identifiable on the basis of factors such as race, religion, and sex.⁵⁹ Section 320 of the *Code* empowered judges to issue writs of seizure and forfeiture in relation to hate material, but these powers focused on real space “premises” where such material was kept for sale or distribution.⁶⁰
- 1.23 In 2001, following the events of 9/11 and in recognition of the role that the internet and computer systems were playing in propagating hate, Parliament amended the *Criminal Code* to, among other things, create section 320.1. Section 320.1 expanded the remedial powers available to a court in relation to hate propagation to allow judges to issue warrants of seizure relating to computer systems and to order custodians of those systems who are engaged in making hate material available online to provide a copy to the court, delete the material and/or to provide information about the identity of the person who posted the material to the court. The provision also created a mechanism for notifying those who had posted the material of the proceeding and providing them an opportunity to respond.⁶¹ In 2014, section 320.1 was again amended to extend these same powers to cases involving unauthorised use of computer systems and to the newly created offence of non-consensual distribution of intimate images.⁶²

2. Creation of the offence of voyeurism in 2005

- 1.24 In 2002 the federal government held a public consultation about amending the *Criminal Code* to specifically prohibit voyeurism and distribution of voyeuristic materials. The consultation followed publicisation of several concerning cases of voyeuristic behaviours using recording technologies, and calls from provincial and territorial ministers of justices and two provincial law commissions⁶³ to explore

⁵⁸ Julian Walker, “Section 13 of the *Canadian Human Rights Act*, Anti-hate laws and freedom of expression” Publication No. 2010-31-E (Canada: 2010) at 5, online: http://publications.gc.ca/collections/collection_2010/bdp-lop/bp/2010-31-eng.pdf.

⁵⁹ *Criminal Code*, *supra* note 6. It is notable that “sex” was not included as a protected ground until 2014, with passage of the *Protecting Canadians from Online Crime Act*, SC 2014, c 31, s 12 [Protecting Canadians] and “gender identity” and “gender expression” were not included until 2017: *An Act to amend the Canadian Human Rights Act and the Criminal Code*, SC 2017, c 13, s 3.

⁶⁰ *Criminal Code*, *supra* note 6, s 320.

⁶¹ *ATA*, *supra* note 21, s 10.

⁶² *Protecting Canadians*, *supra* note 59, s 16.

⁶³ Canada. *Voyeurism as a Criminal Offence: A Consultation Paper*. (Canada: Department of Justice, 2002), online: <http://www.justice.gc.ca/eng/cons/voy/voy.pdf> at 3.

creation of an offence. In its 2002 consultation paper the federal government contextualised the inquiry as follows:

The rapid technological developments of recent years have brought many benefits to Canadian society, but they have also had implications for such basic matters as privacy and the role of the law. Web cameras, for example, which can transmit live images over the Internet, have raised concerns about the potential for abuse, notably the secret viewing or recording of citizens for sexual purposes or where the viewing or recording involves a serious breach of privacy. In light of the Government's commitment in the Speech from the Throne to protect Canadians from new and emerging forms of crime, this may be a good time to review the law in this area and ensure that it is up to date and able to deal with new challenges appropriately and effectively.⁶⁴

- 1.25 Prior to 2002, voyeuristic behaviours were dealt with under *Criminal Code* offences such as mischief or, in applicable cases involving children, the child pornography provisions of the *Code*. However, there was no single comprehensive response to voyeurism and the interpretation and application of other provisions to these behaviours was inconsistent across courts.⁶⁵
- 1.26 Ultimately, the provision enacted in 2005 addressed voyeurism as both a sexual offence and a privacy offence, prohibiting both voyeurism and distribution of voyeuristic materials. The particular wording of the provision and its interpretive challenges are discussed, respectively, in subsections B and C below.

3. *Creation of the offence of advertising sexual services in 2014*

- 1.27 In December 2014, Bill C-36, the *Protection of Communities and Exploited Persons Act*,⁶⁶ came into force. While the *Act* amended the *Criminal Code* to make purchasing sexual services an offence, it also created a prohibition on advertising the sale of sexual services of others.⁶⁷ The advertising prohibition applies to both print media and to websites and extends to “publishers or website administrators, if they know that the advertisement exists and that it is in fact for the sale of sexual services.”⁶⁸

⁶⁴ Canada. *Voyeurism as a Criminal Offence: A Consultation Paper*. (Canada: Department of Justice, 2002), online: <http://www.justice.gc.ca/eng/cons/voy/voy.pdf> at 1.

⁶⁵ Canada. *Voyeurism as a Criminal Offence: A Consultation Paper*. (Canada: Department of Justice, 2002), online: <http://www.justice.gc.ca/eng/cons/voy/voy.pdf> at 5.

⁶⁶ *Protection of Communities and Exploited Persons Act*, SC 2014, c 25.

⁶⁷ *Protection of Communities and Exploited Persons Act*, SC 2014, c 25, creating s 286.4 and 286.5.

⁶⁸ Canada. “Prostitution Criminal Law Reform: Bill C-36, the *Protection of Communities and Exploited Persons Act*”, (Department of Justice: 2018), online: http://www.justice.gc.ca/eng/rp-pr/other-audre/c36fs_fi/.

1.28 The amendment followed public controversy around advertisements for sexual services found on Craigslist's "erotic services" advertising section. In 2010, the then-federal Minister of Justice demanded that Craigslist remove ads for erotic services, citing concerns about human trafficking and child sexual abuse. This followed similar prior demands from the Alberta Justice Minister and seventeen US state attorneys general.⁶⁹ Exposing website administrators to criminal liability under the new provision was intended to create an incentive for online service providers to remove such content.

4. *Creation of the offence of non-consensual distribution of intimate images in 2014*

1.29 The 2014 creation of section 162.1, the offence of non-consensual distribution of intimate images, is perhaps Canada's most significant substantive post-internet criminal law amendment relating to offensive and abusive online content. The passage of the *Protecting Canadians from Online Crime Act*⁷⁰ arguably responded to a number of issues arising from Canada's pre-internet criminal law, including:

- (1) use of child pornography provisions to deal with youth-to-youth non-consensual distribution cases, which many considered to be unnecessarily punitive and out of step with the original intention of those provisions to protect young people;
- (2) the absence of an adequate criminal law response to deal with both the sexual exploitation *and* violation of privacy that are common features of non-consensual distribution of intimate images; and
- (3) the absence of a criminal law response to non-consensual disclosure cases targeting adult women, given the very high threshold for proving obscenity.⁷¹

1.30 Creation of the offence followed several years of parliamentary debate relating to "cyberbullying", which intensified in 2010 as a result of high profile media cases involving teen suicides associated with online harassment and violence,⁷² as well as the 2013 report of the Cybercrime Working Group (a joint working group report to the FPT Ministers for Justice and Public Safety) which recommended (among other things):

⁶⁹ Gloria Galloway, "Justice minister presses Craigslist to remove erotic-services ads" *The Globe and Mail*. (3 November 2010), online: <https://www.theglobeandmail.com/news/politics/ottawa-notebook/justice-minister-presses-craigslist-to-remove-erotic-services-ads/article4083693/>.

⁷⁰ *Protecting Canadians*, *supra* note 59.

⁷¹ For further analysis of justifications for creating the new offence, see Carissima Mathen, "Crowdsourcing Sexual Objectification" (2014) 3(3) *Laws* 529, online: <https://www.mdpi.com/2075-471X/3/3/529>.

⁷² Bailey Juggernaut, *supra* note 9 at 673.

a new criminal offence addressing the non-consensual distribution of intimate images be created, including complementary amendments relating to, for example, the forfeiture of items used in the commission of the offence and restitution to permit the victim to be compensated for any costs associated with having the images removed from the Internet.⁷³

1.31 The “cyberbullying” Bill that was finally passed into law followed a series of prior parliamentary and senate engagements with the issue, including:

[previously] proposed *Criminal Code* amendments to address cyberbullying;⁷⁴ the proceedings of the Standing Senate Committee on Human Rights with respect to cyberbullying in 2011;⁷⁵ a 2012 House of Commons proposal to create a non-partisan committee to investigate and propose a national strategy with respect to bullying and cyberbullying;⁷⁶ a 2013 federal contribution to a Red Cross anti-bullying program;⁷⁷ and proposed *Criminal Code* amendments to prohibit the non-consensual distribution of intimate images, first tabled in an NDP private member’s Bill in June 2013,⁷⁸ and subsequently included in omnibus government Bill C-13.⁷⁹

1.32 Controversially, while the new legislation was billed largely as addressing “cyberbullying”, the provisions relating to non-consensual distribution were only a small part of the amending legislation, which also included:

- (1) significant expansion of state surveillance powers through amendments to search and seizure powers, and creation of new judicial powers to make preservation demands and production orders relating to online content;⁸⁰

⁷³ Cybercrime Working Group, *supra* note 11 at 2.

⁷⁴ Bill C-355, *An act to amend the Criminal Code (cyberbullying)*, 2nd Sess, 40th Parl, 2009 (first reading 1 April 2009; reinstated in 3rd Sess, 3 Mar 2010); Bill C-273, *An act to amend the Criminal Code (cyberbullying)*, 1st Sess, 41st Parl, 2011 (first reading 19 September 2011).

⁷⁵ Senate, *supra* note 10.

⁷⁶ Private Members’ Business, Motion M-385, moved by Dany Morin: House of Commons, *Journals*, 41st Parl, 1st Sess, No 161 (15 October 2012) at 1100.

⁷⁷ House of Commons, *Edited Hansard*, 41st Parl, 1st Sess, No 261 (3 June 2013) at 1437 (Hon James Moore, Minister of Canadian Heritage and Official Languages); CBC News, “Feds pledge \$250K to youth-led anti-bullying project”, *CBC News Ottawa* (2 June 2013), online: CBC <<http://www.cbc.ca/news/canada/ottawa/>>.

⁷⁸ Bill C-540, *An Act to amend the Criminal Code (non-consensual making or distribution of intimate images)*, 1st Sess, 41st Parl, 2013 (first reading 17 June 2013; reinstated in 2nd Sess, 16 October 2013).

⁷⁹ Bailey Juggernaut, *supra* note 9 at 673-4.

⁸⁰ Protecting Canadians, *supra* note 59, Summary.

- (2) empowering courts to make orders prohibiting offenders from using the internet;⁸¹
- (3) specification of offences relating to wrongful use or distribution of telecommunications signals;⁸²
- (4) revising the offence of unauthorised use of a computer system;⁸³
- (5) revising the offences relating to false, indecent and harassing communications to remove references to specific technologies (e.g. telegrams);⁸⁴ and
- (6) revising the offence of mischief in relation to computer data.⁸⁵

1.33 The particular wording of section 162.1 and its interpretive challenges are discussed, respectively, in subsections B and C below.

B. Overview of applicable criminal law provisions

1.34 A review of Canadian case law reveals that both pre-internet provisions of the Canadian *Criminal Code* and the post-internet amendments discussed above in subsection A can, and have been, applied to abusive and offensive content online. A significant percentage of reported cases relating to DCT-facilitated violence and harassment involve child pornography and other kinds of sexual offences against children (such as luring), which are beyond the scope of this report.⁸⁶ Outside of these situations, the criminal offences that may be applied to online content that could be categorised as abusive and/or offensive include (in alphabetical order by topic):

- (1) counselling suicide (section 241);
- (2) criminal harassment (section 264);
- (3) defamatory libel (section 298);
- (4) extortion (section 346);

⁸¹ Protecting Canadians, *supra* note 59, s 3, creating s 162.2.

⁸² Protecting Canadians, *supra* note 59, s 15, replacing the pre-existing s 327.

⁸³ Protecting Canadians, *supra* note 59, s 16, replacing the pre-existing s 342.1.

⁸⁴ Protecting Canadians, *supra* note 59, s 18, replacing the pre-existing ss 371 and 372.

⁸⁵ Protecting Canadians, *supra* note 59, s 19 replacing the pre-existing s 430(1.1).

⁸⁶ For an overview of these provisions and summaries of related case law, see: <http://www.equalityproject.ca/cyberviolence-criminal-case-law/cyberviolence-criminal-case-law-offences-against-adults/>.

- (5) fraudulent, false and harassing communications (sections 371, 372);
- (6) hate propagation (sections 318, 319);
- (7) human trafficking and advertising sexual services (sections 279.01, 279.02, 286.4);
- (8) identity fraud (section 403);
- (9) intimidation (section 423);
- (10) mischief in relation to data (section 430);
- (11) non-consensual distribution of intimate images (section 162.1);
- (12) obscenity (section 163);
- (13) uttering threats (sections 264.1 and 265); and
- (14) voyeurism (section 162).

1.35 Subsections 1-14 below describe each of these provisions, and highlight some of the case law in which they have been applied. The full text of each of the relevant provisions is set out in Appendix A.

1. Counselling suicide (s 241)

1.36 In Canada, a person who counsels another person to die by suicide or aids or abets a person in dying by suicide commits an offence and, on conviction, is subject to up to 14 years in prison, whether or not death ensues.⁸⁷ Except for the exemptions related to medically assisted suicide, the provision long predates the advent of online communications. Since the provision does not distinguish particular modes of counselling, aiding or abetting, there is nothing on its face that would suggest it would be inapplicable where such conduct is committed via DCTs, such as the internet.

1.37 I have located two reported Canadian cases with accused persons charged with aiding and abetting suicide that involved use of the internet to convey information about committing suicide.⁸⁸ In both cases, the accused was known to the person who died, although the internet was a source of information about how to carry out a suicide. In another internationally known case prosecuted in Minnesota, William

⁸⁷ *Criminal Code*, *supra* note 6, s 241. Note that there is now an exemption from this offence for medically assisted suicide: ss. 241(2) and 241.2.

⁸⁸ *R v Houle*, 2006 QCCS 319; *R v Martens*, 2004 BCSC 1450.

Melchert-Dinkel, a former Minnesota nurse, was ultimately convicted⁸⁹ under Minnesota law of assisting a British man to die via internet communication, but acquitted of the same offence in relation to a young Canadian woman.⁹⁰ The reason for the acquittal in relation to the Canadian woman appeared to centre more on the specific content of the communication, rather than on the fact that the communication occurred via an internet chat room.

- 1.38 While suicides relating to internet content and activity have certainly been the topic of legislative debate in Canada in relation to “cyberbullying”, I have not located any parliamentary debate focused on the need for legislative change specifically designed to address the kind of situation at play in the Melchert-Dinkel case.

2. Criminal harassment (s 264)

- 1.39 In Canada it is a crime for a person to knowingly or recklessly engage in certain forms of conduct that cause another person “reasonably, in all circumstances, to fear for their safety or the safety of anyone known to them.”⁹¹ The prohibited types of conduct include repeatedly following or communicating directly or indirectly with the person, or engaging in threatening conduct.⁹² The maximum punishment for criminal harassment is ten years imprisonment.⁹³⁹⁴
- 1.40 There are numerous Canadian cases in which the criminal harassment provision has been applied to content delivered via DCTs. The behaviours covered in the case law include: non-consensual distribution of intimate images (prior to enactment of section 162.1, which is discussed in subsection 9 below), “doxing”,⁹⁵ swatting,⁹⁶ repeated texting,⁹⁷ disturbing (often sexualised) postings and threats

⁸⁹ Prior to the conviction and the acquittal, a constitutional challenge by the defendant resulted in a court ruling that the Minnesota prohibition on advising or encouraging suicide violated the First Amendment right to free expression, but the prohibition on *assisting* suicide did not: Harvard Law Review, “State v Melchert-Dinkel: Minnesota Supreme Court Determines that False Claims Used to Advise or Encourage Suicide Do Not Fall Within the *Alvarez* Fraud Exception” (2015) 128 Harv L Rev 1280.

⁹⁰ Associated Press, “Former nurse helped to instruct man on how to commit suicide, court rules”. *The Guardian*. (29 Dec 2015), online: <https://www.theguardian.com/us-news/2015/dec/28/minnesota-suicide-conviction-william-melchert-dinkel-mark-drybrough>.

⁹¹ Criminal Code, *supra* note 6, s 264.

⁹² Criminal Code, *supra* note 6, s 264(2).

⁹³ Criminal Code, *supra* note 6, s 264(3).

⁹⁴ Bailey & Mathen, *supra* note 55 at 6.

⁹⁵ *R v BLA*, 2015 BCPC 203 [BLA]; *R v Korbut*, 2012 ONCJ 522.

⁹⁶ *BLA*, *supra* note 95.

⁹⁷ *R v Erickson*, 2015 ABPC 234; *R v Alvarez-Gongora*, 2014 ONCJ 712 ; *R v B(H)*, 2016 ONSC 594.

on social media,⁹⁸ persistent requests for intimate images,⁹⁹ use of a keylogger to access the victim's passwords, computer contents and intimate images,¹⁰⁰ threatening phone calls¹⁰¹ and email messages,¹⁰² creation of fake Facebook profiles accusing the victim of spreading HIV¹⁰³ and to maintain contact with the victim,¹⁰⁴ and a tweeted threat to bomb a public figure.^{105"106} In a set of 24 cases analysed by Bailey & Mathen, sentences upon conviction ranged from a conditional discharge for a young offender up to two years less a day in prison for another offender.¹⁰⁷

1.41 Three aspects of these cases are worthy of note with respect to Canadian criminal law's capacity to respond to offensive and abusive online content. First, the facts in some cases evidencing the relentless, invasiveness and long-lasting effects of DCT-facilitated harassment led some courts to see content communicated this way as especially harmful to those targeted.¹⁰⁸ Second, in some cases courts imposed penalties that included restrictions on convicted persons' access to and use of the internet and social media, raising important questions about the appropriate balance between the expressive and informational rights of perpetrators and the equality and security rights of their targets.¹⁰⁹ Third, in some cases, the fact that threats were communicated via the internet led courts to question whether targets could reasonably have feared for their safety, indirectly questioning whether a lack of physical immediacy somehow mitigates the reasonableness of the target's perception of the content communicated.¹¹⁰ The third issue is canvassed in greater detail in subsection C below.

⁹⁸ *R v Cholin*, 2010 BCPC 203; *R v CL*, 2014 NSPC 79.

⁹⁹ *R v SB*, 2014 BCPC 279.

¹⁰⁰ *R v Barnes*, 2006 ABCA 295.

¹⁰¹ *R v Kapoor*, 2012 ABPC 299; *R v Lepore* [2001] OJ No 2053, OTC 411.

¹⁰² *R v Greenberg*, 2009 ONCJ 28; *R v Owens*, 2007 ONCJ 151.

¹⁰³ *R v Wenc*, 2009 ABCA 328.

¹⁰⁴ *R v Amiri*, 2013 ONCJ 829; *R v Smith*, 2014 ONCA 324.

¹⁰⁵ *R c Le Seilleur*, 2014 QCCQ 12216.

¹⁰⁶ Bailey & Mathen, *supra* note 56 at 6-7.

¹⁰⁷ Bailey & Mathen, *supra* note 56 at 7.

¹⁰⁸ Bailey & Mathen, *supra* note 56.

¹⁰⁹ Bailey & Mathen, *supra* note 56 at 8.

¹¹⁰ Bailey & Mathen, *supra* note 56 at 9-10.

3. Defamatory libel (s 298)¹¹¹

- 1.42 In Canada, “[d]efamatory libel is defined as the publication, without lawful justification or excuse, of a matter that is likely to injure another by exposing them to hatred, contempt or ridicule or that is designed to insult the person about whom it is published. The maximum punishment for defamatory libel is two years imprisonment.¹¹² Despite concerns that the provision violates the constitutional protection for freedom of expression, the Supreme Court of Canada found it to be valid in 1998.¹¹³¹¹⁴
- 1.43 In one reported DCT-facilitated case of defamatory libel,¹¹⁵ a female restaurant owner was convicted for using her target’s personal information to set up a fake email account through which she sent defamatory messages to the target’s employer. The perpetrator also posted the target’s photo and a sexually explicit message on an online dating site in the name of the target. Upon conviction, the accused woman was sentenced to 90 days in jail.¹¹⁶

4. Extortion (s 346)

- 1.44 In Canada, it is a crime to use “threats or violence to induce someone to do anything. The maximum punishment is life imprisonment.¹¹⁷¹¹⁸
- 1.45 Technology surfaced in a number of ways in a set of thirteen Canadian extortion cases reviewed by Bailey & Mathen. These included: “threats to publish nude

¹¹¹ Section 296 of the Canadian *Criminal Code* also prohibits “blasphemous libel”, which is probably best understood as a relic of the past that is unlikely to survive constitutional scrutiny or to be resorted to by crown prosecutors today. For further discussion, see: Dennis Baker and Benjamin Janzen, “Is it time to overhaul the *Criminal Code of Canada*?” Macdonald Laurier Institute Commentary (May 2013), online: https://www.macdonaldlaurier.ca/files/pdf/2013.05.25-Commentary-Criminal_Code_Overhaul-vFinal-web.pdf at 3.

¹¹² *Criminal Code*, *supra* note 6, s 301.

¹¹³ *R v Lucas* [1998] 1 SCR 439, 1998 CanLII 815. “The court was unanimous in upholding the statute though it divided somewhat on the analysis. The court found defamatory libel to be only weakly linked to the “core values” protected by the fundamental freedom of expression. While the offence *prima facie* offended section 2(b) of the *Charter*, it was nonetheless a “reasonable limit” under section 1. The court did read into the offence an intent to defame the victim (in addition to the accused’s knowledge of falsity); and it ruled that the offence can only be proved when the libel is seen by, or delivered with intent that it be seen by, someone *other* than the person defamed”: Bailey & Mathen, *supra* note 56.

¹¹⁴ Bailey & Mathen, *supra* note 56, at 11-12.

¹¹⁵ *R v Simoes*, 2014 ONCA 144.

¹¹⁶ Bailey & Mathen, *supra* note 56 at 14.

¹¹⁷ *Criminal Code*, *supra* note 6, s 346(1.1)(b).

¹¹⁸ Bailey & Mathen, *supra* note 56 at 12.

photos online;¹¹⁹ inducing transmission of nude images online;¹²⁰ and using online social media sites such as Nexopia in order to develop a relationship with the victim.¹²¹ The sentences ranged from a fifteen-month conditional sentence¹²² to 7 years imprisonment (in a case involving luring, and counselling production of child pornography in addition to extortion).¹²³ The highest sentence for conviction on extortion charges only was 18 months imprisonment.¹²⁴¹²⁵

5. *Fraudulent, false, indecent and harassing communications (sections 371, 372)*

1.46 Offences relating to fraudulent, false, indecent, and harassing communications may also be applicable to abusive and offensive online content. Prior to 2014, these offences were tied more specifically to certain types of communication (eg telegram, cablegram, telephone, cable and radio).¹²⁶ However, the same legislative amendment that brought the non-consensual distribution of intimate images offence into being (discussed in subsection A above) also amended these provisions to remove references to specific types of communication.¹²⁷ As a result, it would now appear clear that communication of the following four kinds of content (whether online or via another means of telecommunications) are prohibited:

- (1) *fraudulent messages* - fraudulent conveyance of a message as if it were sent with the authority of another person, knowing it is not and with intent for it to be acted upon as if it were;¹²⁸
- (2) *false information* - conveying or causing communication of false information with intent to injure or alarm a person by letter or by any means of telecommunications;¹²⁹

¹¹⁹ *R v Davis* [1999] 3 SCR 759, SCJ No 67; *R v W*, 2014 BCPC 197; *R v RLB*, [1992] ABCA 243, 131 AR 216; *R v Hassan*, [2009] OJ No 1378; *R v Walls*, 2012 ONCJ 835.

¹²⁰ *R v Innes*, 2007 ABPC 237 [*Innes*]; *R v Chartier*, 2015 MBPC 63 [*Chartier*]; *R v Y*, 2015 NSPC 14.

¹²¹ *Innes*, *supra* note 120.

¹²² *R. v Colosie*, 2016 CanLII 14269 (ON SC).

¹²³ *Innes*, *supra* note 120.

¹²⁴ *Chartier*, *supra* note 120.

¹²⁵ Bailey & Mathen, *supra* note 56 at 12-13.

¹²⁶ See ss 371-372, *Criminal Code*, RSC 1985, c C-46, past version in force 1 November 2013 to 11 December 2013.

¹²⁷ *Protecting Canadians*, *supra* note 59, s 18.

¹²⁸ *Criminal Code*, *supra* note 6, s 371.

¹²⁹ *Criminal Code*, *supra* note 6, s 372(1).

- (3) *indecent communications* – making an indecent communication with intent to alarm or annoy a person by sending it to that person or any other person by means of telecommunications;¹³⁰ and
- (4) *harassing communications* – repeatedly communicating or causing to be communicated messages by means of telecommunications without lawful excuse and with intent to harass.¹³¹

1.47 Those convicted of conveying fraudulent messages face up to 5 years in prison, while those convicted under the false, indecent and harassing communications provisions face up to two years in prison.¹³²

1.48 The provisions have been applied to communications via the internet both before and after the 2014 amendments discussed above in subsection A, which removed references to specific types of communications technologies.¹³³ These included cases involving threats sent in multiple email messages in which the accused posed as another person using a fake email address in the name of that other person,¹³⁴ and harassing communications contained in multiple text messages.¹³⁵

6. Hate propagation (sections 318 and 319)

1.49 As I have noted in previous writing:

Criminal law responses to hate propagation predated the arrival of vitriolic attacks via the internet, although hate propagation provisions of the *Criminal Code* have been modified in response to internet-related developments [as noted in subsection A above]. Three *Criminal Code* provisions relate specifically to hate propagation:

- (a) *advocating genocide* of a section of the public identifiable on the basis of certain grounds, including colour, race, religion, ethnic origin, sex, sexual orientation, mental or physical disability (punishable by up to five years in prison);¹³⁶

¹³⁰ *Criminal Code*, *supra* note 6, s 372(2).

¹³¹ *Criminal Code*, *supra* note 6, s 372(3).

¹³² *Criminal Code*, *supra* note 6, s 371, 372(4).

¹³³ See, for example: *R v Gerl*, 2014 SKQB 292 (CanLII) (s 372(1)); *R. v Broydell*, 2017 CanLII 80475 (NL PC) (s 372(3)).

¹³⁴ *Gerl*, *supra* note 133.

¹³⁵ *Broydell*, *supra* note 133.

¹³⁶ *Criminal Code*, *supra* note 6, s 318(1).

- (b) *publicly inciting hatred* against an identifiable group in a way that is likely to lead to breach of the peace (punishable by up to 2 years in prison);¹³⁷
- (c) *publicly communicating statements willfully promoting hatred* against an identifiable group (subject to defences of good faith, truth and others) (punishable by up to 2 years in prison).¹³⁸

...

The number of criminal law prosecutions and the impacts of criminal law responses to hate propagation are limited by, among other things, the high threshold to be met (proof beyond a reasonable doubt), and the requirement to obtain Attorney General approval in order to prosecute.¹³⁹ As a result, relatively few cases of online hate propagation are prosecuted.¹⁴⁰

1.50 Most of the reported cases relating to internet hate propagation that I have located were prosecuted under section 319(2) – wilful promotion of hatred.¹⁴¹ The Supreme Court of Canada found section 319(2) to be a justifiable limitation on free expression in the pre-internet case of *Keegstra*.¹⁴² The British Columbia Supreme Court reaffirmed that finding in the context of wilful promotion of hatred via the internet in *Topham*, concluding:

The fact that the Internet has significantly increased the ability of people, businesses and governments to communicate widely does not raise a new issue in the s. 1 justification of the Criminal Code provision. Indeed, the fact that the Internet facilitates the easy exchange of information with many people means it can cause the harm outlined in *Keegstra*. Indeed, the Internet may make the risk of harm associated with hate speech a more pressing issue.¹⁴³

1.51 The content at issue in the seven cases reviewed for this report included anti-semitic, anti-Muslim, and white supremacist content. All cases resulted in

¹³⁷ *Criminal Code*, *supra* note 6, s 319(1).

¹³⁸ *Criminal Code*, *supra* note 6, s 319(2).

¹³⁹ *ibid*, s 320(7). See e.g. *Bailey Twenty Years* *supra* note 21 at 371 fn 128.

¹⁴⁰ *Bailey Canadian*, *supra* note 2 at 42.

¹⁴¹ The s 319(2) cases include: *R. v. Topham*, 2017 BCSC 551 (CanLII); *R. v. Topham*, 2017 BCSC 259 (CanLII) [Topham 259]; *R. v. Presseault*, 2007 QCCQ 384 (CanLII); *R. v. Nicholson*, 2002 Carswell BC 3592, 57 W.C.B. (2d) 234; *R. v. Reinhard Gustav Mueller (aka Reni Sentana-Ries)* (1 September 2006) No. 040910531Q2, Court of Queen's Bench of Alberta (Edmonton Registry), Clarke J [Mueller]; *R. v. Noble*, 2008 CarswellBC 330, 2008 BCSC 216 (CanLII); *R. v. Castonguay*, (2013) 3 C.R. (7th) 82 (QCCQ). *R. v. Mackenzie*, 2016 ABPC 173 (CanLII) involved charges of mischief and s 319(1).

¹⁴² *R. v. Keegstra*, [1990 CanLII 24 \(SCC\)](#), [1990] 3 s.C.R. 697.

¹⁴³ *Topham* 259, *supra* note 141 at para 57.

convictions, with sentences ranging from 6 months community service¹⁴⁴ to 16 months in prison.¹⁴⁵

7. Human trafficking (s. 279.01, 279.02) and advertising sexual services (s. 286.4)

1.52 DCTs are beginning to figure prominently in the context of human trafficking, in part due to the use of the internet for luring victims and for advertising sexual services of another. In Canada,

Section 279.01(1) prohibits, *inter alia*, transporting a person or controlling their movements for the purpose of exploiting them. If committed in the course of listed offences, the punishment ranges from a minimum of 5-years imprisonment to a maximum of life imprisonment. In other cases it ranges from a minimum of 4 years to a maximum of 14 years.¹⁴⁶ Section 279 also includes specific offences relating to material benefit (s. 279.02) and trafficking a person under 18 (section 279.011).¹⁴⁷

1.53 In one of eight cases under these provisions reviewed by Bailey & Mathen,¹⁴⁸ a perpetrator who:

lured a 17-year-old woman with cognitive limitations from Montreal to Windsor, and trafficked her to more than 100 men, was sentenced to six years imprisonment (the highest sentence we found for human trafficking in a TFVAWG related case).¹⁴⁹ The court considered the repeated posting of the complainant's semi-nude photos to be an aggravating factor.¹⁵⁰

1.54 Section 286.4 sets out a human trafficking related provision; knowingly advertising the sexual services of another in exchange for consideration. Punishment upon conviction ranges from 18 months to 5 years.¹⁵¹ Bailey and Mathen¹⁵² noted a connection between human trafficking and advertising sexual services in the cases they reviewed:

¹⁴⁴ *Topham* 259, *supra* note 141.

¹⁴⁵ *Mueller*, *supra* note 240.

¹⁴⁶ *Criminal Code*, *supra* note 6, s 279.01(1)(a)–(b).

¹⁴⁷ Bailey & Mathen, *supra* note 56 at 14.

¹⁴⁸ Bailey & Mathen, *supra* note 56 at 14.

¹⁴⁹ *R v Byron*, 2014 ONSC 990.

¹⁵⁰ Bailey & Mathen, *supra* note 56 at 14.

¹⁵¹ *Criminal Code*, *supra* note 6, s 286.4(a)–(b).

¹⁵² Bailey & Mathen, *supra* note 56 at 15.

In a number of cases the internet, particularly the website Backpage.com,¹⁵³ was used to advertise the complainants for sexual services, including posting sexually explicit photos, as well as other personally identifying information.¹⁵⁴

8. Identity fraud (s 403)

- 1.55 In Canada, it is “a crime to fraudulently personate another person in order to cause disadvantage for someone or gain advantage for oneself. The maximum punishment for identity fraud is 10 years imprisonment.¹⁵⁵”¹⁵⁶ Identity fraud may be a relevant criminal charge in relation to abusive and/or offensive content posted by one person while posing as another.
- 1.56 In the cases reviewed by Bailey & Mathen¹⁵⁷ fraud charges were sometimes accompanied by charges for other offences. For example, in *Mackie*¹⁵⁸ the perpetrator was charged with multiple counts of luring, extortion, and child pornography, in addition to fraud and mischief charges. Over a five-year period, the accused requested nude photos from boys and girls on Nexopia and Facebook. If they refused, he used information he had learned from them to hack their email and social media accounts. Mackie then used that information to personate the child victim in order to solicit nude photos from their friends. He offered to relinquish control over the accounts if the children sent him nude photos. Mackie was sentenced to 11 years in prison.¹⁵⁹

9. Intimidation (section 423)

- 1.57 In Canada, it is a crime to use violence or threats of violence; intimidation through threats of violence; or watching and besetting a person with the purpose of forcing that person to do anything they have a right not to do, or keeping them from doing something they have a right to do.¹⁶⁰ It is a specific intent offence, so the court must be satisfied that the accused’s *purpose* was to achieve the prohibited end of interfering with another’s right to take certain actions.¹⁶¹ Upon conviction for intimidation, a perpetrator faces up to 5 years in prison.¹⁶²

¹⁵³ See, for example: *R v Majdalani*, 2017 ONCJ 145 [*Majdalani*]; *R v Ajibade*, 2015 ONCJ 494; *R v B(H)*, 2016 ONSC 594; *R v Moradi*, 2016 ONCJ 842; *R v S*, 2015 ONSC 7749.

¹⁵⁴ *Majdalani*, *supra* note 153.

¹⁵⁵ *Criminal Code*, *supra* note 6, s 403(3)(a).

¹⁵⁶ Bailey & Mathen, *supra* note 56 at 13.

¹⁵⁷ Bailey & Mathen, *supra* note 56 at 13.

¹⁵⁸ *R v Mackie*, 2013 ABPC 116.

¹⁵⁹ Bailey & Mathen, *supra* note 56 at 13.

¹⁶⁰ *Criminal Code*, *supra* note 6, s 423(1).

¹⁶¹ *R v Martin* [2006 BCSC 1874 \(CanLII\)](#) at para 14.

¹⁶² *R v Martin* [2006 BCSC 1874 \(CanLII\)](#).

- 1.58 Reported case law reveals that this offence has been used in relation to content posted online, including: images taken by a private surveillance camera;¹⁶³ and sending threatening emails.¹⁶⁴

10. Mischief in relation to data (section 430(1.1))

- 1.59 In Canada, it is a crime to “destroy or alter computer data, or to interfere with lawful use of computer data”¹⁶⁵ or to interfere with a person’s lawful use of computer data to which they are entitled to have access.¹⁶⁶ “[T]he maximum [penalty] for mischief in relation to data (if it causes actual danger to life) is life imprisonment.¹⁶⁷”¹⁶⁸ In cases where posting of abusive and/or offensive content involves these sorts of interferences with computer data, section 430(1.1) may be applicable.
- 1.60 Bailey & Mathen’s review of DCT-facilitated violence case law includes two cases involving mischief in relation to data, one of which results in a conviction and the other in an acquittal. In *Carter*, an Ontario Provincial Police Officer was convicted under section 430(1.1) after accessing her former partner’s email and Facebook accounts and sending malicious messages to another woman.¹⁶⁹ However, in *Maurer*,¹⁷⁰ the accused was acquitted of the charge, with the court concluding that Maurer’s “theft of computer files containing nude photos from his ex-girlfriend did not deprive her of the data itself and therefore did not satisfy one of the necessary elements of the offence.”¹⁷¹

11. Non-consensual distribution of intimate images (s. 162.1)

- 1.61 As noted in subsection A above, in 2014 the *Criminal Code* was amended to introduce a new prohibition on non-consensual distribution of intimate images. Since the coming into force of the new provision in section 162.1, it is a crime to:

knowingly publish, transmit, sell, make available or advertise and intimate image of a person knowing the person depicted in the image did not give consent to

¹⁶³ *R v O’Connor*, 2017 NSPC 68 (CanLII).

¹⁶⁴ *R v Mirsayah*, 2007 BCSC 1596 (CanLII).

¹⁶⁵ Bailey & Mathen, *supra* note 56 at 13.

¹⁶⁶ *Criminal Code*, *supra* note 6, s 430(1.1).

¹⁶⁷ *Criminal Code*, *supra* note 6, s 430(2). Note that lesser maximum penalties apply to situations of mischief leading to property damage: ss 430(3)–(4) of the *Criminal Code*.

¹⁶⁸ Bailey & Mathen, *supra* note 56 at 13.

¹⁶⁹ *R v Carter*, 2013 ONSC 7792.

¹⁷⁰ *R v Maurer*, 2015 SKQB 175.

¹⁷¹ Bailey & Mathen, *supra* note 56 at 14.

that conduct or being reckless as to whether that person consented.¹⁷² “Intimate image” is defined as a visual recording of a person made by any means, where (i) the person is nude, exposing their genital organs or anal region or breasts or is engaged in explicit sexual activity; (ii) in respect of which, at the time of the recording, there were circumstances giving rise to a reasonable expectation of privacy; and (iii) in respect of which the person retains a reasonable expectation of privacy at the time the offence is committed.¹⁷³ It is a defence to the charge if the distribution serves the public good.¹⁷⁴

Upon conviction, in addition to the possibility of imprisonment, the court can prohibit the offender from using the internet.¹⁷⁵ Further, as is the case with child pornography, the court can make a variety of orders¹⁷⁶ with respect to seizure, forfeiture, and disposal of intimate images covered by the provision.¹⁷⁷

1.62 Given the recency of the amendment, there are relatively few reported cases under the provision. Bailey & Mathen’s review includes three cases, all of which resulted in conviction.¹⁷⁸ In the first, a 22-year-old who surreptitiously photographed his girlfriend’s breasts and shared them with two friends was convicted and received a suspended sentence.¹⁷⁹ In the second, an accused who was also being tried for sexual offences against his daughter was convicted of sharing an intimate image of an adult woman without her consent. He was sentenced to six months imprisonment with respect to the sharing of the image.¹⁸⁰ In the third, an accused was convicted of texting and posting “on Facebook an image from a surreptitiously recorded video of him and his ex-partner having sex.¹⁸¹ [Bailey & Mathen were] unable to discover whether a sentence was issued [in this case].”¹⁸²

¹⁷² Criminal Code, *supra* note 6, s 162.1. See e.g. Winnipeg Free Press, “Winnipeg man jailed for posting nude photos of ex on Facebook” (23 March 2016), <<https://www.thestar.com/news/canada/2016/03/23/winnipeg-man-jailed-for-posting-revenge-porn-photos-of-ex-on-facebook.html>>.

¹⁷³ Criminal Code, *supra* note 6, s 162.1(2).

¹⁷⁴ Criminal Code, *supra* note 6, s 162.1(3).

¹⁷⁵ Criminal Code, *supra* note 6, s 162.2(1).

¹⁷⁶ Criminal Code, *supra* note 6, s 164, 164.1, 164.2.

¹⁷⁷ Bailey Canadian, *supra* note 2 at 46.

¹⁷⁸ Bailey & Mathen, *supra* note 56 at 6.

¹⁷⁹ *R v PSD*, 2016 BCPC 400.

¹⁸⁰ *R c DG*, 2016 QCCQ 6167.

¹⁸¹ *R v Verner*, 2016 ONCJ 6167.

¹⁸² Bailey & Mathen, *supra* note 56 at 6.

1.63 Concerns about the breadth and application of the new provision are discussed in more detail below in subsection C.

12. Obscenity (section 163)

- 1.64 Section 163(1) of the *Criminal Code* makes it an offence to, among other things, make, print, publish or distribute “any obscene written matter, picture, model, phonography record or other thing whatever”.¹⁸³ Under section 163(2) it is also an offence to sell, expose to public view or possess for those purposes such material, as well as to publicly exhibit “a disgusting object or indecent show”.¹⁸⁴ It is a defence to these charges if it can be shown that the impugned acts “did not extend beyond what served the public good”.¹⁸⁵ Notably, unlike the criminal prohibition on child pornography, mere possession of obscene material is *not* a crime.
- 1.65 Section 163(1) survived constitutional scrutiny in *Butler*,¹⁸⁶ a case in which the Supreme Court of Canada held that although the provision violated freedom of expression under section 2(b) of the *Charter*, the restriction it imposed was justified in a free and democratic society. The justification for the infringement related primarily to the goal of preventing sexual violence (especially against women). Under the framework set out in *Butler*, content will not be considered obscene merely because it is sexually explicit, so long as it is not violent or degrading. However, sexually explicit material including children or using violence is presumed to be harmful and therefore “obscene”. Sexually explicit material that is degrading or dehumanising may be obscene if it can be proven to be harmful.¹⁸⁷
- 1.66 Although it was thought that *Butler* would open the door to increased prosecution of obscenity, a 2015 study suggests that this has not been the case, with only a few cases prosecuted and “even fewer convictions”.¹⁸⁸ While there have been many prosecutions under the *child* pornography provision,¹⁸⁹ heterosexual pornography involving sexual violence against women has neither been a law enforcement nor a prosecutorial priority since at least the mid-1990s.¹⁹⁰ Perhaps

¹⁸³ *Criminal Code*, *supra* note 6, s 163.

¹⁸⁴ *Criminal Code*, *supra* note 6, s 163(2).

¹⁸⁵ *Criminal Code*, *supra* note 6, s163(3).

¹⁸⁶ *R v Butler* [1992] 1 SCR 452.

¹⁸⁷ Janine Benedet, “The Paper Tigress: Canadian Obscenity Law Twenty Years After R v Butler” (2015) 93 Can Bar Rev 1 at 9 [Benedet].

¹⁸⁸ Benedet, *supra* note 187 at 3.

¹⁸⁹ For a database of cases, see: <http://www.equalityproject.ca/cyberviolence-criminal-case-law/cyberviolence-criminal-case-law-offences-against-adults/cyberviolence-criminal-case-law-child-pornography-offences/>.

¹⁹⁰ Benedet, *supra* note 187 at 20.

tellingly, there *have* been prosecutions relating to LGBTQ pornography.¹⁹¹ A shift away from prosecuting adult obscenity cases in the internet context is almost certainly connected with the prioritisation of policing child pornography, including through establishment of special police units and the shifting of the focus of pre-existing police units from obscenity toward child pornography.¹⁹²

13. Uttering threats (sections 264.1 and 265)

- 1.67 It is a crime in Canada to utter, convey or cause someone to receive a threat to cause death or bodily harm to a person, to burn, destroy or damage someone's property, or to kill, poison or injure a person's pet.¹⁹³ Threats to cause death or bodily harm to a person attract a potential penalty of up to five years in prison, while the maximum penalty upon conviction for the other two types of prohibited threats is two years.¹⁹⁴ Prohibitions on assault (including sexual assault) also apply to threats to apply force to person without their consent, so long as the target of the threat reasonably believes the threatener has the present ability to carry out the threat.¹⁹⁵
- 1.68 These provisions have been applied to threats communicated online via Facebook;¹⁹⁶ in blog posts;¹⁹⁷ and on an internet chat site.¹⁹⁸ Interestingly, while charges led to conviction in relation to threats against two prime ministers,¹⁹⁹ they led to an acquittal with respect to threats communicated to an ordinary citizen via a chat site on the basis that, in this latter context, they were not intended to be taken seriously.²⁰⁰

14. Voyeurism (section 162)

- 1.69 Section 162 of the *Criminal Code* makes it a crime to surreptitiously observe or visually record someone in circumstances where they can reasonably expect privacy, if the person is: (i) in a place where they would expect to be nude; (ii) is

¹⁹¹ See, for example: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120, 2000 SCC 69 (CanLII), <<http://canlii.ca/t/5239>>, retrieved on 2018-09-30; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, 2007 SCC 2 (CanLII), <<http://canlii.ca/t/1q8m5>>, retrieved on 2018-09-30.

¹⁹² Benedet, *supra* note 187 at 13, 23-24.

¹⁹³ *Criminal Code*, *supra* note 6, s 264.1(1).

¹⁹⁴ *Criminal Code*, *supra* note 6, s 264.1(2) and (3).

¹⁹⁵ *Criminal Code*, *supra* note 6, s 265(1) and (2).

¹⁹⁶ *R v Hayes*, 2017 SKPC 8 (CanLII) [Hayes].

¹⁹⁷ *R v Fenton*, 2008 ABPC 347 (CanLII) [Fenton].

¹⁹⁸ *R v Jaeb*, 2000 CanLII 19628 (SK PC) [Jaeb].

¹⁹⁹ *Hayes*, *supra* note 196; *Fenton*, *supra* note 197.

²⁰⁰ *Jaeb*, *supra* note 198 at para 41.

engaged in sexual activity; or (iii) the observation is done for sexual purposes.²⁰¹ It is also a crime to knowingly distribute, circulate, etc. a recording obtained through commission of a voyeuristic act.²⁰² A charge may be defended on the grounds that the observation or recording served the public good.²⁰³ Upon conviction for voyeurism, an accused faces up to 5 years in prison.²⁰⁴

1.70 Bailey & Mathen describe the 32 reported voyeurism cases that they reviewed as follows:

The perpetrators used camcorders,²⁰⁵ video cameras,²⁰⁶ pencams,²⁰⁷ and smartphones²⁰⁸ to surreptitiously monitor and record women and/or girls in parks and at beaches,²⁰⁹ washrooms,²¹⁰ bedrooms,²¹¹ to take “up-skirt” photos of women in public places,²¹² and to record sexual assaults.²¹³ In one case, surreptitiously taken sexually explicit images were distributed to the victim’s friends and family via the internet.²¹⁴ Sentences for these offences ranged from conditional discharges²¹⁵ to four years imprisonment.²¹⁶

1.71 In three out of four cases where acquittals were entered, the stumbling block was whether the targeted women had a reasonable expectation of privacy in the

²⁰¹ Criminal Code, *supra* note 6, s 162(1).

²⁰² Criminal Code, *supra* note 6, s 162(4).

²⁰³ Criminal Code, *supra* note 6, s 162(6).

²⁰⁴ Criminal Code, *supra* note 6, s 162(5).

²⁰⁵ *R v Berry*, 2014 BCSC 284 [Berry].

²⁰⁶ *R v Bosomworth*, 2015 BCPC 7 [Bosomworth]; *R v Hamilton*, 2009 BCPC 381 [Hamilton]; *R v Laskaris*, 2008 BCPC 130 [Laskaris]; *R v Payne*, 2014 BCPC 361 [Payne].

²⁰⁷ *R v Jarvis*, 2015 ONSC 6813 [Jarvis trial], upheld [2017] OJ No 5261 [Jarvis appeal]. When both decisions are referred to together they are referred to hereafter as *Jarvis*.

²⁰⁸ *Payne*, *supra* note 206; *R v Rocha*, 2012 ABPC 24 [Rocha].

²⁰⁹ *Berry*, *supra* note 205; *R v Rudiger*, 2011 BCSC 1397; *R v Taylor*, 2015 ONCJ 449 [Taylor].

²¹⁰ *Berry*, *supra* note 205; *Bosomworth*, *supra* note 206; *Laskaris*, *supra* note 206; *Payne*, *supra* note 206; *R v RHC*, 2010 BCPC 475 [RHC]; *R v Grice*, 2008 ONCJ 476; *R v Muggridge*, 2015 NLPC 1314.

²¹¹ *R v Cassels*, 2013 MBPC 47.

²¹² *R v Coucke*, (June 24, 2011) Edmonton No. 090658113P1 (ABPC); *R v Rocha*, 2012 ABPC 24; *R c Pierre*, 2015 QCCQ 4512.

²¹³ *R v Truong*, 2013 ABCA 373.

²¹⁴ *R v DeSilva*, 2011 ONCJ 133.

²¹⁵ *RHC*, *supra* note 210; *R v Pan*, 2012 ABPC 203.

²¹⁶ *R v Schledermann*, 2014 ONSC 674, in which the 4-year sentence related to multiple offences, including voyeurism.

circumstances. Concerns around the interpretation of privacy expectations in an online context are discussed further in subsection C(2) below.

C. Shortcomings of existing criminal law provisions

1.72 The shortcomings of existing criminal law provisions in Canada in dealing with offensive and abusive online content can be seen as falling within two broad categories relating to: (1) lack of institutional responsiveness to complaints; and (2) interpretive challenges in applying pre-existing law to internet-related cases.

1. Lack of institutional responsiveness to complaints

1.73 In Canada, as in other jurisdictions, there have been challenges in getting law enforcement agents and other institutions (such as schools) to adequately respond to complaints relating to abusive and offensive online content. A variety of factors can contribute to this lack of responsiveness, including: lack of training and resources, confusion about who has jurisdiction (for example, between schools and the police in cases involving student-on-student online harassment or between local, provincial and federal policing agencies); failure to properly evaluate the applicability of existing law to internet-related situations (which may reflect inadequate resources and training for police and Crown prosecutors); and (iii) deference to service providers' terms of service and decision-making processes about whether or not to remove content upon request.

1.74 The first two of these factors were at play in the case of Rehtaeh Parsons, a Nova Scotia teen who died after a suicide attempt that followed non-consensual online distribution of images of her being sexually assaulted, which prompted further online attacks against her. The tragic outcome in this high profile case resulted in the Nova Scotia Ministers responsible for justice and the status of women commissioning counsel Murray Segal in 2013 to conduct an independent review of the police and prosecution response to the case. Segal reported in October 2015 and made 17 recommendations, including:

- (1) revision of law enforcement protocols relating to sexual violence to explicitly address the proper protocol for interviewing children;
- (2) creation of an integrated sex crimes unit that would better facilitate collaboration between the policing units involved in cases of sexual violence;
- (3) better collaboration between educational institutions and policing agencies in dealing with "cyberbullying" early (including by seeking orders to seize images and devices where appropriate, and clarifying the relationship between police liaison officers in schools and police investigating criminal matters);

- (4) better training of prosecutors and police involved in cases of sexual violence, including updates on new ways of dealing with online content (e.g. by seizure orders, etc);
- (5) expansion of police-based victims services to cover sexual assault complainants;
- (6) investigatory prioritisation of cases involving young people (versus those involving adults);
- (7) better documentation of crown advice to police as to whether there is a reasonable prospect of conviction in these kinds of cases;
- (8) increased training of prosecutors with respect to cases involving online sexual violence;
- (9) creation of a cybercrime support unit with a broad mandate to be involved in any case of this kind;
- (10) ensuring that *Education Act* provisions applicable to this kind of case are adequate (and amending them if not), ensuring that school officials know how to apply such provisions, and developing information sharing guidelines between police and schools;
- (11) amendment of the Practice Note to law enforcement agents to address inaccuracies and a lack of clarity around a number of issues relating to the interpretation and application of the child pornography and non-consensual distribution of intimate images provisions; and
- (12) collaboration between Nova Scotia’s CyberScan Unit and police investigating complaints of sexual violence in which “cyberbullying” is also involved.²¹⁷

1.75 In 2017, Segal reported that 14 of his 17 recommendations had been implemented, while implementation of the final three was underway.²¹⁸ These changes, however, have not necessarily been implemented in other Canadian jurisdictions.

1.76 It is unclear whether or not the third factor, deference to internet service providers’ decision-making processes, is widespread. However, in at least one reported instance, police receiving a report of what appeared to have been fraudulent

²¹⁷ Murray Segal, *Independent Review of the Police and Prosecution Response to the Rehteah Parsons Case*. (2015), online: <https://novascotia.ca/segalreport/Parsons-Independent-Review.pdf> at 140-145.

²¹⁸ Murray Segal, *Independent Review of the Police and Prosecution Response to the Rehteah Parsons Case: Progress Report*. (2017), online: <https://novascotia.ca/segalreport/Segal-Progress-Report-2017.pdf>.

personation under the *Criminal Code* suggested that the complainant take up the matter with the related internet service provider, noting that it was possible that the content would be acceptable under that provider's terms of service if it could be considered a "parody".²¹⁹ Given recent reports about the degree of control online service providers exercise over online content,²²⁰ it seems obvious that a solid review of the relationship between public policy and private contractual provisions, as well as between state and private agencies is in order.

2. Interpretive challenges in application

1.77 In fairness to law enforcement agents and crown prosecutors, it must also be recognized that determining whether and how existing criminal law can be applied to offensive and abusive online content is also complicated by interpretive challenges within criminal case law itself (some of which predates the internet). These challenges include:²²¹

- (1) analyses of terms such as "safety", "harm", "violence" and "injury" that occasionally "fail to grasp the very real, but in many cases non-physical, harms that impair" the ability of those targeted by offensive and abusive online content to fully function in "our increasingly digitally networked society";²²²
- (2) analyses that shift the blame for offensive and abusive online content onto the shoulders of victims, especially women and girls in cases involving sexualised attacks;²²³ and
- (3) interpretations of "privacy" that equate being in a space perceived of as "public" with having foregone *all* expectations of privacy in that space.²²⁴

1.78 A variety of *Criminal Code* and other related criminal law provisions that could relate to cases involving offensive and abusive content require courts to interpret terms such as "safety", "harm", "violence" and "injury". For example, in the context of criminal harassment under s 264, it must be demonstrated that the complainant "reasonably feared" for "their safety or the safety of anyone known to them" as a

²¹⁹ Suzanne Dunn, Julie Lalonde, and Jane Bailey, "Terms of Silence: Addressing weaknesses in corporate and law enforcement responses to cyberviolence against girls" (2017) 10(2) *Girlhood Studies* 80.

²²⁰ See, for example: Ian Sherr, "Facebook, Google and Twitter have a lot to prove to Congress" *CNET*. (4 Sep 2018), online: <https://www.cnet.com/news/facebook-twitter-and-google-have-a-lot-to-prove-to-congress/>.

²²¹ This report sketches the parameters of these issues. For a fuller analysis, see: Bailey & Mathen, *supra* note 56.

²²² Bailey & Mathen, *supra* note 56 at 2.

²²³ Bailey & Mathen, *supra* note 56.

²²⁴ Bailey & Mathen, *supra* note 56.

result of the harassing behaviour of the accused.²²⁵ Existing jurisprudence makes it clear that this issue must be determined having regard for the context in which the complainant finds her/himself and that safety includes concerns about both physical and non-physical (eg mental, emotional and psychological) harms.²²⁶ However, some jurisprudence relating to *online* harassment suggests, based on an inaccurate segregation of *online* from *offline*, that threats made online are less reasonably feared than threats made offline, and perhaps also that physical violence is more reasonably feared than psychological violence (such as ongoing monitoring and tracking).²²⁷ If this approach to online harassment were to be widely adopted, it could significantly diminish the responsiveness of criminal law provisions that predate the internet to abusive and offensive online content.

- 1.79 Interpretation of criminal law provisions in ways that blame the victim, particularly in cases involving women complainants in sexual and domestic violence cases, long predates the internet.²²⁸ There is some evidence of this interpretive approach in the context of criminal cases involving abusive and offensive online content, especially in relation to complaints by adult women (versus complaints by girls). In many cases, courts have emphasised the need to safeguard and protect girls targeted by harmful online content, based on their “innocence” as children.²²⁹ In contrast, some Canadian cases suggest that being targeted by offensive and abusive content is the price that women pay when they participate in online spaces.²³⁰ Such an interpretation obviously limits criminal law’s efficacy in addressing abusive and offence online content aimed at women by implicitly suggesting that they should stay offline if they wish to avoid harassment.
- 1.80 Canadian jurisprudence interpreting *Charter* guarantees against unreasonable search and seizure,²³¹ and protecting life, liberty and security of the person,²³² offers a framework for a nuanced, contextualised, and normative approach to expectations of “privacy”. Generously applied, this framework should allow for robust protection of privacy in the context of DCTs generally and online

²²⁵ *Criminal Code*, *supra* note 6, s 264(1).

²²⁶ Bailey & Mathen, *supra* note 56 at 29-30.

²²⁷ Bailey & Mathen, *supra* note 56 at 30-31.

²²⁸ For further discussion in the context of criminal harassment, see: Isabel Grant, “Intimate Partner Criminal Harassment Through a Lens of Responsibilization” (2015) Osgoode Leg Stud Research Paper Series 87 at 25, online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1082&context=olsrps>.

²²⁹ Bailey & Mathen, *supra* note 56 at 38.

²³⁰ Bailey & Mathen, *supra* note 56 at 41.

²³¹ Section 8 of the *Charter* states, “Everyone has the right to be secure against unreasonable search or seizure”: *supra* note 27.

²³² Section 7 of the *Charter* states, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”: *supra* note 27.

communications specifically. However, some judicial interpretations of the reasonable expectation of privacy requirement in the voyeurism offence raise broader concerns about the capacity of Canadian criminal law to address offensive and abusive online content that involves privacy violations (such as voyeurism, non-consensual distribution of intimate images²³³). For example, in *Jarvis*, a teacher who surreptitiously recorded images of the breasts of female students with a pen cam was acquitted of voyeurism based on the Court of Appeal's conclusion that the students could not have reasonably expected privacy in the public setting of a school.²³⁴ The Supreme Court of Canada heard the appeal from that acquittal in spring 2017. Their decision is currently under reserve.²³⁵

- 1.81 In a post-internet era in which digital imagery proliferates, an approach that equates being in a public place with having foregone all expectations of privacy raises the spectre that prior participation in or exposure in public fora will negate the capacity of certain provisions to address subsequent widespread exposure in *online* fora. Therefore, the outcome of the Supreme Court of Canada's decision in *Jarvis* could have important consequences for other cases, including charges laid against a Calgary man accused of taking photos of women's body parts on the street without their consent and then posting them to his Twitter account.²³⁶

CONCLUSION

- 1.82 In Canada, as in other countries, the internet was heralded in the mid-1990s as ushering in new opportunities for social, cultural and, especially, economic growth. In very short order, however, the challenges it presented became apparent, including the proliferation of abusive and offensive content, which is often understood as posing particularly problematic consequences for young people and women. Multiple legal avenues – both non-criminal and criminal - are available for addressing this content. Some pre-date the internet and others were

²³³ The non-consensual distribution provision requires complainants to have had a reasonable expectation of privacy with respect to the image in issue both at the time the image was taken and at the time the image was circulated. This requirement raises concerns about the provision's efficacy in addressing non-consensual distribution as a form of gender-based violence. As Moira Aikenhead argues, the provision's focus on the victim's expectations of privacy is likely to lead to "undue scrutiny on victims' behaviour and expectations in relation to their intimate images" and insufficient scrutiny of "offenders' motivations and use" of those images: Moira Aikenhead, "Non-consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence" (2018) 30(1) CJWL 117 at 117.

²³⁴ *Jarvis*, *supra* note 207.

²³⁵ For further information, see: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37833>.

²³⁶ The Canadian Press, "Jeffery Robert Williamson Arrested For Canada Creep Twitter Account" *Huffington Post* (15 June 2017), online: http://www.huffingtonpost.ca/2017/06/15/canada-creep-twitter-arrest_n_17121540.html.

created to respond to DCT-generated challenges, the complexity of which is certain to *require* multi-faceted approaches.

1.83 Non-criminal law responses in Canada include:

- (1) human rights legislation at the federal, provincial and territorial levels that provides remedies for addressing the public display of discriminatory content and symbols (although constitutional limitations on jurisdiction have been understood by some to place internet content regulation exclusively within the purview of the federal government);
- (2) education law in all provinces and territories that provides both for punitive responses to “cyberbullying” involving students, as well as proactive initiatives designed to improve school culture and inculcate respect for diversity;
- (3) civil litigation options that vary from jurisdiction to jurisdiction within Canada, but include the possibility of civil recovery for: (i) privacy violations pursuant to certain provincial statutory regimes and common law torts; (ii) defamation; (iii) copyright violation; (iv) statutorily created torts of non-consensual distribution and/or “cyberbullying” in some provinces; and (v) torts for institutional negligence in cases involving failure to address offensive and abusive content (e.g. in schools); and
- (4) regulatory/administrative bodies such as: (i) offices of FPT privacy commissioners; and (ii) specialised units created to assist those targeted by “cyberbullying” and/or non-consensual distribution of intimate images in two provinces (Nova Scotia and Manitoba).

1.84 These non-criminal legal avenues are supplemented by multiple provisions of the *Criminal Code* that both pre-date and post-date the internet. Recognition of the impacts of abusive and offensive online content led to at least four significant changes in the criminal law:

- (1) 2001 amendments to pre-existing hate propaganda provisions to expand the availability of warrants of seizure to include computer systems, and the scope of judicial powers to include orders for deletion and production in relation to computer systems;
- (2) 2004 creation of a voyeurism offence to address tech-facilitated privacy-invasive acts of sexual violence that weren’t specifically captured by pre-existing offences;
- (3) 2014 creation of an offence of advertising sexual services to address the use of online platforms for purposes of sexual trafficking of others; and
- (4) 2014 creation of a non-consensual distribution of intimate images offence to address a second type of privacy-invasive act of sexual violence in respect

of which pre-existing provisions offered no realistic protection for adult targets, and left young people who re-distributed other teens' images subject to prosecution under child pornography provisions originally created to protect youth.

- 1.85 Taking both the pre- and post-internet provisions together, there are at least 14 *Criminal Code* offences in Canada that can and have been applied to situations involving different forms of offensive and abusive online content. These include: counselling suicide (s. 241); criminal harassment (section 264); defamatory libel (section 298); extortion (section 346); fraudulent, false and harassing communications (sections 371, 372); hate propagation (sections 318, 319); human trafficking and advertising sexual services (sections 279.01, 279.02, 286.4); identity fraud (section 403); intimidation (section 423); mischief in relation to data (section 430); non-consensual distribution of intimate images (section 162.1); obscenity (section 163); uttering threats (section 264.1); and voyeurism (section 162).
- 1.86 The application of both pre- and post- internet criminal law provisions to abusive and offensive online communications in Canada, however, is not without its problems. These include: (i) evidence of a lack of institutional responsiveness to complaints (e.g. by police and in schools); and (ii) interpretive issues in the jurisprudence (e.g. failure to fully recognise the significance of *non-physical* "harm" in the context of technologically mediated communication, blaming victims for exposing themselves to attack simply by being online, and failure to interpret "privacy" and expectations of privacy in contextual and nuanced ways).
- 1.87 Notwithstanding these and other ongoing challenges (including the variation in protection from one province/territory to the next), Canadian law – both non-criminal and criminal – offers a number of options for addressing offensive and abusive online content. However, new issues, such as "deep fakes",²³⁷ will continue to arise as DCTs and other forms of technology develop, inevitably presenting challenges to the current legal framework. In the future, as in the past, multi-pronged approaches that go beyond reactive criminal law, including responses that support victims and attempt to proactively address issues such as prejudice and discrimination that undergird much offensive and abusive content, while offering greater protection for individual privacy, equality and dignity will be essential.

²³⁷ Deep fake technology "makes it possible to create audio and video of real people saying and doing things they never said or did", which will almost certainly expose "individuals and businesses to novel forms of exploitation, intimidation, and personal sabotage", as well as posing serious risks to democracy and national security: Robert Chesney and Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security" (2018) *U of Texas Law, Public Law Research Paper No. 692* at 1, accessible online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213954.

<p>1. Counselling suicide</p>	<p>s 241</p>	<p>Counselling or aiding suicide</p> <p>241 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, whether suicide ensues or not,</p> <p>(a) counsels a person to die by suicide or abets a person in dying by suicide; or</p> <p>(b) aids a person to die by suicide.</p> <p>Exemption for medical assistance in dying</p> <p>(2) No medical practitioner or nurse practitioner commits an offence under paragraph (1)(b) if they provide a person with medical assistance in dying in accordance with section 241.2.</p> <p>Exemption for person aiding practitioner</p> <p>(3) No person is a party to an offence under paragraph (1)(b) if they do anything for the purpose of aiding a medical practitioner or nurse practitioner to provide a person with medical assistance in dying in accordance with section 241.2.</p> <p>Exemption for pharmacist</p> <p>(4) No pharmacist who dispenses a substance to a person other than a medical practitioner or nurse practitioner commits an offence under paragraph (1)(b) if the pharmacist dispenses the substance further to a prescription that is written by such a practitioner in providing medical assistance in dying in accordance with section 241.2.</p> <p>Exemption for person aiding patient</p> <p>(5) No person commits an offence under paragraph (1)(b) if they do anything, at another person's explicit request, for the purpose of aiding that other person to self-administer a substance that has been prescribed for that other person as part of the provision of medical assistance in dying in accordance with section 241.2.</p>
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		<p>Clarification</p> <p>(5.1) For greater certainty, no social worker, psychologist, psychiatrist, therapist, medical practitioner, nurse practitioner or other health care professional commits an offence if they provide information to a person on the lawful provision of medical assistance in dying.</p> <p>Reasonable but mistaken belief</p> <p>(6) For greater certainty, the exemption set out in any of subsections (2) to (5) applies even if the person invoking the exemption has a reasonable but mistaken belief about any fact that is an element of the exemption.</p>
2. Criminal harassment	s 264	<p>Criminal harassment</p> <p>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.</p> <p>Prohibited conduct</p> <p>(2) The conduct mentioned in subsection (1) consists of</p> <p>(a) repeatedly following from place to place the other person or anyone known to them;</p> <p>(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;</p> <p>(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</p> <p>(d) engaging in threatening conduct directed at the other person or any member of their family.</p>

		<p>Punishment</p> <p>(3) Every person who contravenes this section is guilty of</p> <p>(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or</p> <p>(b) an offence punishable on summary conviction.</p> <p>Factors to be considered</p> <p>(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</p> <p>(a) the terms or conditions of an order made pursuant to section 161 or a recognisance entered into pursuant to section 810, 810.1 or 810.2; or</p> <p>(b) the terms or conditions of any other order or recognisance 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 recognisance referred to in paragraph (a).</p> <p>Reasons</p> <p>(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.</p> <p>R.S., 1985, c. C-46, s 264; R.S., 1985, c. 27 (1st Supp.), s 37; 1993, c. 45, s 2; 1997, c. 16, s 4, c. 17, s 9; 2002, c. 13, s 10.</p>
3. Defamatory libel	s 298	<p>Defamatory Libel</p> <p>Definition of <i>newspaper</i></p>

		<p>297 In sections 303, 304 and 308, <i>newspaper</i> 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.</p> <p>R.S., c. C-34, s 261.</p> <p>Definition</p> <p>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.</p> <p>Mode of expression</p> <p>(2) A defamatory libel may be expressed directly or by insinuation or irony in words legibly marked on any substance; or</p> <p>by any object signifying a defamatory libel otherwise than by words.</p> <p>R.S., c. C-34, s 262.</p>
4. Extortion	s 346	<p>Extortion</p> <p>Every person who commits extortion is guilty of an indictable offence and liable</p> <p>(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organisation, to imprisonment</p>

	<p>for life and to a minimum punishment of imprisonment for a term of</p> <p>(i) in the case of a first offence, five years, and</p> <p>(ii) in the case of a second or subsequent offence, seven years;</p> <p>(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and</p> <p>(b) in any other case, to imprisonment for life.</p> <p>Subsequent offences</p> <p>In determining, for the purpose of paragraph (1.1)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:</p> <p>(a) an offence under this section;</p> <p>(b) an offence under subsection 85(1) or (2) or section 244 or 244.2; or</p> <p>(c) an offence under section 220, 236, 239, 272 or 273, subsection 279(1) or section 279.1 or 344 if a firearm was used in the commission of the offence.</p> <p>However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.</p> <p>Sequence of convictions only</p> <p>For the purposes of subsection (1.2), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or</p>
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		<p>whether any offence occurred before or after any conviction.</p> <p>Saving</p> <p>(2) A threat to institute civil proceedings is not a threat for the purposes of this section.</p> <p>R.S., 1985, c. C-46, s 346; R.S., 1985, c. 27 (1st Supp.), s 46; 1995, c. 39, s 150; 2008, c. 6, s 33; 2009, c. 22, s 15.</p>
<p>5. Fraudulent, false and harassing communications</p>	<p>ss 371, 372</p>	<p>Message in false name</p> <p>371 Everyone who, with intent to defraud, causes a message to be sent as if it were sent under the authority of another person, knowing that it is not sent under that authority and with intent that it should be acted on as if it were, is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.</p> <p>R.S., 1985, c. C-46, s 371; 2014, c. 31, s 18.</p> <p>False information</p> <p>372 (1) Everyone commits an offence who, with intent to injure or alarm a person, conveys information that they know is false, or causes such information to be conveyed by letter or any means of telecommunication.</p> <p>Indecent communications</p> <p>(2) Everyone commits an offence who, with intent to alarm or annoy a person, makes an indecent communication to that person or to any other person by a means of telecommunication.</p> <p>Harassing communications</p> <p>(3) Everyone commits an offence who, without lawful excuse and with intent to harass a person, repeatedly communicates, or causes repeated communications to be made, with them by a means of telecommunication.</p>

		<p>Punishment</p> <p>(4) Everyone who commits an offence under this section is</p> <p>(a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or</p> <p>(b) guilty of an offence punishable on summary conviction.</p> <p>R.S., 1985, c. C-46, s 372; 2014, c. 31, s 18.</p>
<p>6. Hate propagation</p>	<p>ss 318, 319</p>	<p>Hate Propaganda</p> <p>Advocating genocide</p> <p>318 (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.</p> <p>Definition of <i>genocide</i></p> <p>(2) In this section, <i>genocide</i> means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,</p> <p>(a) killing members of the group; or</p> <p>(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.</p> <p>Consent</p> <p>(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.</p> <p>Definition of <i>identifiable group</i></p> <p>(4) In this section, <i>identifiable group</i> means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.</p>

		<p>R.S., 1985, c. C-46, s 318; 2004, c. 14, s 1; 2014, c. 31, s 12; 2017, c. 13, s 3.</p> <p>Public incitement of hatred</p> <p>319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of</p> <p>(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or</p> <p>(b) an offence punishable on summary conviction.</p> <p>Wilful promotion of hatred</p> <p>(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of</p> <p>(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or</p> <p>(b) an offence punishable on summary conviction.</p> <p>Defences</p> <p>(3) No person shall be convicted of an offence under subsection (2)</p> <p>(a) if he establishes that the statements communicated were true;</p> <p>(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;</p> <p>(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or</p>
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	<p>(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.</p> <p>Forfeiture</p> <p>(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.</p> <p>Exemption from seizure of communication facilities</p> <p>(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.</p> <p>Consent</p> <p>(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.</p> <p>Definitions</p> <p>(7) In this section,</p> <p><i>communicating</i> includes communicating by telephone, broadcasting or other audible or visible means; (<i>communiquer</i>)</p> <p><i>identifiable group</i> has the same meaning as in section 318; (<i>groupe identifiable</i>)</p> <p><i>public place</i> includes any place to which the public have access as of right or by invitation, express or implied; (<i>endroit public</i>)</p> <p><i>statements</i> includes words spoken or written or recorded electronically or electro-magnetically</p>
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		<p>or otherwise, and gestures, signs or other visible representations. (<i>déclarations</i>)</p> <p>R.S., 1985, c. C-46, s 319; R.S., 1985, c. 27 (1st Supp.), s 203; 2004, c. 14, s 2.</p>
7. Human trafficking and advertising sexual services	<p>ss 279.01, 279.02, 286.4</p>	<p>Trafficking in persons</p> <p>279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable</p> <p>(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or</p> <p>(b) to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case.</p> <p>Consent</p> <p>(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.</p> <p>2005, c. 43, s 3; 2014, c. 25, s 18.</p> <p>Material benefit — trafficking</p> <p>279.02 (1) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 279.01(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.</p> <p>Material benefit — trafficking of person under 18 years</p>

	<p>(2) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 279.011(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.</p> <p>2005, c. 43, s 3; 2010, c. 3, s 3; 2014, c. 25, s 19.</p> <p>Advertising sexual services</p> <p>286.4 Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of</p> <p>(a) an indictable offence and liable to imprisonment for a term of not more than five years; or</p> <p>(b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months.</p> <p>2014, c. 25, s 20.</p> <p>Immunity — material benefit and advertising</p> <p>286.5 (1) No person shall be prosecuted for</p> <p>(a) an offence under section 286.2 if the benefit is derived from the provision of their own sexual services; or</p> <p>(b) an offence under section 286.4 in relation to the advertisement of their own sexual services.</p> <p>Immunity — aiding, abetting, etc.</p> <p>(2) No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of sections 286.1 to 286.4 or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.</p> <p>2014, c. 25, s 20.</p>
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8. Identity fraud	s 403	<p>Identity fraud</p> <p>403 (1) Everyone commits an offence who fraudulently personates another person, living or dead,</p> <p>(a) with intent to gain advantage for themselves or another person;</p> <p>(b) with intent to obtain any property or an interest in any property;</p> <p>(c) with intent to cause disadvantage to the person being personated or another person; or</p> <p>(d) with intent to avoid arrest or prosecution or to obstruct, pervert or defeat the course of justice.</p> <p>Clarification</p> <p>(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.</p> <p>Punishment</p> <p>(3) Everyone who commits an offence under subsection (1)</p> <p>(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or</p> <p>(b) is guilty of an offence punishable on summary conviction.</p> <p>R.S., 1985, c. C-46, s 403; 1994, c. 44, s 27; 2009, c. 28, s 10.</p>
9. Intimidation	s 423	<p>Intimidation</p> <p>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</p>

		<p>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,</p> <p>(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;</p> <p>(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;</p> <p>(c) persistently follows that person;</p> <p>(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;</p> <p>(e) with one or more other persons, follows that person, in a disorderly manner, on a highway;</p> <p>(f) besets or watches the place where that person resides, works, carries on business or happens to be; or</p> <p>(g) blocks or obstructs a highway.</p> <p>Exception</p> <p>(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.</p> <p>R.S., 1985, c. C-46, s 423; 2000, c. 12, s 95; 2001, c. 32, s 10.</p>
10. Mischief in relation to data	s 430	Mischief

		<p>430 (1) Every one commits mischief who wilfully</p> <p>(a) destroys or damages property;</p> <p>(b) renders property dangerous, useless, inoperative or ineffective;</p> <p>(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or</p> <p>(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.</p> <p>Mischief in relation to computer data</p> <p>Everyone commits mischief who wilfully</p> <p>(a) destroys or alters computer data;</p> <p>(b) renders computer data meaningless, useless or ineffective;</p> <p>(c) obstructs, interrupts or interferes with the lawful use of computer data; or</p> <p>(d) obstructs, interrupts or interferes with a person in the lawful use of computer data or denies access to computer data to a person who is entitled to access to it.</p> <p>Punishment</p> <p>(2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and liable to imprisonment for life.</p> <p>Punishment</p> <p>(3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars</p> <p>(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or</p>
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		<p>(b) is guilty of an offence punishable on summary conviction.</p> <p>Idem</p> <p>(4) Every one who commits mischief in relation to property, other than property described in subsection (3),</p> <p>(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or</p> <p>(b) is guilty of an offence punishable on summary conviction.</p>
<p>11. Non-consensual distribution of intimate images</p>	<p>s 162.1</p>	<p>Publication, etc., of an intimate image without consent</p> <p>162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty</p> <p>(a) of an indictable offence and liable to imprisonment for a term of not more than five years; or</p> <p>(b) of an offence punishable on summary conviction.</p> <p>Definition of <i>intimate image</i></p> <p>(2) In this section, <i>intimate image</i> means a visual recording of a person made by any means including a photographic, film or video recording,</p> <p>(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;</p> <p>(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and</p>

		<p>(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.</p> <p>Defence</p> <p>(3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.</p> <p>Question of fact and law, motives</p> <p>(4) For the purposes of subsection (3),</p> <p>(a) it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and</p> <p>(b) the motives of an accused are irrelevant.</p> <p>2014, c. 31, s 3.</p>
12. Obscenity	s 163	<p>Corrupting morals</p> <p>163 (1) Every one commits an offence who</p> <p>(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or</p> <p>(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.</p> <p>Idem</p> <p>(2) Every one commits an offence who knowingly, without lawful justification or excuse,</p>

		<p>(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;</p> <p>(b) publicly exhibits a disgusting object or an indecent show;</p> <p>(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or</p> <p>(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.</p> <p>Defence of public good</p> <p>(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.</p> <p>Question of law and question of fact</p> <p>(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.</p> <p>Motives irrelevant</p> <p>(5) For the purposes of this section, the motives of an accused are irrelevant.</p>
13. Uttering threats	ss 264.1 and 265	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

		<p>to cause death or bodily harm to any person;</p> <p>to burn, destroy or damage real or personal property; or</p> <p>to kill, poison or injure an animal or bird that is the property of any person.</p> <p>Punishment</p> <p>(2) Every one who commits an offence under paragraph (1)(a) is guilty of</p> <p>an indictable offence and liable to imprisonment for a term not exceeding five years; or</p> <p>an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.</p> <p>Idem</p> <p>(3) Every one who commits an offence under paragraph (1)(b) or (c)</p> <p>is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or</p> <p>is guilty of an offence punishable on summary conviction.</p> <p>R.S., 1985, c. 27 (1st Supp.), s 38; 1994, c. 44, s 16.</p> <p>Assault</p> <p>265 (1) A person commits an assault when</p> <p>...</p> <p>(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;</p> <p>Application</p>
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		(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
14. Voyeurism	s 162	<p>Voyeurism</p> <p>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</p> <p>(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;</p> <p>(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</p> <p>(c) the observation or recording is done for a sexual purpose.</p> <p>Definition of <i>visual recording</i></p> <p>(2) In this section, <i>visual recording</i> includes a photographic, film or video recording made by any means.</p> <p>Exemption</p> <p>(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.</p> <p>Printing, publication, etc., of voyeuristic recordings</p> <p>(4) Every one commits an offence who, knowing that a recording was obtained by the</p>

		<p>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.</p> <p>Punishment</p> <p>(5) Every one who commits an offence under subsection (1) or (4)</p> <p>(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or</p> <p>(b) is guilty of an offence punishable on summary conviction.</p> <p>Defence</p> <p>(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.</p> <p>Question of law, motives</p> <p>(7) For the purposes of subsection (6),</p> <p>(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</p> <p>(b) the motives of an accused are irrelevant.</p> <p>R.S., 1985, c. C-46, s 162; R.S., 1985, c. 19 (3rd Supp.), s 4; 2005, c. 32, s 6.</p>
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