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# Privacy-related crimes in Canadian law

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### **Abstract**

Since criminal law is usually considered a last resort for regulators, it provides a particularly focused lens through which to study privacy protection: privacy crimes are the most poignant forms of privacy infringements. This paper provides an overview of how privacy is protected through substantive criminal law in Canada. As part of a large-scale project on privacy protection in the 21st century, together with similar country studies, it will facilitate comparative legal analysis of privacy crimes (a relatively under-researched field), and also help to better understand privacy, as the forms and scope of privacy protection in criminal law tell us something about how privacy is conceptualized in law, and what legislators consider particularly protection-worthy in privacy. This paper offers a descriptive, bird's-eye overview of offences relating to spatial, personal, relational, and informational privacy. After an introduction into Canadian criminal law, I describe a broad range of offences against places, computers, body and mind, reputation, papers, secrets, and data.

# Privacy-related crimes in Canadian law

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## 1. Introduction

This report provides an overview of how privacy is protected through substantive criminal law in Canada. Because criminalization is generally reserved for offenses that are seen as particularly damaging to society or morally undesirable (or, as Dressler and Garvey have formulated it, as the consequence of “a formal and solemn pronouncement of the moral condemnation of the community”<sup>1</sup>), an analysis of substantive privacy crimes provides a particularly focused lens through which to study privacy protection. If these assumptions about the criminal law hold true, then those privacy intrusions that are criminalized, as opposed to those subject to only civil liability (e.g. under federal or provincial statutory legislation,<sup>2</sup> tort law,<sup>3</sup> or other theories), may be seen as examples of those forms of privacy that are seen by legislators within Canada as the most morally reprehensible or damaging to Canadian society.

This working paper, which is part of a larger and on-going project, provides an overview of (selected) privacy violations in Canadian criminal law. We structure our analysis along four types of objects of the right to privacy, as identified in our earlier work: the protection of persons, places, things, and data.<sup>4</sup> Because the overall goal of this project is to generate a better understanding of the concept of privacy and its importance in our contemporary society filled with myriad new forms of surveillance and other privacy intrusions (and to do so from a comparative perspective), we conceptualize privacy broadly and include criminal provisions that relate to the broad theme of protecting aspects of persons and their personal lives (encompassing the various types and dimensions of privacy we present in Koops, et al. (2017)). This conceptualization undoubtedly encompasses a large part of criminal law (e.g. even the crime(s) of homicide often involve physical contact with a person’s body, which raise privacy questions about physical privacy and the right to limit access to our bodies). As such, we do not describe all privacy violations in great detail, and we limit our discussion to crimes that have clear connections to privacy interests. The current working version of this draft also includes more substantive analysis of particular offenses (those prioritized by our on-going

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<sup>1</sup> Joshua Dressler and Stephen P Garvey, *CASES AND MATERIALS ON CRIMINAL LAW 3* (Sixth ed., St. Paul: West Academic Publishing, 2012).

<sup>2</sup> The most relevant federal legislation here is the Protection and Electronic Documents Act (Canada) (S.C. 2000, c. 5), although multiple provinces have enacted privacy-related legislation as well.

<sup>3</sup> Besides breach of confidence (which has English roots) and intentional infliction of emotional distress, Canadian courts have generally not developed many privacy-relevant torts, although Ontario courts have recently adopted two forms summarized by the American Restatement (Second) of Torts (2010): intrusion upon seclusion and public disclosure of private facts. *See Jones v. Tsige*, 2012 ONCA 32 (2012) (intrusion upon seclusion); *Doe 464533 v N.D.*, 2016 ONSC 541 (2016) (Public disclosure of embarrassing private facts about the plaintiff).

<sup>4</sup> *See Koops, et al., A Typology of Privacy*, 38 U. PA. J. INT’L L. \_\_ (2017) (forthcoming).

research to date), and additional analysis and analysis of additional provisions will continue to be added as the research progresses.

Section 2 contains a short summary of the basic elements of Canadian criminal law. Sections 3-6 outline criminal provisions related to protecting places (section 3), persons (both as individuals and in the context of social and/or intimate relationships) (section 4), things (section 5), and information or data (section 6).

Where code provisions are referenced in the text (e.g., s. 264), these refer to the Criminal Code of Canada, unless otherwise stated.

## 2. Basic elements of Canadian criminal law and privacy

Criminal law in Canada evolved from its aboriginal beginnings (prior to European colonization) to French criminal law during French colonization and, finally, to a system based on English criminal law after the English drove the French forces from Canada in 1763.<sup>5</sup> Today, to ensure consistency across Canada, criminal offences are enacted solely by the federal parliament, although constitutional law and judicial common law also overlap somewhat in certain ways with the criminal law (e.g., through the Charter and common law defenses).<sup>6</sup> Provincial governments retain some power to impose sanctions for regulatory offences, such as in the area of traffic safety.<sup>7</sup> The primary source of criminal offences is the Criminal Code of Canada, which was initially enacted in 1982.<sup>8</sup> However, the Code “does not systematically define fault elements” and offenses do exist in other federal legislation, such as in the Controlled Drugs and Substances Act.<sup>9</sup> Within the Criminal Code, offenses are organized into various types, including (but not limited to) “Offences Against Public Order,”<sup>10</sup> “Terrorism,”<sup>11</sup> offenses involving “Firearms and Other Weapons,”<sup>12</sup> “Offences Against the Administration of Law and Justice,”<sup>13</sup> “Sexual Offences, Public Morals and Disorderly Conduct,”<sup>14</sup> “Invasion of Privacy,”<sup>15</sup> “Offences Against the Person and Reputation,”<sup>16</sup> “Offences Against Rights of Property,”<sup>17</sup> and fraud.<sup>18</sup> The Code also provides for inchoate offences, such as attempt, conspiracy, as well as for and accessory-based offences.<sup>19</sup>

In Canada, major (indictable) offenses and lesser offenses (those punishable on summary conviction) vary by the magnitude of possible punishment, but are also defined by procedural rules. Judges in Canada have the power of judicial review over legislative action, which may in some cases impact how courts rule in cases involving contested criminal punishment. Often

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<sup>5</sup> Kent Roach, *Canada*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 98 (edited by Kevin Jon Heller and Markus D. Dubber, Stanford, CA: Stanford University Press, 2011).

<sup>6</sup> KENT ROACH, CRIMINAL LAW 5 (Toronto: Irwin Law Inc., 2015). Roach, *Canada*, *supra* note 5 at 98-99.

<sup>7</sup> Roach, *Canada*, *supra* note 5 at 99.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Criminal Code of Canada, Part II, §§ 46-83.

<sup>11</sup> Criminal Code of Canada, Part II.1, §§ 83.01-83.3.

<sup>12</sup> Criminal Code of Canada, Part III, §§ 84-117.11.

<sup>13</sup> Criminal Code of Canada, Part IV, §§ 118-144.

<sup>14</sup> Criminal Code of Canada, Part V, §§ 150-180.

<sup>15</sup> Criminal Code of Canada, Part VI, §§ 183-184.

<sup>16</sup> Criminal Code of Canada, Part VIII, §§ 214-318.

<sup>17</sup> Criminal Code of Canada, Part IX, §§ 321-366.

<sup>18</sup> Criminal Code of Canada, Part X, §§ 379-427.

<sup>19</sup> Criminal Code of Canada, Part XIII, §§ 463.

judges have great leniency in sentencing, and may also invalidate legislative acts as being unconstitutional.

### 3. The protection of places

Canadian criminal law protects different types of spaces, including dwellings (“dwelling-house”<sup>20</sup>) as well as other spaces in which people may possess property-based interests. A number of offences apply to trespasses against property, including but not limited to dwelling houses, with invasions of homes sometimes providing the basis for aggravated penalties.

#### 3.1. The concept of the “dwelling-house”

The Criminal Code refers frequently to the concept of a “dwelling-house,” which is defined in s. 2 as:

the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes

- (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passage-way, and
- (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence; (*maison d’habitation*)

Canadian courts sometimes refer to legal treatises and dictionaries to define the concept of “curtilage.”<sup>21</sup> In short, the curtilage includes, “The area surrounding and associated with a dwelling house.”<sup>22</sup> Importantly, the criminal code incorporates only some of the potential curtilage within its ambit, namely those buildings connected to a dwelling house that are directly connected to a dwelling house by a shared doorway or interior walkway. The concept of a dwelling house itself is based on the facts of a given case as, by definition, a house that is not currently “kept or occupied as a permanent or temporary residence” would not be considered a dwelling house.

#### 3.2. Unlawful trespass offences

The Criminal Code includes multiple offences related to unlawful trespass to dwelling houses. It is an indictable offence (with the possibility of 10 years of imprisonment) to enter or to be present in a dwelling house with the intent to commit another indictable offence, unless a defendant can prove some other lawful excuse.<sup>23</sup> Because of the requirement that the property be “kept or occupied as a permanent or temporary residence,” the provision would not apply to squatting or entrance to abandoned property or, e.g., a home that is not currently used or kept as an actual residence. Likewise, it is unlawful (punishable on summary conviction) for a person to “loiter[] or prowl[] at night on the property of another person near a dwelling-house situated on that property.”<sup>24</sup>

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<sup>20</sup> Criminal Code of Canada § 177 (“Trespassing at night”).

<sup>21</sup> See, e.g., R. v. Le (T.D.), 2011 MBCA 83, paras. 78-79 (2011)

<sup>22</sup> STEPHEN COUGHLAN, CRIMINAL PROCEDURE 397 (Toronto: Irwin Law Inc., 2008).

<sup>23</sup> Criminal Code of Canada § 349 (“Being unlawfully in dwelling-house”).

<sup>24</sup> Criminal Code of Canada § 177 (“Trespassing at night”).

Other trespass-based offenses apply to dwelling houses, but also to other types of property. For example, the Criminal Code contains offences covering forcible entry and detainer as well as breaking and entering. Under s. 72, forcible entry is committed whenever a

person enters real property that is in the actual and peaceable possession of another in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.<sup>25</sup>

The offense of breaking and entering applies to dwelling houses, but also to other buildings and structures, vehicles and vessels, and holding pens for “fur-bearing animals” kept for “breeding or commercial purposes.”<sup>26</sup> Breaking and entering (or breaking out) occurs whenever a person breaks and enters into or out of a relevant place if they do so for the purpose of committing an indictable offence therein or they actually do commit an indictable offense while in the covered place.<sup>27</sup> Breaking and entering into a dwelling house (rather than another covered place) carries significantly heightened penalties, including life imprisonment,<sup>28</sup> and aggravated penalties also apply when the home is invaded while occupied.<sup>29</sup> A separate provision applies specifically to breaking and entering for the purpose of stealing a firearm.<sup>30</sup>

### 3.3. Defences

The Criminal Code also provides property owners and possessors a significant defence for otherwise criminal conduct (e.g., assault, battery) committed in reasonable defence of their property. Generally, the defence applies whenever the act is reasonable in circumstances where the person with the possessory interest reasonably believes another person is or is about to enter the property unlawfully and the act is done to prevent such unlawful entry or the related destruction of property.<sup>31</sup>

### 3.4. Offences against entering computer systems

Canadian law also prohibits unauthorized access to and use of computer systems. A “computer system” is defined, for purposes of the Criminal Code, as:

- a device that, or a group of interconnected or related devices one or more of which,
  - (a) contains computer programs or other computer data, and
  - (b) by means of computer programs,
    - (i) performs logic and control, and
    - (ii) may perform any other function; (*ordinateur*)<sup>32</sup>

A person violates the law whenever the person, fraudulently and without authorization,

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

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<sup>25</sup> Criminal Code of Canada § 72 (“Forcible entry”).

<sup>26</sup> Criminal Code of Canada § 348(3).

<sup>27</sup> Criminal Code of Canada § 348(1).

<sup>28</sup> Criminal Code of Canada § 348(1)(d).

<sup>29</sup> Criminal Code of Canada § 348.1.

<sup>30</sup> Criminal Code of Canada § 98.

<sup>31</sup> Criminal Code of Canada § 35.

<sup>32</sup> Criminal Code of Canada § 342.1(2).

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

(d) uses, possesses, traffics in or permits another person to have access to a computer password that would enable a person to commit an offence under paragraph (a), (b) or (c).<sup>33</sup>

Canadian courts have held that this definition encompasses, e.g., text messaging<sup>34</sup> as well as computer and internet use.<sup>35</sup> The third formulation (c) has been used by prosecutors in a number of cases involving child luring,<sup>36</sup> sexual offenses involving minors (or persons the perpetrators thought were minors),<sup>37</sup> and using an employer-provided laptop computer to access child pornography.<sup>38</sup> Additionally, the code also prohibits the making, possessing, selling, importing, obtaining, or distribution of “a device that is designed or adapted primarily to commit” the offences of unauthorized use of a computer or mischief in relation to computer data.<sup>39</sup>

## 4. The protection of persons

### 4.1. Protection from interference with the body

The Criminal Code encompasses a number of offences that penalize interference with another person’s body. These offences range from hostage taking<sup>40</sup> (also in violation of the International Convention against the Taking of Hostages),<sup>41</sup> kidnapping,<sup>42</sup> and abduction,<sup>43</sup> to a range of sexual offences,<sup>44</sup> assault and battery,<sup>45</sup> homicide-related offences,<sup>46</sup> and human trafficking.<sup>47</sup> The code also criminalizes unlawful abortions (procured miscarriages), whether done by the pregnant woman or another person,<sup>48</sup> as well as “counselling or aiding suicide” unless done in accordance with the regulations around medically-assisted suicide.<sup>49</sup> Other offences include causing bodily harm with an air gun or pistol,<sup>50</sup> discharging a firearm recklessly or with the intent to cause bodily harm,<sup>51</sup> overcoming resistance in order to commit

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<sup>33</sup> Criminal Code of Canada § 342.1(1).

<sup>34</sup> See, e.g., R. v. Woodward, 2011 ONCA 610 (2011) (text messaging via cellular phones constituted communicating via a “computer system”).

<sup>35</sup> See, e.g., R. v. Alicandro, 2009 ONCA 133 (2009) (internet chat room).

<sup>36</sup> Woodward, *supra* note 34.

<sup>37</sup> Alicandro, *supra* note 35.

<sup>38</sup> See, e.g., R. v. Cole, 2011 ONCA 218 (2011).

<sup>39</sup> Criminal Code of Canada § 342.2.

<sup>40</sup> Criminal Code of Canada § 279.1.

<sup>41</sup> Criminal Code of Canada § 83.01(1)(a)(iv).

<sup>42</sup> Criminal Code of Canada § 279.

<sup>43</sup> Criminal Code of Canada §§ 280, 281-283.

<sup>44</sup> Criminal Code of Canada § 150, *et seq.*

<sup>45</sup> Criminal Code of Canada §§ 265-266 (“Assault”), 267 (“Assault with a weapon or causing bodily harm”), 268 (“Aggravated assault”), 269 (“Unlawfully causing bodily harm”), 269.01(1) (“assault against a public transit operator”), 269.1 (torture).

<sup>46</sup> Criminal Code of Canada §§ 219-221 (“Criminal negligence for harm or causing death”), 222 (“homicide”), 229-240 (variety of murder, manslaughter, infanticide, and attempt offences).

<sup>47</sup> Criminal Code of Canada §§ 279.01, 279.011.

<sup>48</sup> Criminal Code of Canada § 241.

<sup>49</sup> Criminal Code of Canada §§ 241.1, 241.2.

<sup>50</sup> Criminal Code of Canada § 244.1.

<sup>51</sup> Criminal Code of Canada §§ 244(1) (intent), 244.2 (recklessness).

an offence,<sup>52</sup> setting a trap likely to cause bodily harm,<sup>53</sup> administering “poison or any other destructive or noxious thing” with the intent to cause bodily harm, kill, annoy, or aggrieve another person.<sup>54</sup>

Sexual offences in the Criminal Code include touching any part of the body of a person under 16 years of age with an object or body part for a sexual purpose,<sup>55</sup> inviting someone to engage in such touching for a sexual purpose,<sup>56</sup> sexual exploitation,<sup>57</sup> incest,<sup>58</sup> anal intercourse,<sup>59</sup> voyeurism<sup>60</sup> (discussed in more detail below), and publication of voyeuristic or intimate images without consent.<sup>61</sup> Under the category of “assaults,” the code also criminalizes sexual assault,<sup>62</sup> sexual assault with a weapon or by threat to a third party,<sup>63</sup> and other forms of aggravated sexual assault.<sup>64</sup>

## **4.2. Protection from interference with the mind**

### **4.2.1. Stalking**

In Canada, stalking is primarily criminalized as a form of criminal harassment under section 264 of the Canadian Criminal Code,<sup>65</sup> rather than under any stalking-specific offense. However, certain stalking-related behaviors (including cyber-stalking) may also constitute offenses under other criminal code provisions; for example, when a course of conduct includes uttering serious threats of harm to persons, property, or animals owned by a person<sup>66</sup>; making false, harassing, or indecent communications<sup>67</sup>; or when it constitutes intimidation,<sup>68</sup> mischief (including mischief related to data),<sup>69</sup> defamatory libel,<sup>70</sup> extortion by libel,<sup>71</sup> intercepting private communications (eavesdropping),<sup>72</sup> voyeurism,<sup>73</sup> or some form of trespassing (such as trespassing at night<sup>74</sup>).<sup>75</sup> Some (cyber-)stalking activities may also fall under criminal

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<sup>52</sup> Criminal Code of Canada §246.

<sup>53</sup> Criminal Code of Canada §247(1).

<sup>54</sup> Criminal Code of Canada §245(1).

<sup>55</sup> Criminal Code of Canada §151.

<sup>56</sup> Criminal Code of Canada §152.

<sup>57</sup> Criminal Code of Canada §§ 153 (“sexual exploitation” of a person aged 16-17), 153.1 (“sexual exploitation of a person with a disability”).

<sup>58</sup> Criminal Code of Canada §155.

<sup>59</sup> Criminal Code of Canada §159.

<sup>60</sup> Criminal Code of Canada §162.

<sup>61</sup> Criminal Code of Canada §§ 162(4) (voyeuristic images), 162.1 (intimate images).

<sup>62</sup> Criminal Code of Canada §271.

<sup>63</sup> Criminal Code of Canada §272(1).

<sup>64</sup> Criminal Code of Canada §273.

<sup>65</sup> Criminal Code of Canada § 264.

<sup>66</sup> Criminal Code of Canada §264.1.

<sup>67</sup> Criminal Code of Canada §372 (R.S.C. 1985, c. C-46, s. 372).

<sup>68</sup> Criminal Code of Canada §423.

<sup>69</sup> Criminal Code § 430.

<sup>70</sup> Criminal Code §§ 300-301 (R.S.C. 1985, c. C-46, ss. 300-301).

<sup>71</sup> Criminal Code § 302 (R.S.C. 1985, c. C-46, s. 302).

<sup>72</sup> Criminal Code §§ 183-196.1 (R.S.C. 1985, c. C-46, ss. 184-196.1).

<sup>73</sup> Criminal Code § 162.

<sup>74</sup> See, e.g., Criminal Code § 177 (trespassing at night).

<sup>75</sup> For a summary, see also Department of Justice Canada, “A Handbook for Police and Crown Prosecutors on Criminal Harassment,” p. 1, revised version, Nov. 2012, at <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/har/EN-CHH2.pdf>.

provisions related to distributing child pornography,<sup>76</sup> internet luring,<sup>77</sup> counselling suicide,<sup>78</sup> willful promotion of hatred,<sup>79</sup> extortion,<sup>80</sup> unauthorized use of a computer,<sup>81</sup> identity theft,<sup>82</sup> or identity fraud.<sup>83</sup>

Rather than prohibiting conduct that causes physical injury, the criminal harassment law is focused on criminalizing certain conduct that is “psychologically harmful to others.”<sup>84</sup> The Canadian Department of Justice, in its publication entitled, “A Handbook for Police and Crown Prosecutors on Criminal Harassment,” defines criminal harassment (including stalking) as “often consist[ing] of repeated conduct that is carried out over a period of time and that causes its targets to reasonably fear for their safety but does not necessarily result in physical injury.”<sup>85</sup> Criminal harassment carries a maximum punishment of imprisonment for up to 10 years.<sup>86</sup>

The criminal harassment offense was initially added to the Criminal Code in 1993, as “a specific response to violence against women, particularly to domestic violence against women,” and subsequent amendments have provided for aggravated punishment when a perpetrator commits harassment in violation of a court order, increased maximum jail times, and the ability to classify any murder committed in conjunction with criminal harassment as first-degree murder.<sup>87</sup> Under Canadian law, a person convicted of (or, in some case, charged with) criminal harassment may not legally possess weapons or firearms.<sup>88</sup> The criminal harassment provisions in the Criminal Code have survived a variety of Charter-based (i.e., constitutional) legal challenges.<sup>89</sup>

Section 264(1) of the Criminal Code outlines criminal harassment:

No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in [prohibited conduct] that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

Prohibited conduct consists of following another person from place to place, directly or indirectly communicating with the victim or a person known to them, besetting or watching the dwelling or other place associated with the victim, or engaging in threatening behavior directed at the victim or a family member of the victim.<sup>90</sup> Notably, the prohibited conduct

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<sup>76</sup> Criminal Code § 163.1(3).

<sup>77</sup> Criminal Code § 172.1.

<sup>78</sup> Criminal Code § 241.

<sup>79</sup> Criminal Code § 319(2).

<sup>80</sup> Criminal Code § 346.

<sup>81</sup> Criminal Code § 342.1.

<sup>82</sup> Criminal Code § 402.2.

<sup>83</sup> Criminal Code § 403.

<sup>84</sup> *Id.* at 2.

<sup>85</sup> *Id.* at 1.

<sup>86</sup> Criminal Code § 264(3).

<sup>87</sup> Department of Justice Canada, *supra* note 75 at 2.

<sup>88</sup> *Id.*; see Criminal Code §§ 109(1) (conviction requires a mandatory weapons prohibition order), 515(4.1) (charged persons on interim release shall not be allowed to possess weapons).

<sup>89</sup> For a short summary of many of these cases, see Department of Justice Canada, *supra* note 75 at 48-49.

<sup>90</sup> Specifically, the code defines prohibited conduct as the following:

- (a) repeatedly following from place to place the other person or anyone known to them;
- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

defined in subsection 264(2) encompasses forms of *repeated* conduct, but also forms of conduct that are not necessarily part of a repeated course or pattern of conduct; as such, a single instance of certain conduct (e.g., “watching the dwelling house”) is potentially subject to criminal sanction.

Importantly, the provision limits culpability (and the ability to prosecute offenders) in a few significant ways. First, it requires the perpetrator to have knowledge that another person (the victim) is harassed or to act recklessly as to whether the victim is harassed. Second, the code outlines an exclusive list of conduct (or stalking tactics), rather than outlining a broader range of harassing conduct. Third, the offense is only committed when the prohibited conduct leads to a specific result; specifically, that the victim *actually fears* for their safety (or for “the safety of anyone known to them”) when such fear is also deemed *objectively reasonable*.<sup>91</sup> The first and third of these factors are particularly limiting, for prosecutorial purposes, because they require prosecutors to prove specific knowledge (or recklessness) on the part of the perpetrator and a subjectively-held and reasonable fear for safety in the victim.

#### 4.2.2. Other offences causing mental disturbance

Besides stalking, a number of additional offences also directly or indirectly disturb mental tranquility or cause mental disturbances. Several nudity and indecent exposure offences seek to protect people from being exposed to nudity against their will.<sup>92</sup> A related offence also prohibits causing disturbances, in places other than dwelling houses, “by fighting, screaming, shouting, swearing, singing or using insulting or obscene language, ... being drunk, ... impeding or molesting other persons,” engaging in indecent exhibition, loitering and obstructing the movement of others, or “discharging firearms.”<sup>93</sup> Several obscenity-related offences also relate to preserving mental tranquility. For example, the Criminal Code prohibits the printing, publishing, distribution, circulation (and related possession) of “any obscene written matter, picture, model, phonograph record or other thing whatever.”<sup>94</sup> Relatedly, it is also an offence to “knowingly, [and] without lawful justification,” sell or expose an obscene thing to the public view or to “publicly exhibit[] a disgusting object or an indecent show.”<sup>95</sup> Under the code, an obscene publication is one, “a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.”<sup>96</sup> Relatedly, the code also criminalizes the making, printing, publishing, transmission, and distribution of child pornography.<sup>97</sup>

Section 372 penalizes three separate forms of conveying or communicating false information or indecent or harassing communications. Knowingly conveying false information by letter or

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- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
  - (d) engaging in threatening conduct directed at the other person or any member of their family.

Criminal Code § 264(2)(a)-(d).

<sup>91</sup> This is an example of what Suzanne van der Aa calls a “consequence-specific provision.” Suzanne van der Aa, “New trends in the criminalization of stalking in the EU Member States” (working paper, on file with the author).

<sup>92</sup> Criminal Code of Canada §§ 174 (nudity), 173(1) (indecent acts), 173(2) (exposure), 175 (indecent exhibition).

<sup>93</sup> Criminal Code of Canada § 175.

<sup>94</sup> Criminal Code of Canada § 163(1) (corrupting morals).

<sup>95</sup> Criminal Code of Canada § 163(1)(2).

<sup>96</sup> Criminal Code of Canada § 163(8).

<sup>97</sup> Criminal Code of Canada § 163.1.

telecommunication is penalized when it is done with the “intent to injure or alarm a person.”<sup>98</sup> Making repeated “indecent” or harassing communications to another person, “without lawful excuse and with intent to harass a person,” is also prohibited.<sup>99</sup> All three of these offences are punishable by up to two years imprisonment, or on summary conviction for up to six months.<sup>100</sup>

Other offences penalize the making of threats in a variety of circumstances, including (but certainly not limited to) threatening to harm a person or their property or pets,<sup>101</sup> or to use force to hijack an aircraft,<sup>102</sup> to take control of a ship or fixed platform,<sup>103</sup> or to commit an offence related to radioactive or nuclear materials.<sup>104</sup> Finally, the code also penalizes the utterance of certain forms of hate speech, including advocating genocide<sup>105</sup> or inciting public hatred against a particular group.<sup>106</sup>

### 4.3. Protection from interference with behaviour

#### 4.3.1. Voyeurism

In Canada, voyeurism is considered primarily a sexual offense. The Canadian Oxford Dictionary, cited by the Canadian Department of Justice in a consultation during consideration of a voyeurism offense in Canadian criminal law, defines a voyeur as “a person who derives sexual gratification from the covert observation of others as they undress or engage in sexual activities.”<sup>107</sup> However, the Canadian provisions do not require a sexual purpose for all forms of voyeurism.

Section 162 of the Criminal Code encompasses four different types of voyeurism-related offenses (see Table 1): two primary offenses (observation with or without a device and recording visual images) as well as separate offenses related to knowingly possessing and disseminating images or recordings captured through voyeuristic activities.

Table 1. Forms of conduct criminalized under the voyeurism provisions in the Canadian Criminal Code.

Observation	Recording	Dissemination	
		Possession	Publication
Crim. Code § 162(1)	Crim. Code § 162(1)	Crim. Code § 162(4)	Crim. Code § 162(4)

Unlike some other jurisdictions, Canada’s code prohibits observation whether or not the voyeur uses a device or merely engages in naked-eye observation (i.e. the classic “peeping-tom” scenario), although it does require observation to be done surreptitiously. Additionally, repeated observation (with or without technical means, and whether or not it is done covertly)

<sup>98</sup> Criminal Code of Canada § 372(1).

<sup>99</sup> Criminal Code of Canada §§ 372(2)-(3).

<sup>100</sup> Criminal Code of Canada § 372(4).

<sup>101</sup> Criminal Code of Canada § 264.1 (uttering threats); Criminal Code of Canada § 265(1)(b) (threatening to commit assault).

<sup>102</sup> Criminal Code of Canada § 76.

<sup>103</sup> Criminal Code of Canada § 78.1.

<sup>104</sup> Criminal Code of Canada § 82.6.

<sup>105</sup> Criminal Code of Canada § 318.

<sup>106</sup> Criminal Code of Canada § 319.

<sup>107</sup> “Voyeur,” Canadian Oxford Dictionary, as cited in Department of Justice (Canada), *supra* note **Error! Bookmark not defined.**. The Oxford Dictionaries (British and World English version) similarly defines a voyeur as “A person who gains sexual pleasure from watching others when they are naked or engaged in sexual activity.” “Voyeur,” Oxford Dictionaries, at <http://www.oxforddictionaries.com/definition/english/voyeur>.

may also be encompassed by Canada's anti-stalking (criminal harassments) law.<sup>108</sup> The Criminal Code prohibits forms of voyeurism that do not include any intent or purpose requirements,<sup>109</sup> as well as a form containing an intent requirement in which the intent must be focused on capturing the (partial) nudity or sexual activity of the victim.

As a general matter, Canadian law prohibits observation or recording in circumstances that give rise to a reasonable expectation of privacy. In its first form, observation or recording is prohibited when it is conducted of a person who

is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity.<sup>110</sup>

Alternatively, the code prohibits the purposeful observation and recording of people when they are nude or

exposing his or her genital organs or anal region or her breasts, or ... engaged in explicit sexual activity.<sup>111</sup>

However, Canadian law also covers observation and recording that is done for a sexual purpose, regardless of the state of undress of the person being watched.<sup>112</sup> Canadian courts have found that sunbathers on a public beach did not have a reasonable expectation of privacy (at least when images were captured overtly),<sup>113</sup> but students at a school did have a reasonable expectation of privacy *vis-à-vis* covert recording by their teacher of his female students' breasts and cleavage through the use of a pen camera, even despite the fact that they could not have such an expectation in regards to images captured by the school's security cameras in the same physical spaces.<sup>114</sup> Interestingly, some Canadian courts have held that the *surreptitiousness* of a defendant's conduct "speaks to the question of reasonable expectation of privacy,"<sup>115</sup> which is to be determined under "an assessment of the totality of the circumstances."<sup>116</sup>

Canada's voyeurism law does not explicitly apply to observation in public places, but some case law does indicate that the provisions might apply to observation or recordings made in publicly accessible places, at least insofar as the offense is done for a sexual purpose (and not in reliance on one of the nudity-based forms of the offense). Specifically, Canadian case law indicates that this form of voyeurism can apply to up-skirting and other recording in public places, as long as the larger "circumstances . . . give rise to a reasonable expectation of privacy."<sup>117</sup> In the voyeurism case of *R. v. Rudiger*, Justice Voith of the Supreme Court of British Columbia, held (after a rather lengthy discussion) that:

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<sup>108</sup> Criminal Code of Canada § 264(1).

<sup>109</sup> Canada Criminal Code s. 162(1)(a); 615-bis (Italy); Article 138 (Slovenia); § 181 of the German Criminal Code

<sup>110</sup> Criminal Code of Canada § 162(1)(a).

<sup>111</sup> Criminal Code of Canada § 162(1)(b). Canadian case law also limits "breasts" to female breasts, finding that men have no expectation of privacy in their (at least uncovered) breasts.

<sup>112</sup> Criminal Code of Canada § 162(1)(c).

<sup>113</sup> *R. v. Lebenfish*, [2014] ONCJ 130 (2014).

<sup>114</sup> *R. v. Jarvis*, 2015 ONSC 6813 (2015)

<sup>115</sup> *Id.* at para. 40; see also *R. v. Taylor*, 2015 ONCJ 449 at para. 29 (covert use of a zoom lens).

<sup>116</sup> *Id.* at 30 ("whether a reasonable expectation of privacy exists, in a given case, is based on an assessment of the totality of the circumstances"), *citing* *R. v. Edwards*, [1996] 1 S.C.R. 128 (S.C.C.), at para. 45.

<sup>117</sup> *R. v. Rudiger*, 2011 BCSC 1397, paras. 74, 77-78 (photos and video of young girls private areas in a public park); and *R. v. Taylor*, 2015 ONCJ 449 (victim had REP in re photos of women's buttocks on public beach – but failed for proof of "sexual purpose"); but see *R. v. Lebenfish*, [2014] ONCJ 130 (J. Green: nude sunbathers on a clothing-optional beach had no reasonable expectation of privacy).

The assertion that because the park was “public” no reasonable expectation of privacy can have existed is . . . too blunt a statement. It does not reflect the protean and flexible nature of a privacy interest. Such interests can be, but need not be, absolute in nature. A person who is within his or her home likely has a sense and expectation of absolute or near absolute privacy. A privacy interest can also, however, be relative in nature. A caregiver who goes to a water park with her child fully understands that other children and caregivers will see her child either in a bathing suit or being changed. That caregiver understands that most such observations will be fleeting in nature. They are akin to a person who walks by while you are having a conversation and catches some small portion of that conversation.

In Canada (as in England and Wales), the separation between indictable offenses and those punishable on summary conviction is generally at a six month threshold. Voyeurism offenses are hybrid offenses (meaning they can be tried either as indictable offenses or by summary conviction), a determination made by prosecutors.

**Table 2. Sentences and fines for violations of voyeurism offenses in Canada.**

Jurisdiction	Major offenses		Minor offenses	
	Max sentence	Max fine	Max sentence	Max fine
Canada	5 years	Up to court	6 months	5,000 CAD

#### **4.3.2. Publication of images obtained by voyeurism**

As noted above, subsection 162(4) penalizes both the knowing possession and dissemination of images obtained in violation of subsection 162(1). As noted in a Canadian Department of Justice’s consultation document, the transmission or distribution of voyeuristic images amplifies the “harm generated by criminal voyeurism” and is thus an obvious addition to the underlying observation or recording offenses. Specifically, the subsection 162(4) applies whenever a person

prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available.<sup>118</sup>

Publication carries the same level of penalties as the primary observation/recording offence.<sup>119</sup>

### **4.4. Protection from interference with identity, reputation or honour**

#### **4.4.1. Defamatory libel**

The Criminal Code criminalizes defamatory libel, which is defined as:

matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.<sup>120</sup>

A defamatory libel need not be expressed directly, as the code covers the publication of defamatory matter that is expressed through insinuation or irony.<sup>121</sup> Publication includes exhibiting libelous matter in public, showing or delivering such material to any person with

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<sup>118</sup> Criminal Code of Canada § 162(4).

<sup>119</sup> Criminal Code of Canada § 162(5).

<sup>120</sup> Criminal Code of Canada § 298(1).

<sup>121</sup> Criminal Code of Canada § 298(2).

intent that it be seen, or causing that such material be read or seen by any other person.<sup>122</sup> Additionally, the publisher need not know that the matter is false to be libelous, but the publication of libelous material that the publisher knows to be false results in increased penalties (up to five year's imprisonment, as opposed to two years otherwise).<sup>123</sup> The code also prohibits using libel, or the threat of publishing or refraining to publish a libel, to extort another person to pay money or confer or procure "an appointment or office of profit or trust" for another person.<sup>124</sup>

#### **4.4.2. Revenge porn (non-consensual pornography)**

The Criminal Code specifically criminalizes the non-consensual publication or dissemination of sexually explicit or intimate images under section 162.1 ("publication of an intimate image without consent"). The offense is committed whenever a person

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.<sup>125</sup>

#### **Subject matter**

In the Canadian offense, an "intimate image" is one in which the subject is either "nude, or exposing his or her genital organs or anal region, or her breasts, or is engaged in explicit sexual activity." In some cases, there is no requirement that the genitals or pubic area be visible. Criminal liability might arise, for example, in respect of the publication of an image of a person who is only partially clothed, or photographed unclothed from the rear so that the genitals are not visible. In terms of the subject matter of the offenses, the incorporation of images of a person naked without any accompanying requirement that the genitals, pubic or anal region, or breasts be visible, indicates that what is being protected in these jurisdictions is a sphere of intimacy that extends beyond the sexual.

#### **Place and Expectations of Privacy**

In Canada, reasonable expectations of privacy play a part in defining the scope of the protection that is provided. The offense is committed where images are published which were recorded in circumstances that gave rise to a reasonable expectation of privacy, which reasonable expectation of privacy must still held at the time of publication. This would mean, for example, that publishing images of a person nude or engaged in sexual activity in a public (or publicly visible place) may not violate the law. For illustration, suppose a couple were to film themselves engaging in sexual intercourse in a secluded part of a public park but happened to have been seen by others who were in the park while engaged in this activity. It is not clear whether this hypothetical couple would be afforded protection against disclosure under Canadian law. In Canada, criminal liability arises only in relation to the publication of recordings, "in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy."<sup>126</sup> If the relevant circumstances here include the public nature of the place in which the activity was recorded, it is arguable that there could

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<sup>122</sup> Criminal Code of Canada § 299.

<sup>123</sup> Criminal Code of Canada §§ 300-301. Truth, on the other hand, can be a defence to a charge of libel, but the accused bears the burden of proving that the material is true *and* that the publication was in the public interest. Criminal Code of Canada § 311.

<sup>124</sup> Criminal Code of Canada § 302.

<sup>125</sup> Criminal Code of Canada § 162.1.

<sup>126</sup> Criminal Code of Canada § 162.1(2)(b).

be no reasonable expectation of privacy and the recorded images should not be afforded protection. The argument might be that if the couple were willing to take the risk of being observed while making the images they should bear the risk of observation of that activity through the subsequent publication or dissemination of the images. If a narrower view is taken as to what circumstances should be taken into account, for example, only the understanding between the people engaged in the activity as to what use will be made of the recording, the images might be afforded protection. The justification for this view would be that, while those depicted in the images ran the risk of being observed by a small number of people for a limited period while making the images, the risks in terms of the number of people who might observe the activity and the period over which this might occur would be of a different order of magnitude should the images be published, for example, on the internet.

**Motive, intent, or purpose**

The *mens rea* requirement of the offense of publishing an intimate image without consent is knowing publication and knowledge that the subject does not consent or recklessness as to consent.<sup>127</sup>

**Defences**

In Canada, it will be a defense to a charge of publishing an intimate image to establish that the conduct that forms the subject-matter of the charge serves the public good (provided that it goes no further than whatever is in the public good).<sup>128</sup> Whether the conduct serves the public good is matter of law to be determined by the court, while the question of whether the accused’s conduct extended beyond that which served the public good.<sup>129</sup> In determining whether the defense is made out, the defendant’s motivation for acting as he did is irrelevant. A similar public interest defense is provided by the English legislation, though it is significantly narrower than the defense available under Canadian law.

**Classification, Sentencing, and Punishment**

As shown in Table 3, below, publication of an intimate image can carry penalties of up to five years of imprisonment, if prosecuted as an indictable offence, or six months if prosecuted on summary conviction.<sup>130</sup> The court may place any such person under a prohibition order, the violation of which may result in additional penalties.<sup>131</sup>

**Table 3. Sentences and fines for revenge pornography offenses in Canada.**

Major (indictable) offenses		Minor (summary conviction) offenses	
Max sentence	Max fine	Max sentence	Max fine
5 years	Unclear – provisions silent as to possibility	6 months	\$5,000 CAD

**4.4.3. Identity theft and identity fraud**

The Criminal Code penalizes various forms of identity theft, identify fraud, and trafficking in identity information. Identity information, for purposes of these provisions, includes

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<sup>127</sup> Criminal Code of Canada § 162.1.

<sup>128</sup> Criminal Code of Canada § 162.1(3).

<sup>129</sup> Criminal Code of Canada § 162.1(4)

<sup>130</sup> Criminal Code of Canada § 162.1(1).

<sup>131</sup> Criminal Code of Canada § 162.2.

any information—including biological or physiological information—of a type that is commonly used alone or in combination with other information to identify or purport to identify an individual, including a fingerprint, voice print, retina image, iris image, DNA profile, name, address, date of birth, written signature, electronic signature, digital signature, user name, credit card number, debit card number, financial institution account number, passport number, Social Insurance Number, health insurance number, driver’s licence number or password.<sup>132</sup>

The offence of identity theft applies whenever a person

knowingly obtains or possesses another person’s identity information in circumstances giving rise to a reasonable inference that the information is intended to be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.<sup>133</sup>

Additionally, the sale (or offer to sell), transmission, distribution, or possession of another person’s identity information with the intent to sell, transmit, or distribute it, constitutes the offence of “trafficking in identity information” as long as the perpetrator knows or is “reckless as to whether the information will be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.”<sup>134</sup> Identity theft and trafficking are punishable by up to five years of imprisonment.<sup>135</sup>

Identity fraud, on the other hand, prohibits a person from impersonating another (by “pretending to be the person or using the person’s identity information”<sup>136</sup>) with the intent to gain advantage or any interest in property, to cause disadvantage to the person being impersonated, or to avoid arrest or prosecution or defeat the administration of justice.<sup>137</sup> Identity fraud is punishable by up to 10 years of imprisonment, although lesser punishment is also provided for identity fraud in connection with a professional or educational examination<sup>138</sup> or for signing certain instruments with a false name.<sup>139</sup>

#### **4.4.4. Other reputation-related offences**

Section 371 of the Criminal Code criminalizes the act of fraudulently sending a message “as if it were sent under the authority of another person” when the actor knows that the message “is not sent under that authority” and does so “with intent that it should be acted on as if it were.”<sup>140</sup> Causing a message to be sent in a false name is an indictable offence punishable by up to five years of imprisonment.<sup>141</sup> Likewise, section 374 criminalizes the act of intentionally and fraudulently making, signing, executing, or endorsing “a document in the name or on the account of another person,” as well as knowingly using such a document with the intent to defraud.<sup>142</sup> Such forms of fraudulent conduct are subject to a maximum of 14 years of imprisonment.<sup>143</sup>

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<sup>132</sup> Criminal Code of Canada § 402.1.

<sup>133</sup> Criminal Code of Canada § 402.2(1).

<sup>134</sup> Criminal Code of Canada § 402.2(2).

<sup>135</sup> Criminal Code of Canada § 402.2(5).

<sup>136</sup> Criminal Code of Canada § 403(2).

<sup>137</sup> Criminal Code of Canada § 403(1).

<sup>138</sup> Criminal Code of Canada § 404.

<sup>139</sup> Criminal Code of Canada § 405.

<sup>140</sup> Criminal Code of Canada § 371.

<sup>141</sup> Criminal Code of Canada § 371.

<sup>142</sup> Criminal Code of Canada § 374.

<sup>143</sup> Criminal Code of Canada § 374.

## 4.5. Offences against communications

### 4.5.1. Interception of communications

In Canada, the basic eavesdropping offense bears some resemblance to the US provision. The Canadian provision prohibits listening to, recording, or acquiring a “private communication”<sup>144</sup> (or acquiring “the substance, meaning or purport thereof”) through the use of any “electromagnetic, acoustic, mechanical or other device... capable of being used to intercept a private communication.”<sup>145</sup>

In Canada, “private communication” includes “oral communication” directed at a “person intended by the originator to receive it”<sup>146</sup> (thus making it unlikely that communicative oral utterances to non-persons would qualify). In Canada, *oral* communication (meaning, in the everyday definition of the term, “spoken rather than written; verbal,” and “relating to the transmission of information or literature by word of mouth”<sup>147</sup>) would likely not cover sign language.

**Table 4. Forms of conduct criminalized under eavesdropping provisions in each jurisdiction.**

Observation (aural)		Recording	Preparatory	Use (contents of comm.)	Dissemination	
Listening	With device				Possession	Disclosure
—	C.C. § 184(1)	C.C. § 184(1)	C.C. § 191(1)	C.C. § 193(1)	C.C. § 191(1)	C.C. § 193(1) <sup>148</sup>

The Canadian provisions also cover “telecommunication”<sup>149</sup> which, at first glance, appears essentially comparable to wire communication in the US context, but has been held to cover non-verbal forms of telecommunications such as text messages sent over a cellular network.<sup>150</sup> Additionally, the Interpretation Act defines “telecommunication” under Canadian law as “the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system,”<sup>151</sup> a definition that would encompass sign language-based communication. However, these provisions of the Canadian eavesdropping and wiretapping laws are outside the scope of the eavesdropping definition used for purposes of the present research.

### Preparatory offenses

A number of preparatory offenses are also covered by the Criminal Code. The code penalizes selling or purchasing an eavesdropping device<sup>152</sup> (see Table 4, above).

<sup>144</sup> Criminal Code of Canada § 184(1).

<sup>145</sup> Criminal Code of Canada § 183.

<sup>146</sup> Criminal Code of Canada § 183.

<sup>147</sup> <http://www.oxforddictionaries.com/definition/english/oral>

<sup>148</sup> Applies also to disclosing the “existence” of the recorded private communication.

<sup>149</sup> Criminal Code of Canada § 183.

<sup>150</sup> R. v. Telus Communications Co., 2013 SCC 16, paras. 26-32 (SCC 2013).

<sup>151</sup> R.S.C., 1985, c. I-21, s. 35, amended in 1993 (S.C. 1993, c. 38, s. 87).

<sup>152</sup> Criminal Code of Canada § 191(1)

## Dissemination offenses

Canadian law penalizes the disclosure of the contents of a private communication, but also extends penalties to any disclosure of the *existence* of a private communication.<sup>153</sup> While US law prohibits the use of an eavesdropping device, Canadian law prohibits the mere possession of such a device,<sup>154</sup> as well as the use of any part or substance of a private communication.<sup>155</sup>

## Subject matter, place, and expectations of privacy

Canadian law prohibits eavesdropping on a “private communication,” defined (in part) as:

any oral communication . . . made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it.<sup>156</sup>

## Exemptions and consent

Canadian law exempts eavesdroppers from liability based on the consent of one party to a private communication, but only when the “private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person.”<sup>157</sup>

## Motive, intent, and purpose requirements

The basic interception statute requires *wilful* interception<sup>158</sup> and the related dissemination offences require *wilful* disclosure of information (either the contents or information about the existence of the communication).<sup>159</sup> Besides exceptions for law enforcement acting for purposes related to avoiding harm to property or persons, the basic offence does not require any intent or purpose on behalf of the perpetrator. However, the offence of intercepting radio-based telecommunications does require that the perpetrator act “maliciously or for gain.”<sup>160</sup> The possession- and sale-related offence requires knowledge by the possessor/seller/purchaser of an interception device “that the design thereof renders it primarily useful for surreptitious interception of private communications.”<sup>161</sup>

## Classification, sentencing, and punishment

Table 5. Sentences and fines across jurisdictions for violations of eavesdropping offenses.

Jurisdiction	Major (indictable) offenses		Minor (summary conviction) offenses	
	Max sentence	Max fine	Max sentence	Max fine
Canada	5 years (observation, recording) 2 years (possession, sale, purchase, disclosure)	Up to court Up to 5,000 CAD in punitive damages <sup>162</sup>	—	—

<sup>153</sup> Criminal Code of Canada § 193(1).

<sup>154</sup> Criminal Code of Canada § 191(1).

<sup>155</sup> Criminal Code of Canada § 193(1).

<sup>156</sup> Criminal Code of Canada § 183.

<sup>157</sup> Criminal Code of Canada § 183.1.

<sup>158</sup> Criminal Code of Canada § 184(1).

<sup>159</sup> Criminal Code of Canada § 193(1); Criminal Code of Canada § 193.1(1).

<sup>160</sup> Criminal Code of Canada § 184.5(1).

<sup>161</sup> Criminal Code of Canada § 191(1).

<sup>162</sup> Criminal Code of Canada § 194(1)

As outlined below in Table 5, the code defines interception-related offences as indictable offenses, punishable by up to five years (aural interception and recording) or two years (possession, sale, purchase, or disclosure) along with possible monetary fines.

## 5. The protection of things

Things, generally physical items of communication (e.g., letters) or items of personal or real property, are generally protected based on property-based principles (e.g., arson and damage to property<sup>163</sup>), although some offences also seek to protect bodily privacy and/or mental tranquillity (e.g., robbery as theft by violence or threat of violence<sup>164</sup>) or privacy interests related to communication (e.g., theft from mail<sup>165</sup> or the possession or use of a device to interfere with or unlawfully access a telecommunication service<sup>166</sup>). Trespass-related offences are summarized above at section 3. Theft-related offences are included in a number of provisions in Part IX of the Criminal Code (“Offences Against Rights of Property”).<sup>167</sup> The code also includes a number of related provisions, including prohibitions on fraudulently destroying title documents,<sup>168</sup> theft or forgery of a credit card,<sup>169</sup> unauthorized use of—or mischief in relation to—a computer system<sup>170</sup> (as discussed above, at section 3.4, and below at section 6, respectively), and mischief in relation to a variety of different types of property.<sup>171</sup>

## 6. The protection of data

The most directly-relevant provisions to the protection of data in the Canadian Criminal Code is the criminalization “mischief in relation to computer data.”<sup>172</sup> Mischief in relation to computer data encompasses the wilful destruction or alteration of computer data as well as obstructing, interrupting, or interfering with computer data (or access to data) and rendering computer data “meaningless, useless or ineffective.”<sup>173</sup> The full provision states:

Everyone commits mischief who wilfully

- (a) destroys or alters computer data;
- (b) renders computer data meaningless, useless or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use of computer data; or
- (d) obstructs, interrupts or interferes with a person in the lawful use of computer data or denies access to computer data to a person who is entitled to access to it.<sup>174</sup>

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<sup>163</sup> Criminal Code of Canada § 434.

<sup>164</sup> Criminal Code of Canada § 343.

<sup>165</sup> Criminal Code of Canada §§ 346 (stopping mail conveyance with intent to rob or search it; subject to life imprisonment), 356 (theft from mail; up to 10 years imprisonment).

<sup>166</sup> Criminal Code of Canada §§ 326-327.

<sup>167</sup> Criminal Code of Canada §§ 322-334.

<sup>168</sup> Criminal Code of Canada § 340.

<sup>169</sup> Criminal Code of Canada § 342(1).

<sup>170</sup> Criminal Code of Canada §§ 342.1-342.2.

<sup>171</sup> Criminal Code of Canada § 430.

<sup>172</sup> Criminal Code of Canada § 430(1.1).

<sup>173</sup> Criminal Code of Canada § 430(1.1).

<sup>174</sup> Criminal Code of Canada § 430(1.1).

Computer data is defined in the code as “representations, including signs, signals or symbols, that are in a form suitable for processing in a computer system; (données informatiques).”<sup>175</sup> Mischief that “causes actual danger to life” is punishable by life imprisonment, while other mischief is subject to more modest penalties (maximums of between two and ten years, depending on whether the value of the property exceeds five thousand dollars).<sup>176</sup>

In other provisions, personal data is protected by a variety of identity theft and identity fraud-related provisions (as described above in subsection 4.4.3). Additionally, the code prohibits the unlawful use of “identity documents,” including

a Social Insurance Number card, a driver’s licence, a health insurance card, a birth certificate, a death certificate, a passport . . . , a document that simplifies the process of entry into Canada, a certificate of citizenship, a document indicating immigration status in Canada, a certificate of Indian status or an employee identity card that bears the employee’s photograph and signature, or any similar document, issued or purported to be issued by a department or agency of the federal government or of a provincial or foreign government.<sup>177</sup>

The code also penalizes the disclosure of some information about a person’s prior sexual history that is contained in certain court applications to withhold such information from evidence.<sup>178</sup>

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<sup>175</sup> Criminal Code of Canada § 342.1(2).

<sup>176</sup> Criminal Code of Canada §§ 430(2)-(4).

<sup>177</sup> Criminal Code of Canada § 56.1(3).

<sup>178</sup> Criminal Code of Canada § 276.3(1).