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IMAGE EXPLOITATION**

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Practice Note

Image Exploitation¹

INTRODUCTION

Image exploitation is a distinct form of cyber-bullying, involving the nonconsensual creation, possession, or distribution of an image or images depicting the victim as nude, semi-nude, engaged in consensual sexual activity, or being sexually assaulted. The image in question may be a photograph, screenshot, or video recording. By using cell phones, email, social media, and the Internet, an offender can distribute photographs and videos to the victim's circle of friends, family, and colleagues, as well as the countless inhabitants of cyberspace.

Image exploitation takes various forms. In some circumstances, images are consensually created or shared, but become exploitive and harmful when they are distributed to others without the victim's consent. In other cases, offenders record sexual assaults, thereby creating lasting images of the victimization, exponentially extending the harm caused by the original assault. Negative impacts on the victim may include emotional, physical, and financial damage, as well as damage to a victim's reputation, family life, and intimate relationships. All forms of image exploitation expose the victim to immeasurable trauma of essentially infinite duration, permanently invading the victim's autonomy and security.

This practice note is intended to assist Crown Attorneys in providing advice to the police as to potential Criminal Code charges that can be laid, depending on the form of image exploitation. It is also intended to provide basic guidance on the type of evidence that may be gathered and considerations when prosecuting a case involving image exploitation.

VARIATIONS AND EXAMPLES OF IMAGE EXPLOITATION

“Sexting”

Sending provocative text or images via cellular telephones is commonly referred to as “sexting.” It is most prevalent among teenagers and young adults, a group generally regarded as having underdeveloped impulse control, judgment, and decision-making abilities. Given that sexting often includes the sharing of sexual photographs, there is always a danger that it becomes a means of image exploitation. Regardless of the motive behind sexting, its potentially permanent consequences can cause grave trauma to victims.

¹ Adapted from Jane Anderson and Supriya Prasad, Prosecuting Image Exploitation, 15 Strategies (Mar.2015), available at www.aequitasresource.org

“Video Voyeurism”

Hidden cameras, in the form of cellular telephones, nanny cams, webcams, and increasingly creative spy cameras, allow modern day “Peeping Toms” to secretly record victims at their most intimate moments. No longer limited to looking through windows without permission, voyeurs can now record and disseminate images remotely. By capturing these private images and sharing them online without consent, offenders re-victimize their subjects repeatedly.

“Recordings of Sexual Assaults”

When perpetrators of, or witnesses to, a sexual assault record the crime with a still or video camera, they are creating an image of exploitation. As people with smart phones increasingly record every aspect of their lives, the recording of crimes, including sexual assaults, is also becoming more frequent. When these images are shared or uploaded to the Internet, the victim’s assault becomes part of the public domain.

“Revenge Porn” or “Non-Consensual Pornography”

The phrase “revenge porn” describes a circumstance where a photograph or video depicting nudity or sexual activity is consensually taken or shared between individuals, but is then distributed to others or posted online without the consent or knowledge of the victim. The term “revenge porn” is used because the described scenario often occurs in the context of a break-up where the offender intends to embarrass, harass, or harm the victim through the dissemination of private, intimate images. The nonconsensual distribution can vary in scope, intent, and harm. The offender may show an image to a few of his/her friends, email an image to a shared group of friends or specified distribution list, or post an image to an online forum, social media network, or an online video sharing platform. When the images are posted online, the offender will often also post identifying information of the victim, including their full name, address, email address, phone number, and/or links to his/her social media accounts.

“Image Blackmail or ‘Sexploitation’ or ‘Sextortion’”

Offenders with access to incriminating or sexually explicit images may use them to blackmail victims. In exchange for not revealing the images, offenders may demand certain actions or extort money, sexual favors, additional images, or other items of value from the victim. Offenders may legally possess the images, or they may have gained access to private photos or videos by illegal means, including hacking into the victim’s computer, email, smart phones, or social media accounts.

IDENTIFYING APPROPRIATE CRIMINAL CODE OFFENCES

As with many areas of cybercrime, the law has struggled to keep pace with technology. The Internet has created new means of committing 'old' crimes, and has also created entirely new crimes, including forms of cyber-bullying, which Parliament has had to address. Below are some of the potential offences which can be used to hold offenders accountable based on the scope of exploitation, their intent, and the harm inflicted upon victims. These outlines should not be substituted for a thorough review of the law, and application of each unique set of facts to the elements of the offence.

Criminal Harassment – s.264 Criminal Code

The offence of criminal harassment requires that the offender engaged in any conduct described in s.264(2), that the victim was harassed by the conduct; that the offender knew that the victim was harassed by the conduct or was reckless or willfully blind whether the victim was harassed; that the offender's conduct caused the victim to fear for his/her safety or the safety of anyone known to him/her; and that the victim's fear was reasonable in all the circumstances.

The offence of criminal harassment requires reasonably-based fear on the part of the victim. Annoyance or even acute embarrassment will not be sufficient to found the offence. An argument could be advanced that a victim's fear for their safety includes their psychological as well as physical safety, in the spirit of caselaw which establishes that a threat to cause "serious bodily harm" under s.264.1 includes psychological harm.

Two of the enumerated types of prohibited conduct under s.264(2) may have application in image exploitation cases, depending on the circumstances.

Section 264(2)(b) prohibits "repeatedly communicating with, either directly or indirectly, the (victim) or anyone known to them". "Repeatedly" has been defined in the caselaw as more than once. "Communication" is not a defined term, and is arguably broad enough to include the receiving of images via text or social media or e-mail. Where the nature of the communication is such as to engender fear in the victim for his/her safety, charges under this section may be appropriate.

Section 264(2)(d) prohibits "engaging in threatening conduct directed at (the victim) or any member of their family". Caselaw has held that one time is sufficient for the threatening conduct to occur. "Threatening conduct" is not a defined term. There may be potential for the use of this section where the victim has been identified on a public website along with the posting of an intimate image, particularly if the posting suggests the victim is offering sex for sale or otherwise welcomes illicit contact.

Voyeurism – s.162 Criminal Code

The offence of voyeurism prohibits visual recording by photographic, film, video or other recording by any means, where the content of the image involves full nudity, genital

organs, anal region, breasts or depicts the victim engaged in explicit sexual activity. The recording must have occurred surreptitiously, and in circumstances where there was a reasonable expectation of privacy. The types of acts criminalized include not only recording, but also distributing/circulating, making public or possessing for the purposes of distributing, where the offender knows the recording was obtained in a manner that offends s.162.

The voyeurism offence requires that the victim be unaware of the recording, and thus is not applicable in a circumstance where the victim is aware he/she is being recorded but does not give consent. The provision has potential in cases involving video voyeurism or recording of sexual assaults where this criteria is met.

Extortion – s.346 Criminal Code

The offence of extortion is broad in scope. It is committed when the offender induces, or attempts to induce, the victim to do “anything” by means of threats, accusations, menaces or violence, with the intent for the offender to obtain “anything”.

This offence is certainly broad enough to encompass most situations of image blackmail, ‘sexploitation’ or ‘sextortion’. It also has potential in cases of sexting, where the offender, once given the image consensually, extorts the victim in exchange for not distributing the image further.

Child Pornography – s.163.1 Criminal Code

A photograph, film, video or other visual representation that depicts explicit sexual activity of a person who is under the age of 18 can be the subject of a child pornography offence. So also can a photograph, film, video or other visual representation whose dominant characteristic is the depiction of a sexual organ or anal region of a person under the age of 18, *whether nude or not*. There are various provisions in the **Code** which criminalize simple possession, to making and distributing such an image. “Explicit sexual activity” refers to nudity or intimate sexual activity, and excludes casual sexual contact such as kissing or hugging. The Crown does not have to prove that the sexual activity actually occurred, it is enough if the image conveys to the reasonable observer that it occurred. In terms of the age limitation, proof is sufficient where the person in the image is in fact under the age of 18, or, where a reasonable person looking at the image would perceive the person as being under 18.

Many of the images associated with sexting could be included within the definition of child pornography. Complicated circumstances arise when minors create, send, or receive sexually explicit images of other minors, particularly ones whom they know and with whom they have a friendly, flirtatious, or romantic relationship. In these circumstances, legal scholars, news pundits, child advocates, and legislators have expressed concern that child pornography laws could be applied to turn typical teenagers into convicted child pornographers and registered sex offenders. They argue that, unlike child pornography, the minors depicted in self-produced sexual images are not victims of sexual abuse, and,

therefore, the child pornography provisions should not apply in cases where minors are simply sexting each other as a volitional, experimental part of their adolescence. The Supreme Court of Canada in *Sharpe* [2001] 1 S.C.R. 45 has recognized an exception to the activities prohibited by Section 163.1. If the recording depicts lawful sexual activity, the person(s) depicted consents to the recording, and the recording is held for private use, then possession is lawful. Possession of the picture or recording in these specific circumstances could not lead to a prosecution. Transmission of the image to other persons, or possession by other persons, continues to be an offence, however. An assessment of whether the sexual activity is indeed, lawful, for the purposes of the private use exemption, must, however, involve a holistic examination of the nature and circumstances of the relationship to determine whether it was exploitive. The existence of exploitation of a manner that offends s.153 of the **Criminal Code**, negates the consent and renders the sexual activity unlawful: *R. v. Barabash* [2015] S.C.J. No. 29.

When and how the justice system should be involved in minor-to-minor sexting deserves careful consideration, in part because the motives and consequences of sexting are complicated. Sexting is often an emotionally-driven behavior by adolescents who possess poor impulse control, judgment, and decision-making abilities. This is further evidenced by the fact that minors and young adults often look back at their sexting activity with remorse or embarrassment. One study found that 75% of teens acknowledge that sexting “can have serious negative consequences.” That same study, however, also reported that 66% of teen girls described sexting as “fun and flirtatious,” while at the same time acknowledging that most sexually explicit photographs were sent after feeling “pressure” from a male peer.

Crown Attorneys must be vigilant and thorough when providing advice on, or resolving cases involving minor- to-minor sexting. Many factors must be considered, including whether the sexual activity and creation of the image was in fact consensual or a product of coercive behavior, whether any images were distributed to others or uploaded to the Internet, and the actual harm caused by the image or the potential harm it could cause.

Transmission of Intimate Images – s.162.1 Criminal Code

This new offence came into force March 10, 2015. It makes it illegal to knowingly publish, distribute, transmit, sell, advertise or make available an “intimate image” of a person, knowing that the person does not consent or being reckless as to consent. An “intimate image” is one in which the person is nude or engaged in explicit sexual activity and in which the person depicted has a reasonable expectation of privacy.

There are no age limitations with respect to the person in the image or recording, and thus circumstances of “revenge porn” involving adults can be captured by this provision.

Where the image under consideration involves a person who is under 18, potentially both Transmission of Intimate Images and Child Pornography offences could apply. Crown Attorneys must be mindful of the different offence elements for each of these two provisions when advising the police concerning charges. The Legislative Summary from

the Library of Parliament on Bill C-13 provides some examples of considerations to be taken into account in weighing the two provisions:

“However, new section 162.1 concerning “intimate images” may lead to an unintended result. Under this provision, the perpetrator cannot be convicted if the person in the image consented to the distribution of the image, whereas under the provision of the **Code** regarding child pornography (section 163.1), consent cannot be used as a defence. This difference may have the following consequence in cases where the images disseminated depict an individual under the age of 18:

- If the individual *did consent* to the distribution, the perpetrator would likely be charged not under new section 162.1, which allows consent as a defence, but under section 163.1, which does not.
- If the individual *did not consent* to the distribution, the perpetrator could be charged under either section, since the defence of consent would not apply.

Since the penalty for child pornography is greater and includes a mandatory minimum sentence, an accused could end up with a harsher sentence in cases where consent was given than in those where it was not.

It appears as well that the new provision does not provide a limitation on the age at which a minor could consent to the distribution of such an image. Bill C-13 does not add the new offence to section 150.1 of the **Code**, which outlines the sexual offences for which consent is not a defence as well as the rules relating to age of consent.

Nudity of a non-sexual nature appears to be sufficient to meet the requirements of the new offence. In contrast, nudity is not sufficient for a conviction for child pornography. That offence includes terms such as “for a sexual purpose” and “the dominant characteristic of which is ... a sexual organ.” Even with these restrictions, the Supreme Court of Canada felt it necessary to clarify in *R. v. Sharpe* that nude baby pictures and non-sexual nudity were not covered by the child pornography offence.

Finally, the child pornography provisions of the **Code** use the terms “sexual organ or the anal region,” whereas the new offence of distributing an intimate image, along with existing provisions in sections 162 and 171.1 use the terms “genital organs,” “anal region” and “breasts.” It is not clear whether the terms imply something different. They seem likely to cover the same areas of the body, but the use of different words may be seen as implying different meanings.”

Mischief in Relation to Data – s.430(1.1) Criminal Code

This provision makes it an offence to interfere with the lawful use of data, or to interfere with any person in the lawful use of data. “Data” is broadly defined in s.342.1 of the **Code**. In circumstances where an intimate image was acquired through hacking, this may be a potential companion charge.

Identity Fraud – s.403 Criminal Code

Section 403 makes it an offence to personate someone with intent to cause them disadvantage. Personation may be committed by using that person’s identity information. “Identity information” is defined in s.402.1 of the **Code** as information used alone or in combination with other information to identify or purport to identify an individual. This provision may have application where images have been posted/sent on-line and are falsely identified as having been posted by the victim or sent from his/her accounts.

Conveying False Information – s.372 Criminal Code

This recent amendment to s.372 makes it an offence to convey false information by way of telecommunication, with intent to injure or alarm a person. “Telecommunication” is not a defined term, but is used elsewhere in the **Code** and is wide enough to cover most cyber communications. The *Telecommunications Act*, for example, defines the term as “the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system”. This provision has potential where the image exploitation involves an element of conveying false information about the victim, such as where information is falsely suggested as having been posted or sent by the victim, or where it is represented that the victim is offering sex for sale, or interested in illicit contact.

JURISDICTION

Jurisdiction is the legal power by which a court is authorized to deal with a particular accused in respect of a particular offence. While this practice note sets out the offences in the **Criminal Code** which may apply to acts of image exploitation, a threshold question may arise as to whether an offence has been committed *in Canada*, or in which province in Canada, since cyber-crimes may be committed from any computer in the world. The issue of territorial jurisdiction will have implications as to which police agency investigates and where charges, if any, should be laid. Common law principles respecting the territorial jurisdiction of a crime reflect that a court may have jurisdiction if the crime commences, any act takes place, or results take effect in the place where the court sits. Therefore, more than one locality may have jurisdiction when it comes to an offence. An offence will have jurisdiction in a Canadian court if there is a real and substantial link between the offence and Canada.

On a practical level, while more than one locality may have jurisdiction, consideration must be given to which is best positioned to investigate or prosecute a matter. Issues such as where the suspect/accused is located, for the purposes of arrest and interrogation; where any physical evidence (including a computer) that should be seized may be found, or where the majority of witnesses are, are important factors in this assessment. Where an accused is situated outside Canada, the availability and practicality of extradition will be a critical factor.

It is beyond the scope of this practice note to expand further on the issue of jurisdiction, but Crown Attorneys must be mindful of these issues when providing advice to the police.

ADDRESSING CYBER-BULLYING

When advice is sought by the police during the course of an investigation, an underlying concern will often be, what measures can be taken to halt the distribution of the intimate image and/or the associated cyber-bullying?

Bill C-13, the *Protecting Canadians from On-Line Crime Act*, which introduced the new offence of Transmission of Intimate Images, also introduced new protective and investigative measures. These measures include:

- A peace bond provision [s.810)(1)(b)] where a person fears on reasonable grounds that another person will commit an offence under s.162.1 of the Code;
- A warrant (s.164) authorizing the seizure and forfeiture of intimate images;
- A warrant of seizure [s.164.1(5)] which orders the custodian of a computer system to delete material which is considered child pornography, voyeurism, an intimate image or an ad for sexual services.

In addition to the provisions contained in the **Criminal Code**, the Nova Scotia *Cyber Safety Act* allows for the issuance of protective/prevention orders of up to one year duration which can prohibit or restrict the use of electronic communications, prohibit or restrict internet access, and result in electronic devices being confiscated. While these measures are civil in nature, they provide an independent means of redress for victims of cyber-bullying. Concerns regarding interference with a police investigation should rarely justify not taking other appropriate measures to limit or terminate the cyber-bullying. Information about measures available under the *Act* can be obtained from the Cyber-Scan Unit of the N.S. Department of Justice (902-424-6990).

PROSECUTING IMAGE EXPLOITATION: GENERAL CONSIDERATIONS

Crimes of image exploitation have several common attributes: they frequently occur within an intimate partner relationship, involve digital evidence, and result in extensive, but often non-monetary harm. The following paragraphs will discuss general considerations that should be taken into account in any prosecution involving image exploitation.

Intimate Partner Violence

Image exploitation is often part of a larger, ongoing pattern of abuse and criminal harassment. When appropriate, multiple acts encompassing the entirety of an offender's criminal activity should be charged substantively.

Protective Orders

Publication bans should be considered to protect the identity of the victim. The provisions in the **Code** should be reviewed carefully as some bans are mandatory and others discretionary, depending on the offence charged. Where an intimate image is tendered as an exhibit in a proceeding, an application for a sealing order should be made under the common law (sample order, attached). Bail conditions should be sought with specific language prohibiting online communication, use of the victim's image, indirect contact, and other prohibitions particular to the facts and offender's pattern of image exploitation.

Digital Evidence

Crown Attorneys must be familiar with basic digital evidence to successfully prosecute most cases involving image exploitation. Offenders use cellular telephones, digital tablets, the Internet, and social media to perpetrate their crimes. Evidence used at trial can be in the form of testimony, screenshots, forensic examinations, or a combination thereof. Often, the most valuable evidence is uncovered using cyber investigative techniques. Forensic investigators can preserve and examine evidence contained on laptops, smart phones, and other digital media that can establish that the offender captured, possessed, and distributed the images used to exploit the victim. For example, many digital photographs and videos will contain metadata that can link the image to a particular device, online account, or other identifying information. Investigators should also look for evidence of ownership, custody, and control to provide circumstantial evidence placing the offender "behind" whichever digital device was used.

Showing Harm

In all cases of image exploitation, it will be necessary to inform the court of the full extent of the harm inflicted on the victim by the offender's acts of image exploitation. Crown Attorneys can use victim impact statements at sentencing to show the serious and

perpetual damage that the offender caused the victim, his/her relationships, professional life, and personal autonomy.

Appendix: Sample Sealing Order

Appendix

**CANADA
PROVINCE OF NOVA SCOTIA**

IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

BETWEEN:

HER MAJESTY THE QUEEN

and

Applicant

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Respondent

ORDER

WHEREAS images contained in the exhibits entered as exhibit **X & Y** in this matter contains material alleged to be "child pornography" as defined in the *Criminal Code* section 163.1;

WHEREAS it is a criminal offence to possess or access such material in circumstances that do not give rise to the defence in s. 163.1(6) of the *Criminal Code*;

THIS COURT ORDERS THAT:

Exhibits **X & Y**, contained in this envelope, be sealed and that the public (including the media) shall not have access to it until or unless there is a further order of the Court.

Dated at Halifax, Province of Nova Scotia, this _____ day of _____, 2015.

The Honourable Judge XXXXX