

CANADIAN JUDICIAL COUNCIL

**COMPLAINT REGARDING
ASSOCIATE CHIEF JUSTICE LORI DOUGLAS**

**RESPONSE ON BEHALF OF DOUGLAS, ACJ
TO MOTION FOR DIRECTIONS RETURNABLE OCTOBER 10, 2014**

October 8, 2014

1. On behalf of Douglas, ACJ, we make the following submissions in response to the motion for directions seeking to strike the evidence in support of the preliminary motion scheduled for October 27, 28 and 29.
2. Independent Counsel accepts that Douglas, ACJ can bring a motion to strike but argues that the Inquiry Committee cannot have the benefit of evidence. If evidence is allowed, Independent Counsel seeks more time to respond.
3. On the first point, we submit the Inquiry Committee, on the very important issues being raised, should not be deprived of the evidence and, in fact, will be aided by the evidence. Evidence is admissible and regularly used in motions for summary disposition of cases which should not be forced to trial. The Supreme Court of Canada in *Hryniak* has recognized that, in appropriate cases, the modern reality is that matters can and should be dealt with without putting parties through the most painstaking proceeding – which, in this case, would be a “full public hearing” on the merits.¹
4. In seeking to strike all of the evidence relating to the motion to strike Allegations 1 and 2, Independent Counsel takes the position that what we are seeking on behalf of Douglas, ACJ is not properly done by way of this motion and we must, instead, subject the Judge to a “full hearing on the merits” as was done under the Fraser Committee.
5. Conducting a formal hearing into the allegations would signal to the public that the CJC and the Committee consider the allegations to be capable of supporting a recommendation for removal. This sends a message that the CJC and the Committee consider Douglas, ACJ to be responsible for her victimization. This message is contrary to the academic, legislative, and social recognition that women whose intimate images are distributed without their consent are victims who must be protected. As a result of the nature of the allegations and the harmful stereotypes and victim blaming embedded in these allegations, conducting a public hearing into Allegations 1 and 2 would:
 - (1) threaten the constitutional principle of judicial independence;

¹ *Hryniak v. Mauldin*, 2014 SCC 7, paras. 2, 28

- (2) lessen public confidence in the judiciary and therefore undermine the goals of the CJC and the purposes of judicial discipline; and
- (3) cause significant irreparable harm to Douglas, ACJ.

6. The Inquiry Committee should have the benefit of the evidence establishing the academic, legislative, and social recognition that is presented in the motion record, in order to apply a 'Boilard-type' test, and make a disposition without forcing an unnecessary and harmful full hearing. This evidence is relevant to the Committee's determination on whether or not the allegations "if established, disclose an arguable case for removal."² The issue is whether these charges which clearly punish a woman who is the victim of wrongdoing should go forward when the evidence establishes that the public and Parliament alike view the non-consensual distribution of intimate images to be a crime. It will be our submission that it cannot properly be the basis of a legal proceeding *against* the victim.

7. The CJC's conduct process has the objective of enhancing the public's confidence in the system of justice. For this Inquiry Committee to engage in a proceeding against a victim of wrongdoing defeats the very objective of the CJC's process.

8. To say to you that in order to review the evidence relevant to points being raised, you have no choice but to put this victim through a public hearing "on the merits" as Independent Counsel argues, is to say this Inquiry Committee must continue to inflict irreparable harm on a victim because Independent Counsel thinks that is required "by the process", even if such a procedure against a victim would undermine the public confidence in the system of justice. That cannot be right.

9. What is really being sought here is an adjournment, and we do not object to a reasonable delay but point out the following chronology.

10. The briefing schedule for this motion provided that the moving party deliver her record on October 1, 2014. That deadline was met.

² Independent Counsel's submissions describing the test to be applied on a 'Boilard-type' motion.

11. In advance of the deadline, indeed in the second week of August 2014, counsel for Douglas, ACJ had discussions with Independent Counsel, frankly expressing concerns about the proceeding against the Judge. As can be seen from the covering email attached as **Schedule A**, on August 15, 2014, Judge's counsel followed up on the discussion by sending background information to Independent Counsel about the non-consensual distribution of intimate images and the harms and problems with blaming the victim.

12. The material sent to Independent Counsel is attached as **Schedule B** to this response.

13. In the covering email, it was pointed out that the proceedings against Douglas, ACJ, a victim of non-consensual distribution of images, raised serious concerns. Ms. Côté was told that the material being sent to her, which included references to the Parliamentary Proceedings on Bill C-13, references from scholars studying in the area, editorial comment and testimony by victims and their families, was just "the tip of the iceberg".

14. Independent Counsel was asked to review the material that is referred to in the memo attached as **Schedule B**. She was also told that there were countless additional stories about this kind of victimization and the concerns raised that it undermines public confidence in the system of justice. As stated in the email, we asked to have a dialogue with Independent Counsel as she considered what the CJC should be pursuing, in view of the issues we were raising with her.

15. On August 15, counsel for the Judge offered to discuss this matter further with Independent Counsel and offered to provide copies of any of the numerous references referred to in the attached memo, **Schedule B**. No request for further discussions or any of the material was made by Independent Counsel.

16. Further discussions were held with Mr. Fallon concerning the nature of the moving party's motion, namely that it was a 'Boilard-type' motion, on all three counts, based on the August 15 memo (**Schedule B**). There was also reference made during the Case Conference with the Committee members on September 26, 2014 describing the nature of the motion as a 'Boilard-type' motion and it was made clear that it was a substantial one and we would need all three days for the hearing.

17. The materials in the motion which was filed on October 1 deal with these very same topics that were addressed in the memo of August 15, 2014, namely:

- (i) the harm caused to victims of the non-consensual distribution of intimate images;
- (ii) the impropriety of blaming the victim;
- (iii) the scholarship that has been produced around these issues, linking it to other aspects of violence against women;
- (iv) the legislative responses around the world and in Canada;
- (v) the testimony in front of Parliament in respect of Bill C-13; and
- (vi) the editorial commentary and strong consensus among Canadians that it is the perpetrators who should be punished, not the victims of such wrongdoing.

18. These points and themes and references were all discussed in the memorandum sent on August 15, 2014, following up on oral discussions in which the concerns and issues raised by the pending motion were voiced.

19. In keeping with the Federal Court practice of filing all documents referred to by an expert, the actual references relied on by the experts were compiled and appear in volumes 2 through 5 of the motion record.

20. Volume 1 of the motion record contains an affidavit of a student-at-law at Torys who attaches publicly available information. The first ten exhibits of her affidavit deal with the very recent and notorious coverage of the distribution of intimate photos of celebrities that occurred after August 15, 2014. The newspaper commentary following those events echoes the views that were reflected in the earlier newspaper coverage referred to in the August 15 memorandum **(Schedule B)**.

21. The student's affidavit goes on to attach additional Parliamentary transcripts from the hearings referred to in the August 15, 2014 memorandum. It also attaches one of the submissions quoted in that August 15 memorandum, namely the West Coast LEAF submission on Bill C-13,

which was among the references offered to Independent Counsel which, by her silence, she declined.

22. Finally, the affidavit includes an excerpt of the testimony of Mr. Justice Freedman. This testimony has been in the possession of Independent Counsel since she took over the brief as it was given under oath before the prior Inquiry Committee. In addition, it must necessarily have been reviewed by Independent Counsel as it is known she has interviewed Mr. Justice Freedman.

23. None of this evidence could be a surprise to Independent Counsel.

24. In Tab 3 of Volume 1, an affidavit of William Gange is provided. Mr. Gange is a barrister who acted for Mr. King and had interactions with counsel for the original complainant, Chapman. Independent Counsel has interviewed Mr. Gange and had access to previous information he provided in connection with the earlier inquiry proceedings. His evidence proves what Independent Counsel knows, both from the file and from our position, that Chapman's disclosure of the intimate photos in August 2010 was done for improper purposes. This evidence should be of assistance to the Panel in determining that the events that befell Douglas, ACJ are typical of so-called "revenge porn".

25. Tabs 5, 6 and 7 in Volume 1 are the expert reports of Dean Sossin, Professor Mary Anne Franks and Professor Jane Bailey. Professor Bailey testified before the Parliamentary Committee reviewing Bill C-13 and Professor Franks' work was discussed. Professor Franks' work is also referred to a number of times in the August 15, 2014 memorandum and she is identified as one of the leading scholars working in this area. Professor Bailey is similarly well-known in Canada as a scholar in the area. Dean Sossin is a well-known expert on ethical oversight of the judiciary.

26. Volume 6 contains the confidential medical evidence, sought to be filed under seal. As can be seen from that evidence, there was an earlier report that has been in Independent Counsel's possession since she took over the file. The updated information is consistent with the evidence that Independent Counsel received directly from Douglas, ACJ on August 12, which will have come as no surprise to Independent Counsel in view of the very public events that are known to have happened to the Judge and have been widely reported over the past four years.

27. In respect of Allegation 3, the motion to strike is not only an issue of jurisdiction, it is also brought on the basis that the facts alleged could not support a recommendation for removal. The evidence relied on in this regard is provided in the expert evidence detailing the harms suffered by victims and the evidence in Volume 6.

28. If a complaint in terms of Allegation 3 were made, it would go through the process set out in the CJC procedures and evidence such as that referred to in Volume 6 and the expert evidence on harms would be available to the Vice Chair or Review Panel as he or they determined whether Allegation 3 met the standard required to be referred to an inquiry committee.

29. This motion to strike these proceedings is a critical one, not only for Douglas, ACJ but also for the integrity of the CJC's process and confidence in the system of justice. The Panel should have the benefit of all relevant evidence.

30. Independent Counsel indicates that, if the evidence is to be considered, it "will jeopardize the current hearing schedule, as cross-examinations will have to be held and Independent Counsel may file responding evidence."

31. Independent Counsel has been in possession of this material since October 1. No attempts have been made to schedule cross-examinations. Much of the material is public material that reflects objective events that have occurred, opinions that have been expressed by all parties in Parliament, by members of the public, and by editorial writers from numerous public publications. These facts cannot be contested. The extent of any cross-examination surely would be limited.

32. The evidence in Volume 6 is completely consistent with the public evidence that has been given by numerous victims and knowledgeable observers on the harm that non-consensual distribution of intimate images causes to the victims of such conduct.

33. Independent Counsel is required to present a case in a fair manner, including evidence which is favourable to the Judge (CJC Policy on Independent Counsel). To seek to strike out relevant evidence on the important issues that is favourable to the Judge's position is inconsistent with the duty of Independent Counsel. A motion to strike all of this important evidence is a step

that is contrary to the duty and responsibility imposed on Independent Counsel to be fair to the Judge. The evidence should not be struck.

34. As noted, if what is really being sought here by Independent Counsel is an adjournment to conduct cross examinations or to file other evidence, we have advised Ms. Côté that we do not object. However, counsel for the Judge respectfully submits that the Inquiry Committee has the discretion to require particulars of what additional evidence (by way of cross or further evidence) is needed to assist the Inquiry Committee. In other words, there should be no adjournment to allow cross examination if there are no legitimate attacks to be made against the experts in relation to their reports. It may be that Independent Counsel needs some limited additional time to consider her position on this point and we do not object.

35. As for additional evidence, Independent Counsel has known since at least August 15, the position we have been taking on the core issue – the impropriety of blaming the victim – and she has had the Freedman, JA, Gange, and medical evidence from the outset of her retainer, and we respectfully submit that any further proposed evidence be described and a timeline for its delivery be provided.

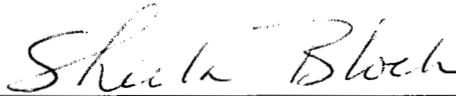
36. Regarding the Freedman, JA evidence – this is exactly the kind of evidence the SCC would say, in the modern reality, could be relied on by a tribunal such as this Inquiry Committee. Surely you can review the sworn evidence of a Court of Appeal judge who was extensively questioned under oath.

37. As for other witnesses, she has affidavits or reports on which she can cross-examine in a timely way, if necessary.

38. It should be kept in mind that an alternative result in summary disposition motions is the narrowing of any further proceedings should any element of a case require further consideration. The Inquiry Committee should have the ability to review the evidence provided and decide if further evidence or process is necessary and appropriate, in the interest of justice. This is for the Inquiry Committee to determine, not counsel to dictate.

DATED at Toronto on October 8, 2014.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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SCHEDULE A

Block, Sheila

From: Block, Sheila
Sent: August-15-14 5:01 PM
To: 'scote@oslers.com'; Fallon, Alexandre
Subject: FW: Memo re Non Consensual Distribution

Suzanne and Alexandre: following up on our meeting in Winnipeg, I am sending you some background information about the non-consensual distribution of intimate images which will give you some context for what you saw and heard on Tuesday. As you know, the judge feels assaulted with every invasion and the CJC has been the prime distributor of her images to her colleagues (although you may know that Joyal CJ took it upon himself to view the pictures, knowing she did not consent and knowing how distressed she was that anyone had looked at them. Although the CJC did not forward the images to Joyal, it has not done anything about his conduct in this regard--conduct that will soon be a crime).

The reaction you experienced from the Associate Chief Justice is not unique to her--the harm caused by this despicable conduct can be seen in the descriptions provided to parliament, by scholars studying in the area, by editorial commentators, by victims and their loved ones. For the system of justice to further victimize a woman who has already been subjected to this maltreatment only brings that system into disrepute.

You say you have a duty. It is in a process that is designed to increase the public's confidence in the system of justice. Please review this material-- and know that it is just the tip of the iceberg. This is a scourge that disproportionately damages women and girls and the vulnerable so there are countless more stories of the infliction of harm. How pursuing a woman who has been victimized 'increases the public confidence in the system of justice' is something we cannot fathom.

I would be willing to discuss any of this with you as you consider what the CJC should be pursuing. If you want any of these references, I have both soft and hard copies of them so let me know

Sheila Block

P. 416.865.7319

MEMORANDUM

Re Non-consensual distribution of intimate images

August 15, 2014

INTRODUCTION

The premise of any allegations in the CJC's inquiry concerning the Honourable Lori Douglas is the fact that intimate images of her were distributed and published on the internet without her consent. Any lines of inquiry based upon this violation of Justice Douglas' consent and privacy compounds the harms she has experienced as a result of this violation. An inquiry premised on the non-consensual distribution of Justice Douglas' intimate images also holds her responsible and passes judgment on her for a series of events which made her the victim of an act recognized as a criminal offence in several jurisdictions, and which is a proposed criminal offence in Canada. Further, such an inquiry is inconsistent with legislative changes, current academic research, and public opinion regarding revenge porn, cyber-bullying, and cyber-misogyny. Public opinion sympathizes with the victims of such acts and recognizes the intense harms that can result from the continuing non-consensual distribution and publication of intimate images.

This memo reviews personal stories from victims and their family members, current and proposed legislation criminalizing the non-consensual distribution of intimate images, academic commentary, and editorial opinion pieces to draw the following conclusions:

1. The non-consensual distribution of intimate images causes significant harm to an individual's mental health and well-being. These harms are reinforced when the subject of such images is then subjected to further inquiry and potential sanctions in their personal and professional lives that stem from the images and their distribution, particularly as the images are redistributed and consumed with rapidity and ease over the internet. Because this issue disproportionately impacts women, these harms impair women's ability to participate as equals in society.
2. Principles of victim protection suggest that legal procedures should protect the interests of victims to the extent possible, particularly in the context of sexual assault and related offences. Pursuing allegations against the subject of non-consensually distributed intimate images is inconsistent with these principles. It contributes instead to a culture of victim-blaming that, again, disproportionately impacts women. It also undermines the concept of informed consent that is central to our societal and legal understanding of sexual interactions.
3. Public opinion and public policy on this issue have evolved in recent years such that the non-consensual distribution of intimate images is now understood as a violation of the subject's rights to privacy and personal autonomy, to the extent that several

jurisdictions, including Canada, have enacted or are in the process of enacting legislation to prohibit such distribution. Pursuing allegations against the subject of these images is inconsistent with this legislation, which recognizes that non-consensual distribution of intimate images is a harmful violation of the subject's rights.

FIRSTHAND REPORTS OF WOMEN'S EXPERIENCE

In the Canadian context, the best-known stories about the non-consensual distribution of intimate images relate to cyber-bullying: “the use of information and communication technologies that support deliberate, hostile, and often repeated behaviour by an individual or group that is intended to hurt others.”¹ Cyber-bullying often, though not always, involves young people as either victims or perpetrators. Its potentially tragic results have received extensive media coverage in Canada, particularly because of the stories of Rehtaeh Parsons and Amanda Todd.

The Parsons and Todd cases both involved the non-consensual distribution of intimate images, and they represent a specific subset of victims: young women and girls, whose images are shared as part of a broader context of cyber-bullying. But many of the targets of this kind of image distribution are not teenagers; instead, they are adult women, who once took intimate photos or had them taken within the confines of a relationship. Later, after the relationship ends or circumstances change, the women discover that these photos have been posted online as “revenge porn,” often with identifying personal information. The consequences of this form of distribution are severe, as the following profiles demonstrate:

1. Ann-Marie Chiarini, 42-year-old single mom and college professor: In 2010, Chiarini and her boyfriend broke up, a few months after she had permitted him to take intimate photographs of her. After they broke up, he accused her of sleeping with multiple other men, and he told her that he would “destroy” her by posting her images. She called the police, who told her that there was nothing they could do. Instead, they blamed her. Chiarini's ex-boyfriend then auctioned the images of her on eBay. He posted links to the auction on the homepage of the college where Chiarini teaches. Soon, all her friends and family were emailing her about the auction. Chiarini experienced post-traumatic stress disorder and began to see a therapist.

A year later, Chiarini found the images on a porn website. Again, the police told her that there was nothing they could do. She became too afraid to leave her house. She tried to go on leave from her job, but senior administrators at her college told her that she had “perpetrated the incident.” She tried to kill herself, but survived the attempt. She recently testified in front of Maryland General Assembly's judicial committee, in support of a proposed law criminalizing revenge porn.²

2. Dr. Holly Jacobs, 29-year-old activist and academic: In 2009, Jacobs discovered that her ex-boyfriend, who she had dated for three years, had posted nude photos and a video of

¹ Canada, 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* (2013) at 3, Tab 1 [Cybercrime Working Group Report].

² Ann-Marie Chiarini, “I was a victim of revenge porn. I don't want anyone else to face this”, *The Guardian* (19 November 2013), Tab 2.

her online. The images went viral, appearing on hundreds of websites. Jacobs would fight to have the images removed from one website only to have them appear on another site shortly thereafter. Photos were sent to her boss. Jacobs was forced to change jobs, and she could not publish in her field or attend academic conferences. Eventually, she legally changed her name. In 2012, Dr. Jacobs started a national campaign to end revenge porn. The web campaign that she initiated, End Revenge Porn, has become a central resource for individuals victimized by the non-consensual distribution of intimate images.³

3. Kimberly Chiles, 38-year-old business owner: In the fall of 2013, Ms. Chiles started receiving frequent “friend” requests on Facebook from men around the world. When the strange activity continued, she put out a plea to her friends to see whether anyone knew what was going on, and she learned that intimate images of her had been posted to a popular revenge porn website, together with a link to her Facebook profile. The images had been posted by the ex-spouse of one of Chiles’ former partners, who had managed to access the photos. Chiles described the impact of finding the photos online as “paralyzing,” particularly because she is active online and uses the internet heavily for business networking. When she called the Edmonton Police Service for help, her judgment and decision-making were challenged by the initial officer who took her call. Fear, anxiety, illness and frustration began to dominate her daily life. In December 2013, she was successful in having her information removed from the internet, after two months of constant effort and an invocation of US copyright law.

Chiles, in her oral submissions to the committee reviewing Bill C-13, remarked that during this time, “I feared going out in public, responding to LinkedIn, Facebook, or emails, afraid that everyone had seen my pictures. It made me paranoid and ashamed. I started feeling like this would never go away and that the abyss of the World Wide Web would devour my images and information, making them forever available to anyone that Googled my name.”⁴

The stories of Chiarini, Jacobs, and Chiles are three among countless others but highlight the deeply-harmful and wide-ranging effects that the non-consensual distribution of intimate images can have on victims. At the time that images are distributed, women’s relationships, careers, families, and security are negatively impacted. The wounds caused by distribution rarely heal fully, because victims experience further damage each time their names are typed into a search engine by a new partner, a potential employer, or a friend, and each time they are forced to confront the effects that the images, widely shared and viewed, have on their personal lives and professional trajectories.

As Rebekah Wells, another victim of non-consensual intimate image distribution, has written, “I am victimized every time someone types my name into the computer. The crime scene is right before everyone’s eyes, played out again and again, and, ironically, I am treated as if I am the one who has committed the crime. I am victimized every time someone tells me that it’s my

³ “About – End Revenge Porn,” online: End Revenge Porn <<http://www.endrevengeporn.org/welcome/>>, Tab 3; Michael Miller, “Miami student Holly Jacobs fights revenge porn” *Miami New Times* (9 May 2013), Tab 4.

⁴ House of Commons, *Standing Committee on Justice and Human Rights*, 41st Parl, 2nd Sess, No. 024 (13 May 2014) at 6-7 (Kimberly Chiles), Tab 5 [May 13 Committee Sitting].

fault because I consented to the taking of the photos.”⁵ Wells hints at a common experience for victims of revenge porn and other forms of non-consensual distribution of intimate images: suffering from an ongoing and repeated fear that the images, even if removed after an initial web posting, will resurface and trigger further damage to their lives and well-being.

The literature shows that extortion is another common element of the non-consensual distribution of intimate images. The disclosure in the investigation in the matter involving Douglas, ACJ shows that the complainant, Chapman, engaged in such extortion. Following the issuance of an injunction on the distribution of the intimate images in question by the Manitoba Court of Queen’s Bench and the dismissal of Chapman’s civil claim against Mr. King, Chapman’s lawyer warned Mr. King’s lawyer that if the latter pursued costs in the proceedings the photographs of Douglas, ACJ would appear on the internet. Mr. King refused to be complicit in such extortion and pursued costs. Shortly afterwards, the photos appeared on a website.

LEGISLATION

For many early victims of non-consensual distribution of intimate images, there was minimal or no legal recourse available for the removal of posted images, nor was there a direct means of imposing consequences on those who posted images. However, as stories of revenge porn and cyber-bullying and the harms of being victimized have become better known, a paradigm shift has occurred in Canada and abroad. The act of sharing intimate images without consent may soon be criminalized in Canada. It is already the basis for criminal and civil liability in other jurisdictions.

Proposed Canadian legislation (Bill C-13)

Cybercrime Working Group Report

In Canada, formal progress towards legislation addressing cyber-bullying and the non-consensual distribution of intimate images began with a working group established in January 2013, co-chaired by the Department of Justice Canada and the Ontario Ministry of the Attorney General. The working group recommended the creation of a new criminal offence to address non-consensual distribution of intimate images, and it also recognized that a multi-pronged approach (rather than a sole focus on criminal justice) would best address these issues.⁶

The working group’s report, released in June 2013, was rooted in an understanding of the destructive harms caused by cyber-bullying, which “can spread to so many people worldwide, instantaneously, anonymously or through impersonation, and may remain online indefinitely.”⁷ With respect to the non-consensual distribution of intimate images, the authors noted that, “Often these images are originally intended for an individual or only a small number of other people but are disseminated more widely than the originator consented to or anticipated. The effect of this distribution is a violation of the depicted person’s privacy in relation to [the]

⁵ Stephen Webster, “Cop sued over revenge porn by woman he met working a similar case” *The Raw Story* (30 May 2013), Tab 6.

⁶ Cybercrime Working Group Report, *supra* note 1 at 2-3.

⁷ *Ibid* at 5.

images, the distribution of which is likely to be embarrassing, humiliating, harassing, and degrading or to otherwise harm that person.”⁸

The consensus of the working group was to recommend the creation of a new criminal offence whose objective would be to protect against the violations of privacy that occur when intimate images are non-consensually distributed. Rather than addressing any malicious intent on the part of a distributor, the offence would focus on the violation of the victim’s rights.

Bill C-13

The federal government introduced Bill C-13, *Protecting Canadians from Online Crime*, in November 2013, fewer than six months after the Working Group’s report. If passed, Bill C-13 will amend the Criminal Code to provide for “a new offence of non-consensual distribution of intimate images.”⁹

Under the amended Code, “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” of a summary or indictable offense.¹⁰

An intimate image is defined as:

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.¹¹

The Bill passed Second Reading on April 28, 2014 and was referred to the Standing Committee on Justice and Human Rights. On June 13, 2014, the Committee presented its report in the House of Commons, with one small proposed amendment to the Bill.¹²

Over the course of its consideration of the Bill, Committee members heard from activists, victims and their families, lawyers, police chiefs, Internet executives, youth and child advocates, the CCLA, and others. While some aspects of the Bill were highly contentious (such as the sections expanding the powers of law enforcement to conduct online surveillance), there was

⁸ *Ibid* at 14.

⁹ Bill C-13, *An Act to Amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act*, 2nd Sess., 41st Parl., 2013, Tab 7 [Bill C-13].

¹⁰ Bill C-13, *supra* note 9, cl. 3.

¹¹ *Ibid*.

¹² “House Government Bill C-13,” online: LEGISinfo, <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?billId=6301394>>, Tab 8.

general consensus on the desirability of criminalizing the non-consensual sharing of intimate images.

Legislation in other jurisdictions

Outside Canada, movements are underway in several countries to criminalize the non-consensual sharing of intimate images. Lawmakers in the United Kingdom have indicated that revenge porn will soon be illegal, and Israel recently passed a law which renders revenge porn a form of sexual harassment, punishable by up to five years in jail.¹³ German law prohibits the “violation of intimate privacy by taking photographs,” which includes making consensually-taken private photographs available to third parties.¹⁴

In the United States, New Jersey’s law relating to the non-consensual distribution of intimate images has been in place for a decade; however, the past two years have brought rapid legislative reform in several states. In 2014 alone, bills have been introduced or are pending in more than two dozen states, with 11 states enacting ‘revenge porn’ laws so far this year. While the laws vary in their content, they are predominantly focused on protecting against disclosure of intimate images, particularly in situations where the individual depicted in the images had consented to image creation but not to dissemination.¹⁵

In California, for example, a criminal offence was enacted in 2013 making it unlawful to distribute consensually created intimate images where serious emotional distress was both intended and caused to the depicted person. In 2014, the state legislature followed up with a bill introducing a civil tort that would allow a person depicted in non-consensually distributed intimate images to recover damages when there was a reasonable expectation of privacy in the images, and the defendant knew about this reasonable expectation.¹⁶ The legislation would also authorize pseudonym use in court to prevent further victimization of the plaintiff and to encourage plaintiffs to seek relief. As the bill’s author points out, “non-consensual distribution degrades, emotionally harms and severely embarrasses the victims. It guarantees reputational harm and frequently affects employment status or prospects.”¹⁷

¹³ Jack Simpson, “Revenge porn: What is it and how widespread is the problem?”, *The Independent* (2 July 2014), Tab 9; “Revenge porn: misery merchants”, *The Economist* (5 July 2014), Tab 10 [“Misery merchants”].

¹⁴ Cybercrime Working Group Report, *supra* note 1 at 30, citing StGB § 201A (Germany).

¹⁵ “State ‘Revenge Porn’ Legislation,” online: National Conference of State Legislatures, <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx>, Tab 11.

¹⁶ This legislation has passed the state assembly and has now been ordered to Third Reading in the state senate, “AB-2643 Invasion of privacy: distribution of sexually explicit materials”, online: California Legislative Information http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2643, Tab 12.

¹⁷ U.S., A.B., 2643, *Invasion of Privacy: Distribution of Sexually Explicit Materials*, 2013, Cal., Bill Analysis at 3, Tab 13.

ACADEMIC COMMENTARY

The leading scholars studying revenge porn and the non-consensual distribution of intimate images, Mary Ann Franks and Danielle Keats Citron, focus their work on four main themes:

1. Gender, misogyny, and their role in revenge porn

Citron and Franks write that “[o]ur society has a poor track record in addressing harms that take women and girls as their primary targets.”¹⁸ Like domestic violence, sexual assault, and sexual harassment, the non-consensual distribution of intimate images is an issue that affects women and girls more frequently than it affects men and boys. There is a “tendency to tolerate, trivialize, or dismiss these harms.”¹⁹ As Citron has pointed out in the context of online harassment of women, failure to address the harm and the exposure to harm that women face is a form of gender discrimination.²⁰ Non-consensual pornography and the failure to address and understand its harms undermine women’s ability to move freely in the world, both online and away from the keyboard. Citron and Franks comment that “not only does [non-consensual sharing] inflict serious and, in many cases, irremediable injury on individual victims, it constitutes a vicious form of sex discrimination.”

Citron’s and Franks’ comments have been echoed by the judiciary in Canada. In finding all of the necessary elements of criminal harassment were present in a case involving the non-consensual distribution of a woman’s intimate images by the accused, an ex-boyfriend, Harris, J wrote: “It seems to me that to argue that a woman who has had her most private and intimate personal images distributed electronically to every friend, relative and church-attending associate has not necessarily suffered a grave and serious fear-inducing harm is to ignore the perspective of women.” Harris, J recognized the psychological injury that would result from this form of sharing, the interference with the complainant’s physical integrity, and the denial of her “right to exercise freedom of choice as to her privacy and sexual integrity.”²¹

2. Cost to human safety and well-being

Victims of revenge porn and other forms of non-consensual distribution of intimate images face significant and long-term trauma. This can include mental health issues, such as anxiety, panic attacks, depression, and eating disorders. It can also cause profound fear. These fears are rooted in very real danger, because “non-consensual pornography raises the risk of offline stalking and physical attack.” Often, when a victim’s image is posted online, it is posted alongside her full name and/or other identifying information, which enables strangers to find and contact her in a multitude of forums.²²

¹⁸ Danielle Citron & Mary Anne Franks, “Criminalizing Revenge Porn” (2014) 49 Wake Forest L. Rev. 345 at 347, Tab 14 [Citron & Franks, “Revenge Porn”].

¹⁹ *Ibid.*

²⁰ See Part I of Danielle Keats Citron, “Law’s Expressive Value in Combating Cyber Gender Harassment”, (2009) 108 Mich. L. Rev. 373, Tab 15.

²¹ *R v Korbit*, 2012 ONCJ 522, 2012 CarswellOnt 10112, Tab 16.

²² Citron & Franks, “Revenge Porn,” *supra* note 18 at 351.

Victims also suffer professionally as a result of the image distribution. They have lost jobs as teachers and in government, and they often struggle to find new employment as employers rely upon online reputations to screen candidates.²³ For women whose careers depend upon their public reputation or their online visibility, the impact of non-consensual image distribution can be particularly devastating.

In addition to the myriad harms experienced by the victims of revenge porn, non-consensual distribution of intimate images also inflicts broader social harms by reinforcing negative stereotypes. It exposes a victim's sexuality in demeaning ways, and it advances perspectives that view women's sexuality as shameful or immoral. As Citron and Franks note, "Revenge porn doesn't just harm individual victims. It also reinforces dangerous social attitudes about sexual privacy and autonomy... No one, man or woman, should have to fear that the price of engaging in sexual intimacy will be a ruined life."²⁴

3. Violations of informed consent and analogies to sexual assault

Many of the academics and activists working in the field of revenge porn have identified the centrality of consent in understanding the harm perpetuated by the sharing of intimate images, and elaborated on the sense of societal reluctance to characterize this sharing as what it is: a violation of sexual consent.

The law on sexual assault is unequivocal: consent is context-specific. As the Supreme Court of Canada has made clear, consent to sexual activity must be ongoing and conscious.²⁵ According to West Coast LEAF:

"[t]he Court's analysis should also apply in cases of non-consensual sharing of intimate images ... While the subject of the image has consented to the taking of the image and the initial sharing of the image with someone of her choosing, she has not consented to the subsequent sharing of the image beyond that person. She has not consented to the sexual activity in question (the sharing of a sexually explicit image of herself) at the time that activity occurred."²⁶

The difficulty some face in understanding the non-consensual sharing of intimate images as a form of non-consensual sexual activity highlights the uncomfortable relationship between the traditional criminal law and the reality of the modern electronic world. When a sexual act without active consent "is inflicted on an individual's physical body, it is considered rape or sexual assault. The fact that non-consensual pornography does not involve physical contact does not change the fact that it is a form of sexual abuse."²⁷

²³ *Ibid* at 352.

²⁴ Mary Anne Franks & Danielle Citron, "It's simple: criminalize revenge porn, or let men punish women they don't like" *The Guardian* (17 April 2014), Tab 17.

²⁵ *R. v. J.A.*, 2011 SCC 28, [2011] 2 SCR 440.

²⁶ "West Coast LEAF's Submission to the Standing Committee on Justice and Human Rights on Bill C-13" (Submitted to the Standing Committee, May 13, 2014) [unpublished] at 5, Tab 18. [LEAF Submissions].

²⁷ Citron & Franks, "Revenge Porn," *supra* note 18 at 363.

The comparison of the violation of consent in the context of traditional sexual assault with the violation of consent in the context of the sharing of intimate images demonstrates the gendered aspects of societal reactions to revenge porn. As Citron and Franks write, “While most people today would rightly recoil at the suggestion that a woman’s consent to sleep with one man can be taken as consent to sleep with all of his friends, this is the very logic of revenge porn apologists.”²⁸ Sexism and negative perceptions of women’s sexuality and autonomy play a role in public dialogue about revenge porn by suggesting that women ought not to have taken these photos to begin with, or that they ought not to have been involved with men who would share such photos. In other words, they shame women for a series of events over which the women lacked any control or influence, and they are blind to the responsibilities of those who *do* have control, whether via the initial distribution of an intimate image or via the redistribution and viewing of the images.

4. Violations of privacy

In addition to the violation of consent to sexual activity, the non-consensual sharing of intimate images is framed in the literature as “a violation of privacy.”²⁹ Information privacy law is rooted in a notion of informed consent: organizations that collect, use, and share personal information must have the informed consent of the individuals whose information has been collected. Consent is granted for particular uses and purposes, and not for others. Although Canadian privacy legislation does not apply to the interactions between two individuals, the applicable concept of consent is similar: “Consent to share information in one context does not serve as consent to share this information in another context,” and the sharing of explicit images in the context of a trusted relationship with the confidence that the images will remain private should not be understood as a license to redistribute those images.³⁰

Canadian law also requires a contextual perspective on privacy, rooted in an individual’s reasonable expectations of privacy and including the ability to control the dissemination of confidential information.³¹ If a woman shares an intimate image of herself with her partner only, she can continue to have a reasonable expectation of privacy in that image, because the context in which the image was shared constrains the extent to which she would reasonably expect that the image would be further disclosed to others.³²

Further, the importance of protecting the privacy interests at stake in the non-consensual distribution of intimate images is heightened by the realities of technology: the Internet facilitates the rapid transfer and lifelong retention of embarrassing and deeply private information. As the Supreme Court noted in a recent case involving the sexualized online bullying of a minor, the “privacy interests in this case are tied ... to the nature of the

²⁸ *Ibid* at 348. See also *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443.

²⁹ Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper* (5 December, 2013) [unpublished] at 8, Tab 19 [Franks, *Combating Non-Consensual Pornography*].

³⁰ [Citron & Franks, “Revenge Porn” *supra* note 18 at 355. For an example of information privacy legislation linking collection, use and disclosure of personal information to informed consent, see *Privacy Act*, R.S.C. 1985, c. P-21, ss. 5,7,8.

³¹ See e.g. *R v. Mills*, [1999] 3 SCR 668 at para 80.

³² Cybercrime Working Group Report, *supra* note 1.

victimization [the victim] seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying.”³³

PUBLIC OPINION

As stories of revenge porn and cyber-bullying victims have gained media attention, public opinion has shifted to recognize the trauma and tragedy inflicted by the non-consensual distribution of intimate images. Op-ed pieces in *The Economist*, the *Globe and Mail*, and the *New York Times* have all addressed the harms caused by this distribution and the challenges involved in legislating against it.³⁴

Emma Wooley’s article in the *Globe and Mail* is a typical example. Wooley describes the prevalence of intimate-image sharing between consenting partners, both youth and adults, as well as the threats and damage that result when such images are forwarded or redistributed. Describing the events that culminated in the suicides of Rehtaeh Parsons and Amanda Todd, Wooley notes that “Too often it’s Ms. Parsons (why was she drinking with boys?) and Ms. Todd (why would she ever flash someone?) who are blamed for what happened to them.” She describes a culture of victim-blaming that focuses on women’s behaviour rather than perpetrators’ responsibility, and she comments on the insufficiency of words like ‘cyber-bullying’ to describe the severity of the danger, malice, and violence involved in the non-consensual sharing of intimate images.

Wooley concludes by commending the Cyber-bullying Working Group for its recommendation that a comprehensive approach to these issues be adopted by all levels of government, and she notes: “I’m glad accountability is finally being placed where it belongs.”³⁵

The sentiments in editorial pieces like Wooley’s are consistent with the comments of the Canadians who spoke to the Parliamentary Standing Committee on Justice and Human Rights as it reviewed Bill C-13. These individuals recognized the importance of a paradigm shift in how the sharing of these images is understood. As Rehtaeh Parson’s father, Glenford Canning, said to the committee, “The first and most important step we need to take to combat online crime involving harassment, stalking, threats, and image sharing, is to stop treating the victim like they are the part of the problem. They are as innocent as the drunk driving victim.”³⁶

The speakers also described the intensity and the reach of the harms that distribution causes. As feminist activist and digital strategist Steph Guthrie pointed out: “The results of this are devastating... The images follow [survivors] into their job interviews, on their first dates, and to the Laundromat... [Image sharing] constricts the survivor’s ability to live life normally and comfortably because they are constantly living with the idea that the people they encounter in

³³ *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567.

³⁴ “Misery merchants,” *supra* note 13; New York Times Editorial Board, “Fighting Back Against Revenge Porn,” (12 October 2013), Tab 20; Emma Woolley, “Time to make ‘revenge-porn’ sharing a criminal act in Canada” *The Globe and Mail* (24 July 2013), Tab 21.

³⁵ *Ibid.*

³⁶ May 13 Committee Sitting, *supra* note 4 at 4 (Glenford Canning).

their day-to-day lives may know intimate things about them that they didn't consent to share."³⁷ As Sue O'Sullivan, the Federal Ombudsman for Victims of Crime stated, intimate image distribution is unique in its "staggering speed and reach... The feeling of being forever vulnerable and exposed and the long-term impact of the associated emotional burden that comes with it are something that we don't truly understand yet."³⁸

Finally, the submissions made in writing and orally before the Committee welcomed the new offence as one step towards a more comprehensive approach to cyber-bullying and the non-consensual sharing of intimate images, recognizing it as one part of broader systemic change. They explained that the bill, "when it is coupled with education, awareness, and integrated community services, is a significant step forward in helping... the community... to effectively and efficiently deal with... the non-consensual distribution of intimate images, [an act] that perpetually revictimizes the victims."³⁹ They did not see the offence as an ultimate solution, but rather as one part of "a variety of responses, including school policies aimed at inclusion and respect for diversity, human rights education for adults and youth, educational initiatives that teach attackers positive and pro-social behavioural skills, [and] restorative practices."⁴⁰

THE ROLE OF THE LEGAL SYSTEM

Every province and territory in Canada has legislation to protect the rights of victims, including their privacy and their dignity. For courts, and most especially an organization like the CJC, run by Chief Justices throughout Canada, to engage in conduct that further victimizes a woman who has suffered from the non-consensual distribution of intimate images is contrary to the law, morality and the consensus opinion of right thinking Canadians.

It would be wrong for any woman, so victimized, to lose her job. It is hard to imagine any Canadian court finding that such victimization constituted cause for dismissal. It is all the more inconceivable that the CJC would pursue a case against a judge who is the victim of such wrongdoing by others, and sacrifice all protection of her privacy and dignity in the name of transparency.

If the objective of the CJC's judicial conduct process is to increase the public's confidence in the judicial system, participating in the further victimization – including use of her intimate images against her will - will inevitably have the opposite effect. It also models the very behaviour that creates the harms now recognized as disproportionately visited on woman and girls and harms which are leading Parliament to make such conduct, including the misuse of intimate images, a crime.

³⁷ House of Commons, *Standing Committee on Justice and Human Rights*, 41st Parl, 2nd Sess, No. 022 (6 May 2014) at 5 (Steph Guthrie), Tab 22.

³⁸ House of Commons, *Standing Committee on Justice and Human Rights*, 41st Parl, 2nd Sess, No. 022 (29 May 2014) at 3 (Sue O'Sullivan), Tab 23.

³⁹ May 13 Committee Sitting, *supra* note 4 at 4-5.

⁴⁰ LEAF submissions, *supra* note 26 at 4.