

**TECHNOLOGICALLY-FACILITATED VIOLENCE:
NON-CONSENSUAL DISTRIBUTION OF INTIMATE IMAGES CASE LAW**

A.	OFFENCE ELEMENTS	2
B.	SELECTED CASE LAW	3
I.	<u>BRITISH COLUMBIA</u>	3
	i. 2016 BCPC 400	3
II.	<u>MANITOBA.....</u>	4
	i. 2018 MBCA 48	5
III.	<u>NEWFOUNDLAND & LABRADOR</u>	7
	i. 2018 CanLII 25580 (NL PC)	7
	ii.[2017] NJ No 1 (NLPC)	8
IV.	<u>NOVA SCOTIA.....</u>	9
	i. 2017 NSPC 12 (Youth Court)	9
V.	<u>ONTARIO.....</u>	9
	i. 2018 ONSC 4726	9
	ii.2018 ONSC 2422	10
	iii. 2018 ONSC 2299	12
	iv. 2018 ONCJ 82	14
	v.2017 ONCJ 943	16
	vi. 2017 ONSC 3425	18
	vii. 2017 ONCJ 317	18
	viii. 2017 ONCJ 415	20
	ix. 2017 ONCJ 129	21
	x.[2016] OJ No 7080 (ONCJ)	23
	xi. [2016] OJ No 7196 (ONCJ)	24
	xii. 2016 ONSC 6585	25
VI.	<u>QUEBEC.....</u>	26
	i. 2016 QCCQ 6167	26

A. OFFENCE ELEMENTS

Non-Consensual Distribution of Intimate Images

s 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

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

(b) of an offence punishable on summary conviction.

Definition of intimate image

(2) In this section, intimate image means a visual recording of a person made by any means including a photographic, film or video recording,

(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;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Defence

(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.

Question of fact and law, motives

(4) For the purposes of subsection (3),

(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

(b) the motives of an accused are irrelevant.

B. SELECTED CASE LAW

I. BRITISH COLUMBIA

i. 2016 BCPC 400

In 2016 BCPC 400, Mr. P received a suspended sentence with 2-years of probation after pleading guilty to distributing an intimate image without consent. Mr. P also pleaded guilty to breaching a recognizance. The Crown dropped more serious charges against Mr. P in light of his two guilty pleas.

Mr. P and Ms. S were in an on-again, off-again relationship. At the time of the offence, Mr. P had been sending multiple messages to Ms. S via electronic means, which she was rejecting. On the evening he committed the offence, Mr. P waited for Ms. S in her driveway late at night. They drove away together, and the Court wrote that, “It is unclear as to all that happened in that car, although both parties were later found to have some physical injuries.”¹ During the altercation in the car, Mr. P used his phone to take blurry photographs of Ms. S’ breasts. The Court wrote that these photos “clearly showed [Ms. S] lack of consent.”² Mr. P then sent copies of the photos to two friends, along with instructions to save the photos for later.

Noting that non-consensual distribution of intimate images can cause significant emotional trauma, particularly when the victim is a young woman, the Court found that the paramount sentencing objectives were denunciation and general deterrence.³ Considering proportionality, the Court wrote:

¹ 2016 BCPC 400 at para 5.

² 2016 BCPC 400.

³ 2016 BCPC 400 (“there has been significant harm caused as a result of the type of behavior that gives rise to this offence. [...] Where such conduct includes cyber-bullying, in which the victim is further tormented by the receivers

[P's] behavior came at a time when he was very frustrated and angered by seemingly mixed signals – a putting off of communication by Ms. S. without a certain end to the relationship. [...] As his counsel rightly points out, [P's] frustration and anger is no excuse for his behavior. However, I find the picture taking was a rash decision made in that context at that moment, rather than a well-planned action. Forwarding the pictures to his two friends shows some planning but nothing beyond that transmission has occurred.

[...]

The rashness of that action, pictures taken with a cell phone during an interaction in a car has, perhaps only fortuitously, led to low quality pictures with limited identifiable features, such that the likelihood of future transmission is much reduced. The existence of a transmitted image to forever have a potential for further transmission is a feature of this offence that is aggravating.

[...]

[W]hile the gravity of the offence in general is significant, the circumstances of this particular case are less egregious than, for example, a case involving significant planning and forethought and resulting in a transmission of identifiable intimate images widely distributed on the internet.⁴

The Court also found that, because Ms. S did not submit a Victim Impact Statement, the long-term impact of P's offence was unclear, however, the court noted that transmission of these types of images has resulted in "significant emotional trauma to victims."⁵ Other mitigating factors on sentencing included the fact that the offender was 22, had no criminal record, pleaded guilty, and presented good prospects for rehabilitation. The Court ultimately concluded that the intimate images offence warranted a suspended sentence, while P's breach of a recognizance necessitated a conditional discharge with 1-year probation.

II. MANITOBA

or recipients of those images, the result has even been tragic, with young women seemingly taking their own lives as a result" at para 5).

⁴ 2016 BCPC 400 at paras 12-15.

⁵ 2016 BCPC 400 at paras 9.

i. 2018 MBCA 48

In **2018 MBCA 48**, Mr. M appealed his sentence of 18 months' imprisonment and three years' probation after pleading guilty to voyeurism, the non-consensual distribution of intimate images, and extortion, along with conditions that he report intimate images to probation services and not possess devices that can access the internet without permission. The judge stated that this "sentence appeal illustrated the pernicious effects that the misuse of technology can have on personal privacy and sexual integrity."⁶

When Mr. M was 19, he surreptitiously filmed his sister's 17-year-old friend while she undressed and showered at their family home. He admitted to being aroused by "peeping tom" pornography and the feeling of being in control. Five years later, he tried to use the film to extort the woman in the film by threatening to disseminate images from the film online.

The court noted that Mr. M engaged in the following behaviour:

To carry out the sextortion, he created multiple email accounts under pseudonyms, he extracted several nude or semi-nude still images from the 2010 recording and he manipulated the image using software to hide their source.

Between July and October 2015, he sent emails from the fake accounts with the intimate images to the complainant and her sister. The emails were menacing. The emails said that cooperation with the demands was the only way to avoid internet publication.⁷

The complainant informed the police, but she did not know who had taken the images and who the extortionist was. The police had difficulties investigating the account because he had deleted the email accounts after using them to send the images. The police were eventually able to discover that the emails had come from Los Angeles.

⁶ 2018 MBCA 48 at para 1.

⁷ 2018 MBCA 48 at paras 5-6.

She wrote back to one of the emails asking what the extortionist wanted and he requested an image of her in a bra, which she refused. Mr. M later contacted the victim claiming his email had been hacked and he had received a copy of the photos, offering to have his tech-savvy friends help her by using more sexualized images of her as bait to trap the extortionist. She thought this was suspicious and reported it to the police. Upon moving back to Winnipeg, the police searched Mr. M's computer and found the images. He confessed to taking the images and using them to extort her upon arrest.

The court noted the significant impact the offence had on the victim, stating:

The events terrified her, exacerbated her anxiety disorder and took over her life. She lived in constant fear that the extortionist had more intimate images of her and was going to eventually hurt, rape or kill her. She struggled in university, was physically ill and could not sleep. She became disassociated and lost her self-esteem. The intensity of her emotions and fear became so unbearable that she contemplated suicide to free herself from the grip of the extortionist. While the accused's arrest brought some closure, she is haunted by the experience and is so fearful of surveillance that she routinely checks for hidden cameras in bathrooms. She is afraid of being physically harmed by the accused and men generally.⁸

The court also noted that:

It is also important to appreciate that sextortion is a form of sexual violence even though it occurs through the medium of the internet. As with physical abuse, a victim's freedom of choice over his or her sexual integrity is violated. The long-term psychological harm to a victim, as was seen here, closely resembles what happens in a case of physical sexual assault (see *R v Innes*, 2008 ABCA 129 at paras 7, 11; and *R v NG et al*, 2015 MBCA 81 at para 33). Finally, it is difficult to hold such offenders accountable because the crime is remotely committed and the nature of the internet provides predators with a degree of anonymity; in this case, it took the efforts of five different law-enforcement agencies in two countries over many months to solve the case.⁹

⁸ 2018 MBCA 48 at para 11.

⁹ 2018 MBCA 48 at para 19.

It also noted that the non-consensual distribution of intimate images and voyeurism are both sexual offences and a privacy offences.

The court allowed the for an adjustment of the sentences for voyeurism (reduced to 3 months) and extortion (reduced to 15 months), did not change the sentence for the non-consensual distribution of intimate images (6 months) and deleted the condition of probation that required him to report intimate images to his probation officer, but it did not change the combined length of imprisonment (18 months) nor remove his internet limitations.

III. NEWFOUNDLAND & LABRADOR

i. 2018 CanLII 25580 (NLPC)

In 2018 CanLII 25580 (NLPC), Mr. G, a 25 year old man, was sentenced to eight months' incarceration and three years' probation after pleading guilty to uttering threats, the non-consensual distribution of intimate images, assaulting a peace officer, and a breach of recognizance.

After the breakdown of his relationship with Ms. X, he threatened to kill her, sent her text messages threatening to kill himself and her, released a video of her having sex with another man to another friend, was intoxicated when on recognizance not to possess or consume alcohol, and resisted arrest.

In regard to the offences against his ex-girlfriend, the court noted that:

[the non-consensual distribution of intimate images...] provides men who are unable to accept the end of a relationship with a new and frightening manner of harming and humiliating their former female partners.

Offences involving violence and intimidation of women by their former male partners are regularly heard in the Provincial Court of this Province. Such crimes have been the subject of many studies and consultations, but little has changed. Our legal system has failed to recognize the extent of the violence that women who

end relationships with their former male partners face. It has failed to acknowledge the reality that this violence can be deadly.¹⁰

Ms. X's victim impact statement said:

I am more timid in relationships. I am more sensitive to anger from others than I use [sic] to be before this, even my family and friends. I was mortified and upset when I learned of the video being sent. I was terrified of where else the video was sent and also what he was saying to people about the video. I'm concerned about what he is capable of if he would go as far as to send a video out of me. I'm concerned he would say things to my daughter and about what he would expose her to. I feel he is very manipulative. I changed the locks on my door for fear he may come to the house. I can't believe I was in a relationship with someone who could treat me like that. I used to worry and get upset about how I could allow someone to do that to me. However, I know now it was not my fault and I never was that person. I finally have been able to move on and I am now happy.

I am concerned that if there was ever any contact he may harm me or our daughter.¹¹

The fact that the video had not been shared online, but only sent to a friend lessened the seriousness of the offence, however, the court noted that when images are shared the person who shares them loses control. Mr. M intended to intimidate and humiliate Ms. X and breached her privacy interests.

He was sentenced to 8 months' imprisonment, and three years' probation with conditions including a no contact order with the victim, not being near places where the victim lives or works, Mr. G must attend counselling, to provide a DNA sample, a weapons ban for 10 years, a ban from posting anything about Ms. X online, and to surrender any intimate photographs or videos he has of Ms. X to the RCMP.

ii. [2017] NJ No 1 (NLPC)

¹⁰ 2018 CanLII 25580 (NL PC) at para 1-2.

¹¹ 2018 CanLII 25580 (NL PC) at para 14.

In **[2017] NJ No 1 (NLPC)**, Mr. C, a 34-year-old man, had been convicted of eleven counts of sexual interference and sexual exploitation of four young children he was in a position of authority with. While on probation he pleaded guilty to sexually abusing his niece's two-year old boy and taking photos of the abuse, possessing and distributing child pornography of a 15-year-old girl, breaching his probation, and breaching an undertaking by possessing a device capable of allowing him to access the internet. He was sentenced to 6 years' imprisonment. Additional orders included a \$200 victim surcharge, a DNA order, a lifetime limitation of being near people under 16, no contact with victim, internet ban except for counselling and employment and then only under supervision, lifetime registration as a sex offender, a lifetime weapons ban, and the forfeiture of items used to commit crimes.

IV. NOVA SCOTIA

i. 2017 NSPC 12 (Youth Court)

In **2017 NSPC 12 (Youth Court)**, a high school principal was informed that six male teenage students were sharing nude photographs of young women they had solicited on a shared Dropbox account. Search warrants of the young men's devices confirmed that they had been sharing photos of young women without their consent. They were found guilty of non-consensual distribution of intimate images and child-pornography offences.

V. ONTARIO

i. 2018 ONSC 4726

In **2018 ONSC 4726**, Mr. B, a 30-year-old man, pleaded guilty to publishing images of Ms. T without her consent following the breakdown of their intimate relationship. Mr. B created a fake Facebook page using Ms. T's full name and posted five intimate images of her on the page that he had taken during their relationship. Ms. T had not given him permission to share those

images with anyone. 96 people, including her employer, co-worker, family and friends were invited to “friend” her on Facebook and viewed the images.

The court noted “It was only through a position of trusted intimacy that he was able to take and retain the intimate images in question. He then betrayed that trust in a horribly deliberate and egregious manner, calculated to repay Ms T.'s trust by subjecting her to extreme humiliation and embarrassment vis-à-vis her friends, family and coworkers.”¹² This was considered an aggravating factor along with the fact that the image contained her face and close ups of her genitals and anal region, the ongoing negative impact on Ms. T, the inability to control the images once they have been released online, and the deliberateness of creating the impersonation account. Mitigating factors included his new relationship and family.

Mr. B was sentenced to a 16 months’ conditional sentence and three years’ probation, additional orders included a \$200 victim surcharge fine, a no contact order with the victim, and a DNA order.

ii. 2018 ONSC 2422

In 2018 ONSC 2422, Mr. B pleaded guilty to the non-consensual distribution of an intimate image, assault, sexual assault, and obstruction of justice. Mr. B and Ms. B had a difficult relationship, during which he had taken consensual naked photographs of Ms. B. Mr. B later published some of those images on the internet without her consent. When she confronted him, he assaulted her. He was found guilty of assault and promised to delete any other intimate images he had of Ms. B.

At a later date, Mr. B, who had not deleted the images, then planned to orchestrate a violent sexual attack on Ms. B by strangers, in which Mr. B would intervene in as her rescuer, hoping to

¹² 2018 ONCJ 82 at para 44.

renew the relationship. He created several fake social media profiles pretending to be Ms. B. The fake profiles claimed she was looking for sexual relationships and included six nude images of her. The phone number linked to the accounts was in fact Mr. B's and he received the texts from the account and pretended to be Ms. B.

Mr. Y saw the ad and began texting with what he thought was Ms. B, who told him that she wanted Mr. Y and others to pretend to violently sexually assault her, fulfilling a "rape fantasy". The texts allegedly sent by Ms. B described violent and graphic requests, including gagging her so she could not scream and taking photos of her to send to a specific email address, claiming she would pretend to fight to get away and resist, but she really would be consenting. Mr. B provided Mr. Y with detailed descriptions of how to get into Ms. B's home and the layout of her home, sent many images of Ms. B clothed and nude to reinforce the illusion Mr. Y was actually speaking with Ms. B. Mr. Y repeatedly asked for more information and proof that she would be consenting before agreeing to "attack" Ms. B and wanted to meet beforehand to go over the plan to ensure she would not experience anything she did not want to. Mr. B would engage in text messages with Ms. B to get photos of her in the moment to then send to Mr. Y to "prove" he was talking to Ms. B in real time, including taking photos of her drivers licence.

After much conversation, Mr. Y went to Ms. B's house and attacked her, Ms. B's screams attracted the neighbors and Mr. B, who was parked near by and had orchestrated the visit, came and pushed Mr. Y off of her. Mr. Y tried to show his cellphone and the texts to the neighbors as proof he had been invited to attack Ms. B but Mr. B grabbed the phone, broke it, and ran to his car where he left the broken phone, then returned to Ms. B's home. When the police arrived, Mr. Y told them Mr. B had taken the phone, which he denied. Mr. B comforted Ms. B as she spoke with the police.

Both Mr. B and Mr. Y were arrested. The police seized Mr. B's cellphone. Mr. Y was able to retrieve he texts from the "Text Now" app he had been using to communicate with who he thought was Ms. B. The police also located Mr. Y's cellphone in Mr. B's car.

Upon searching the internet, Ms. B was able to locate at least 11 fake profiles of her where her intimate images were posted. Some included her name, identification, information about where she worked, and degrading hashtags. Members of the public had rated her photos and made cruel comments about her body. She was not able to close all of the accounts and a “reverse image” search of the images showed they had been spread further online. The court noted that some of the images seem “destined to remain on the internet indefinitely.” Strangers who came across the images have sought to locate or contact Ms. B.

The impact on Ms. B has been severe, she experienced terror and ongoing trauma that has transformed her in negative ways. The court noted that the:

Discovery of her ongoing and seemingly intractable "online presence", created by Mr B., has been especially devastating to Ms B.'s sense of personal dignity and self-esteem. The realization that complete strangers continue to view and rate her naked images, while posting hideous comments about her, has made her hate herself and her own body. She feels extremely exposed and violated. She wants to "disappear" and "become invisible". She cannot see anyone without wondering if they too have viewed the images.¹³

Mr. B was sentenced to 5 years imprisonment, additional orders included a weapons ban for life, a DNA order, a 20 year registration as a sex offender, a 20 year internet limitations (including a requirement he use his full name for all online communications, a prohibition from using photos of Ms. B online, a prohibition from communicating about Ms. B online), an \$800 victim surcharge fee, no contact order with Ms. B and some others, and a forfeiture of the cellphone used in the offence.

iii. 2018 ONSC 2299

¹³ 2018 ONSC 2422 at para 97.

In **2018 ONSC 2299**, Mr. S was accused of trying to extort money from Ms. K by threatening to post intimate images on Facebook and Skype where her friends and family would see the images. He allegedly posted two images online (on three Facebook accounts and one Skype account) without her consent when she did not give him any money. He was charged with extortion and the non-consensual distribution of intimate images. Mr. S claimed he had a legitimate reason to ask for the money and claimed Ms. K had posted the images on their joint accounts, not him.

Evidence included 557 pages of texts between the parties over various social media accounts, as well as text and video messages from Skype.

Ms. K acknowledged there were many photos of her in the nude, alone and having sex with men. She and Mr. S enjoyed going to nude resorts where they would sometimes film her engaged in sex acts with other men. She claimed she did not have access to those images that were posted and claimed only Mr. S had access to them. However, she had shared other intimate images with people she had been intimate with, some friends, cousins and a sister. She did not consent to having any of the images of her sexually engaging with someone else to be put on the internet. However, she had put some nude images of her on the internet in the past including at least one video of her engaging in sexual activity with Mr. S.

The images that had been posted online were of her engaged in sex acts with other men. The court noted:

Prior to leaving this issue I would like to make it clear that the fact that Ms. L.K. may herself have distributed intimate images of herself, or consented to the accused putting intimate images of her on the Internet, (other than the two images in question) does not equate with consent to the two images in question. Consent to each image must be given. Consistent with that observation, Ms. L.K. acknowledged that she had consented to many other intimate images of her having been placed

on the Internet, and acknowledged having done so herself. There is no suggestion that an individual consent had been given to each image. Rather, I was left with the impression that it was a blanket consent or understanding between Ms. L.K. and Mr. S.S. related to a specific group of images. I conclude that consent can be given to either individual images or groups of images provided they are identifiable.¹⁴

There was dispute about who had created and had control over the social media accounts the images were posted up on, who had copies of the images, and who posted the images. There were significant issues around credibility and authenticity around much of the evidence of this trial. There was evidence that the images were intimate and were placed online, however, who put the images online and whether Ms. K had consented to them being posted or withdrawn consent for them to be posted was unclear. Mr. S was acquitted of the non-consensual distribution of intimate images. He was also acquitted of extortion because the language he used was not considered threatening by the court and because the integrity of the evidence had been severely compromised, as some of the messages were missing from the evidence.

iv. 2018 ONCJ 82

In 2018 ONCJ 82, Mr. S, a 30-year-old man, was dating Ms. K, a 19-year-old woman. During their relationship, they had consensually filmed some of their sexual activity. Ms. K became uncomfortable with the filming and declined to engage in further recordings. Later, she discovered hidden cameras and cellphones in Mr. S's bedroom that were used to surreptitiously film their sexual activity, she also discovered that Mr. S had posted some of the videos on a pornography site along with her full name. Ms. K Googled herself and found several videos associated with her full name were posted on pornography sites. Mr. S promised to take the videos down, but did not. Ms. K received a Facebook messenger message from someone in Europe who had seen the videos. Without Ms. K's knowledge, Mr. S later placed an escort advertisement on a well-known escort website that included several images of the victim, her

¹⁴ At para 29.

full name, phone number and a comment that Ms. K was “into anything”. Ms. K received over 300 calls and messages responding to the ad. Another person contacted her about another escort advertisement on a second escort website. Ms. K reported Mr. S to the police, who discovered 11 sexual videos of Ms. K and Mr. S online, with Ms. K’s name associated. The images had been viewed over 10,000 times.

The Court noted the severe impact this had on Ms. K, noting her victim impact statement:

She has been devastated by this offence and has tried to commit suicide on several occasions. She has been diagnosed with several psychiatric conditions, including depression and anxiety.

Since ending the relationship with the offender, L.K. has achieved a degree of sobriety. She is concerned about the prospect of relapsing, and has added addiction counselling to the host of commitments she has undertaken to address her physical and mental health.

L.K. has been plagued by feelings of loneliness and self-loathing and is struggling to carry on. She lives with thoughts of suicide on a daily basis. She observed: "I've been at constant battle with my own thoughts and feelings eating away at me until there's nothing left. Like a disease with no cure."¹⁵

The Court noted multiple aggravating factors including the significant impact on the victim, the breach of trust, the continued distribution of the videos and images over the objections of the victim, the fact that some of the recordings had been filmed surreptitiously, the breadth of the distribution, the graphic nature of the images, the degrading descriptions attached to the images, and the personal identifiers that were published about the victim. The Court stated that in most cases of non-consensual distribution of intimate images, a conviction will typically attract incarceration.

¹⁵ 2018 ONCJ 82 at paras 17-19.

Noting the gendered elements of the crime, “offenders are almost exclusively male - their victims, often girls and women”, the Court also noted that:

the fact that the victim may have consensually participated in recording sexual activity in no way impacts or diminishes the moral responsibility of the offender. To conclude otherwise engages retrograde thinking surrounding the interplay of sex, privacy, consent and control. Where, as in this case, the offender also secretly records the sexual activity to be later distributed, the moral responsibility is dramatically heightened.¹⁶

Mr. S was sentenced to 18 months’ incarceration, 3 years’ of probation, including orders that he have no contact with the victim, stay 500 metres away from places where the victim frequents or is known to be, not possess weapons, to attend programming; not to publish, distribute, transmit, sell, make available or advertise any sexually explicit material or intimate material on the internet; and not to possess, access, publish, distribute, sell, make available or advertise any images of the victim by computer, electronic or other means.

v. 2017 ONCJ 943

In **2017 ONCJ 943**, Mr. R was engaged to marry the victim however, an incident occurred that Mr. R wanted to keep secret and the relationship ended. He had a specialization in information technology and had access to his fiancé’s online school account, school email and Facebook account. During their relationship, the victim had sent multiple nude images to Mr. R. Following the breakdown of the relationship, he threatened to share the intimate images with her parents if she did not agree to follow his side of the story in relation to the incident that he wanted to keep secret. She told R she no longer wanted any contact with R, but he continued to persistently contact her electronically. The messages were often non-sensical ramblings with ominous tones.

¹⁶ 2018 ONCJ 82 at para 35.

Later, several friends and family members of the victim received an anonymous email with several intimate images of the victim and copies of her Facebook messages about a previous boyfriend. A second anonymous email with an intimate image was sent to her father. Her school supervisor also received an anonymous email accusing the victim of fraud. R denied sharing the images or sending the images, suggesting an anonymous hacker must have sent them. During one conversation with the victim R claimed that intimate images with victim's name attached had been posted on Reddit. However, the victim Googled her name and did not find evidence of this. R continued to send harassing messages to the victim and about the victim on his social media, some of which suggested that he was watching the victim. Someone had also changed the password to the victim's Facebook account, locking her out of the account. At trial R's story about the images changed several times, at some point he claimed to have not seen the nude photos at all, that had not wanted to receive the photos, and to have seen them but deleted them later.

R's one sided and persistent contact with the victim was enough to convict him on the criminal harassment charges, however, because the images had been sent anonymously, the courts had to consider whether there was enough evidence to determine whether R sent the messages. The Court concluded that R did send the images, taking into account that R had access to the victim's various digital accounts, including her Facebook where the message had been copied from, that the list of people who the images were sent to suggested they were sent from someone who knew the victim well, and that the messages contained information that only R and his fiancé would be aware of. The court held that "The alternative anonymous hacker theory is devoid of any realistic foundation in this case."¹⁷

It should be noted that the judge in this case problematically suggested that the victim could have avoided the harassment by removing WhatsApp from her phone or blocking R from

¹⁷ 2017 ONCJ 558 at para 146.

contacting her, but after considering the victim's testimony, recognized that she had chosen to keep the line of contact open so that she could monitor R's state of mind and capture concerning messages.

Mr. R was sentenced to nine months' incarceration and 30 months' probation. Additional orders included, no contact order with complainant, family and other particular individuals; an order to keep 200 meters distance from the complainant and family home; a DNA order; an internet prohibition for five years, save for educational and employment purposes (only using the school's and employer's devices) and to pay bills, obtain services from the government and correspond for purposes of employment and education; and a two year social media and WhatsApp prohibition.

Also see: 2017 ONCJ 558 (Trial)

vi. 2017 ONSC 3425

In **2017 ONSC 3425**, Mr. A pleaded guilty to the non-consensual distribution of intimate images. Mr. A's coworker was using Mr. A's phone. He sent two nude male images to the daughter of a family friend of Mr. A's. Mr. A denies the images were of him. The complainant sent two images of her, including one of her vagina. Mr. A showed the images to two co-workers and then claimed to have deleted the images. The courts held that the distribution in this case was limited and therefore the Mr. A's actions fell on the "less serious end of the spectrum of this offence".

He was given a conditional discharge, probation for 12 months with the condition that he not contact the complainant or attend places where she may be, and not exchange intimate images or same intimate images on his devices.

vii. 2017 ONCJ 317

In **2017 ONCJ 317**, Mr. C, a 32-year-old man, uploaded five intimate videos and seventeen intimate images of his ex-girlfriend, Ms. S, onto pornography websites, including one dedicated to “revenge porn”. The couple had taken the images consensually during their relationship. Ms. S’s face was visible in several of the images, and Mr. C posted Ms. S’s name and information about her age, ethnicity, and place of birth as well as degrading comments alongside the images. One site limited the number of images Mr. C could post up and Mr. C commented on the site expressing his desire to post more images. When Ms. S became aware of the postings, she reported Mr. C to the police. The police contacted Mr. C who stated he would remove the content that day. Later, Ms. S searched her name and found the video were still available. She took great efforts to contact websites to get the content removed, but was unable to remove all copies of them from the internet. The Court noted that after much effort, she realized that “everyday people were downloading and uploading my pictures and images.”¹⁸ The Court acknowledged that each time the images are viewed Ms. S’s privacy and dignity is violated again, and may be violated in perpetuity. Strangers began to contact her and have continued to contact her because of the images.

Ms. S had to take time off work, had a hard time paying her bills, and suffered academically due to her distress over the images. The Court noted that:

[Ms. S] said that she will never trust anyone again and knows that this will affect all her future relationships with her family and friends because she is afraid what people have seen of her. [Ms S]. continues to receive messages on social media from strangers who ask her to perform sex acts for them. She is concerned that future employers might come across these images should they decide to Google her name. [Ms. S] said that “[w]ith everything that I had experienced I didn’t feel like a person anymore.”¹⁹

¹⁸ 2017 ONCJ 317 at para 14.

¹⁹ 2017 ONCJ 317 at para 15.

When discussing the offence, the Court stated that the offence captures sending a single image of an unidentifiable person to another recipient, sharing images via social media, and posting images on websites, and that the core of the provision was to protect privacy and control over private images, stating: “[w]here someone shares an intimate image without consent, he violates the depicted person's privacy because he has gone beyond that limited, consensual use. The more people to whom the image is exposed, the greater the invasion of privacy and the greater the harm caused to the victim.”²⁰

Ms. S suffered significant and long-lasting harms. Her victim impact statement stated:

To this very day I'm afraid to Google my name, knowing that I will see the very things that I don't want to see. Who I am, who I wanted to be, I don't think I can be any of that anymore, if people Google my name they won't see my achievements or strides I have made professionally, but instead videos and pictures that would make any potential employer disregard my application. I will never trust anyone again. I know this will affect any sort of relationship I will ever have with my family and friends, everyday will be a struggle because I'm afraid of what people have seen and what they think of me. I just want my freedom and life back. It did not deserve to be snatched away because I loved the wrong person. Maybe one day I'll be okay, but not today.²¹

Mr. C pleaded guilty to non-consensual distribution of intimate images 18 months after being charged. He was sentenced to five-month imprisonment, 12 months of probation, 60 hours of community service, along with a no contact order with the victim and a prohibition from being within 50 metres of any place the victim frequents. The Court declined to order an internet prohibition, even though it said this type of offence normally would attract one.

viii. 2017 ONCJ 415

²⁰ 2017 ONCJ 317 at para 20.

²¹ 2017 ONCJ 317 at para 64.

In **2017 ONCJ 415**, Mr. V was convicted of non-consensual distribution of intimate images. Mr. V had surreptitiously taken a video of him having sex with his girlfriend, Ms. MS, during their relationship. Following a confrontation with another man, Mr. V texted a screenshot of the video recording to another man without Ms. MS's consent, and also posted the image on Facebook. Mr. V also repeatedly sent messages to Ms. MS suggesting that there were additional images and videos. At trial the court clarified the provision, finding that images that included either nudity *or* sexual activity would meet the requirement of the *Criminal Code*. However, the Court noted that the images do not need to include sexual intercourse to meet the "sexual activity" definition. If there is evidence that the images were taken during the course of sexual activity, but may only capture the individuals' nude in the bedroom at that moment, it will still be found to constitute sexual activity within the meaning of the provision.

The Court concluded:

I am mindful of the *Supreme Court of Canada's* definitions in [*R v. Sharpe*] which indicate what the law does not catch such as things like photos of teenagers kissing at a summer camp and things of that sort. It is not meant to catch casual sexual contact, like touching, kissing, hugging.

When somebody is videotaping an act of sexual intercourse, that is capturing an explicit sexual activity and in this context, when somebody is publishing an image, excerpted from that, it is clear to me that the intention is to put up in public or send to a friend, in this case of this lady, to say, "I have got an image of us having intercourse. You know it and I know it."

I do not know what other inference there can be drawn from this than that he intended that message be sent to her and to embarrass her by sending it to her boyfriend and putting it out publicly.

Mr. V was convicted of the offence.

ix. 2017 ONCJ 129

In **2017 ONCJ 129**, Mr. C, a 21-year-old man, had been dating Ms. A for three years. During their relationship Ms. A had sent some nude images to Mr. C and he had taken some nude images of

her. After the relationship ended, Ms. A contacted the police after Mr. C threatened to post nude pictures of her online and send copies to Ms. A's mother if she didn't speak with him. Months later, several friends and co-workers received copies of the images via Instagram. Mr. C pleaded guilty to distributing the images and breaching his undertaking not to contact Ms. A.

Ms. A's victim impact statement stated:

This has impacted my lifestyle in a way that when I look at people I know, I feel as if they see me in a different way, as they have pretty much seen what is beneath my clothing. He has shared my body with entire world. Friends, colleagues, classmates, people who I interact and see every day of my life. To me, it is an automatic assumption people have a different outlook or perspective on who I really am. Honestly it's hard to gain trust in anyone because of my experience with him. I am very closed off; my self-esteem has gone down. I have limited trust in new relationships with new people including my new boyfriend.

[...]

This has affected not only how people see me, how my employers see me, my friends, my families outlook on me, but most important how I now see myself.²²

The Courts noted Mr. C's attempts to extort Ms. A as an aggravating factor, as well as Mr. C's desire for revenge, the breach of trust, the traumatic impact on Ms. A, and Mr. C's contacting Ms. A while ordered not to. It also noted the absence of aggravating factors including the fact that the photos were only posted once, to a small group of people and that Ms. A was only naked and not engaged in sexual activity.

Upon sentencing, the Court did impose some limitations on Mr. C's internet use but noted that the use of the internet is unavoidable in modern day life. Mr. C was given a conditional discharge, probation for three years, 150 hours of community service, probation order including a no contact order with victim. For the first six months of his probation, Mr. C was

²² 2017 ONCJ 129 at para 51.

ordered not to “use the Internet or any similar communication service to directly or indirectly access any social media sites, social network, Internet discussion forum or chat room, or maintain a personal profile on any such service (e.g. Facebook, Twitter, Tinder, Instagram, Snapchat or any equivalent or similar service). He has five days in which to comply with this condition.”²³ For the duration of order, Mr. C was ordered to identify himself by his full name while using the internet and not to use pseudonyms, nickname, or code names, a parole officer was to have access to his computer or other devices, and he was not to possess any digital, video or photographic images of Ms. A or intimate images of any person he knows. He was given five days to delete images of Ms. A in his possession.

x. [2016] OJ No 7080 (ONCJ)

In **[2016] OJ No 7080 (ONCJ)**, Mr. H dated the victim and had surreptitiously recorded their sexual activity. He had a pattern of sexual exhibitionism and had posted sexual images of himself online in the past and was sexually aroused by watching videos of a person engaged in sexual activity when they do not know they are being filmed. Mr. H later posting the videos of the complainant on a pornography site and sent a link to some of their friends. The court noted that Mr. H claimed that he posted the videos “as a type of bragging that he was having sexual relations with a beautiful woman.”

The court noted about the victim impact statement:

The complainant has provided a very thoughtful Victim Impact Statement. This offence has had a tremendous impact on her life. On the one hand, this offence constituted the ultimate breach of trust on a personal level. The defendant was well aware of her lack of consent in the videotaping of their sexual relationship, yet proceeded not only to do so, but to share that video for his own selfish motives. She feels that she has been stripped of her dignity and humanity and had been made an

²³ 2017 ONCJ 129 at para 119.

object, a fetish. This lack of respect for her as a person, from a person who purported to love her, has led her to believe that anyone who may have viewed the depictions will share the same lack of respect. Although she acknowledges that the defendant permitted her to satisfy herself that the videos and photos were deleted from all of the defendant's accounts, she cannot be assured that any individual who had access to the videos or photos has done the same.

In effect, the complainant has to live with the knowledge that anyone she meets may have had access to viewing her in intimate moments. This has led her to feel that the defendant has stripped her of her ability to feel safe. She feels vulnerable. She has changed her activities, the activities she used to enjoy with family members, as she no longer feels safe alone. She has suffered humiliation as she has had to disclose this to her superior as she works in the education sector and any disclosure of this would reflect negatively on the organization. She had explained this repeatedly to the defendant during the relationship. She fears losing her career if this is revealed publicly.

She succinctly summarized the impact as follows, and I quote:

"If B.H. had assaulted me physically in some way and there was no video or pictures, no audience, I would have an easier time to deal with this privately and move on with my life. Because of the extreme fear of the unknown I now have, because he stripped me of control over my own image, because he made pictures and videos of me naked, that I didn't know about, and then distributed them, which I also did not know about, I don't believe my life will ever be the same again. No amount of rehabilitation or punishment for B.H. will ever make me whole again."²⁴

Mr. H was sentenced to 90 days incarceration, which the court noted was at the “very low end of the range for this offence.”

xi. [2016] OJ No 7196 (ONCJ)

In **[2016] OJ No 7196 (ONCJ)**, Mr. L pleaded guilty to three counts of non-consensual distribution of intimate images. There were three complainants, all of whom had previous romantic or sexual relationships with Mr. L. The first victim, Ms. P dated Mr. L who

²⁴ [2016] OJ No 7080 (ONCJ) at paras 13-16.

surreptitiously recorded sexual activities Ms. P performed over Skype after Mr. L threatened to expose their relationship to her boyfriend unless she did so. Ms. P later learned of the videos, which she asked Mr. L to delete and he said he would. He did not and five years later he contacted Ms. P and threatened to post the videos unless she dated him again. Ms. P called the police who cautioned Mr. L to delete the video. Several months later the video appeared on a pornography site using a version of Ms. P's name. Ms. P was devastated and faced long term consequences from the posting. She informed the police of the posting.

The second victim, Ms. SL dated Mr. L and had sexual video chats with him which he recorded without her consent. After the relationship ended, he threatened to show the videos to her family. After their relationship ended, Ms. SL saw a news report regarding Mr. L posting Ms. P's videos online. She then searched her name and discovered two intimate videos of her on two pornography websites, one of which agreed to take the video down, the other did not.

The third victim, Ms. W met Mr. L and filmed an intimate act together that was meant to be kept private. After they broke up he threatened to post the video. Ms. W said she would charge him if he did but Mr. L posted the video with Ms. W's name attached to it.

He was sentenced to 12 months of imprisonment, 2 years of probation and was ordered to give a DNA sample.

xii. 2016 ONSC 6585

In **2016 ONSC 6585**, Mr. T was a 42-year-old high-school teacher in an 18 month long romantic relationship with the victim. They would talk over Skype and the victim would occasionally pose nude for Mr. T, which Mr. T took screen shots of. She did not consent to him taking screen shots of her. A fake account later sent a series of seven emails with these pictures to her family, friends, co-workers and her new partner, suggesting she and her new partner were looking to include new sexual partners in their relationship. The victim was negatively impacted by this, the court stated:

The victim indicates that she was humiliated, shocked and confused by the defendant's actions. Her sleep patterns have been seriously disrupted, she has been diagnosed with PTSD, anxiety and depression and has resorted to alcohol to cope. The victim describes herself as suffering from low self-esteem and has considered suicide.

The victim has experienced setbacks in her teaching career and anticipates that her career aspirations will be limited as a result of what has occurred.²⁵

Mr. T was convicted of voyeurism but acquitted of the non-consensual distribution of intimate images because it was not proven beyond a reasonable doubt that he was the one to set up the fake account and distribute the images. He was sentenced to 12 months` probation and 50 hours of community service, as well as a no contact order with the victim and another individual.

Also see: 2016 ONSC 2537 (Evidence)

VI. QUEBEC

i. 2016 QCCQ 6167

In 2016 QCCQ 6167 Mr. DG pleaded guilty and was convicted of incest, sexual abuse, and the non-consensual distribution of an intimate image of his 8-year-old daughter while he had custody of her on the weekends. He also admitted to taking and sharing an intimate photograph of a woman, Ms. Y. Following a joint submission by counsel, the Court sentenced DG to 14-years imprisonment for the offences against his daughter and 6-months for the intimate images offence against Ms. Y. The ancillary orders made against Mr. DG including requirements to provide a DNA sample and to comply with the Sex Offender Registry, and prohibitions on direct or indirect contact with the victims and possession of firearms.

²⁵ At para 14-15.