

# Class 12 – November 29

- (1) Fun class exercise!
- (2) Admin / News, etc.
- (3) Introduction to the Substantive Law of Cybercrime in Canada (voice permitting!)
- (4) Tearful farewells and thank yous



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# ALL RISE!



# Today at the Candy Court of Appeals

## Joined cases:

1. *Lavallee et al. v. Isak* (Lower ct. 2021 ONSC 6661)
2. *Lavallee and Driscoll-Marie v. Lavallee and Snapchat, Twitter and Instagram* (which I made up; stand by...)

Mendelsohn, J.A. presiding

To be reported at

2022 CCA (McGill Internet Law Moot) 1



# *Lavallee et al. v. Isak*

## Recall the Facts?

- Shania L. takes video of Justine L. and Gilmour Driscoll-Marie playfighting, posts on Snapchat, shared with select group of friends
- One follower took screenshot of Gilmour on top of Justine, holding her hands behind her back and with his knee on her back
- Solit Isak got the screenshot, started online campaign on Instagram and Twitter against the 3 calling them racist



# *Lavallee et al. v. Isak*

## The Fallout

- Justine fired from her job at CBSA
- Shania fired from Boston Pizza; Ottawa School Board rescinded job offer
- Home vandalized
- Friends and family subject to death threats, harassment on social media



# *Lavallee (Justine) and Driscoll-Marie v. Lavallee (Shania) and Snapchat, Twitter and Instagram*

## Imaginary Facts

- The campaign against the Lavalles was so traumatic, the sisters no longer speak to each other; Justine blames Shania for her troubles b/c she filmed the fight and posted it on Snapchat
- Gilmour loses his job at the federal department Indigenous Services Canada
- Gilmour breaks up with Shania, also blames her b/c she filmed and posted



# 2 cases

## *Lavallee et al. v. Isak*

- 2 Lavalles sue Isak for defamation, based on Insta and Twitter posts

## *Lavallee and Driscoll-Marie v. Lavallee and Snapchat, Twitter and Instagram*

- Justine Lavallee and Gilmour D-M sue Shania Lavallee for unauthorized distribution of their image, likeness and voices, using **intrusion upon seclusion** tort from *Vanderveen* and *Jones v. Tsige*
- Also sue Snapchat for allowing the video to be posted generally, and in violation of their community guidelines
- Sued Twitter and Instagram for hosting the screenshot, and not removing them when asked, and violations of Twitter rules and Insta community guidelines



# Lower Court Holdings

## *Lavallee et al. v. Isak*

### Held (summary judgment)

- Liable for defamation
- All 3 elements of defamation (*Grant v. Torstar*) shown
- Defenses of justification and fair comment rejected

## *Lavallee and Driscoll-Marie v. Lavallee and Snapchat, Twitter and Instagram*

### Held

- Shania not liable, successful defence of “consent”
- Snapchat, Twitter and Instagram guidelines not broken or even binding
- Snapchat, Twitter and Instagram not liable for hosting because...?



# Possible Issues on Appeal

## *Lavallee et al. v. Isak*

- J erred in applying Grant element 3 → a reasonable person would not believe all that and thus not have lower opinion
- J erred in fair comment analysis
- J erred in not forcing apology
- J erred in not awarding punitive damages
- ...?

## *Lavallee and Driscoll-Marie v. Lavallee and Snapchat et al*

- J erred in concluding Justine and Gilmour consented to be filmed
- J erred in application of s. 230 CDA
- J erred in concluding Twitter and Insta did not have to remove screenshot when asked
- J erred when concluding guidelines not broken or binding

# Pick a client! Pick a case! Plead it!

- Justine Lavallee
  - Shania Lavallee
  - Gilmour Driscoll-Maurice
  - Solit Isak
  - Snapchat, Twitter and / or Instagram
- All holdings under appeal
- One paragraph facta by email are welcome too



# Admin Crap

- Course evaluations on Mercury until December 6 → Just do it!



# Essay Formalities

- McGill Citation Guide
- My availabilities during December
  - All the time by appointment just email
  - December 8 → 1ish – 4 PM Thomson House
  - What questions will I answer?
  - What will I not? (1) research (2) analysis (3) reasoning and (4) interpretation of the law
- Submissions December 15<sup>th</sup> 3 PM to [SAOAssignments.law@mcgill.ca](mailto:SAOAssignments.law@mcgill.ca) with cc to [allen@allenmendelsohn.com](mailto:allen@allenmendelsohn.com) or [allen.mendelsohn@mcgill.ca](mailto:allen.mendelsohn@mcgill.ca)



# Other announcements



*Class 12*



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# News Item 1

Esther Gao presentation



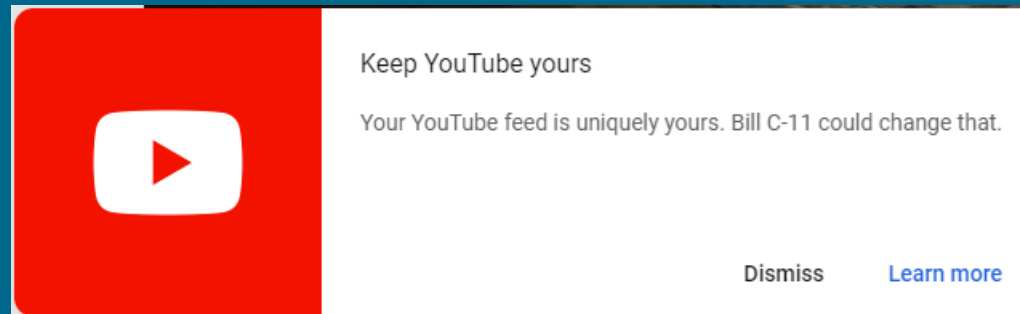
# In the News

1. *Meta Fined \$275 Million for Breaking E.U. Data Privacy Law*

(NYT yesterday)

→ Told you the GDPR was important!

2.



# INTRO TO CYBERCRIME IN CANADA (-ISH)



*Class 12*



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# Cybercrime as per Global Affairs Canada

“Cybercrime is generally defined as a criminal offence involving a computer as the object of the crime (hacking, phishing, spamming), or as the tool used to commit a material component of the offence (child pornography, hate crimes, computer fraud).”



# Cybercrime as per the RCMP



# T.V. TIME!

[https://youtu.be/NLb6h\\_7NAW0](https://youtu.be/NLb6h_7NAW0)



# Elliot's Crime

“I started intercepting all the traffic on your network”

“When I decided to hack you”

“I own everything – all your emails, all your files, all your pics” (from Platosboys.com)



# Treaty Number 185 of the Council of Europe

Signed 2001, effective 2004

“Convention on Cybercrime” (official title)

“Budapest Convention”

“Budapest Convention on Cybercrime”



# Budapest Convention

- Signed November 2001, effective as of July 1, 2004
- Currently 67 nations have ratified
- Important non-Euro nations – USA, Canada, Japan, Israel, Australia (22 total)
- Important non-signatories – Russia, China, India, Brazil



# Budapest Convention – Jurisdiction?

“The Convention on Cybercrime (the Convention), to which Canada is a signatory, requires that each State party prosecute cybercrimes committed within its territory. This means that a country could claim territorial jurisdiction in a case where the computer system attacked is on its territory, even if the perpetrator of the attack is not.”

- *Parliamentary report on cybercrime 2011*



# Budapest Convention – Jurisdiction

## Art. 22:

Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of this Convention, when the offence is committed:

a. in its territory; or

...

d. by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.





# Budapest Convention – Preamble

The member States of the Council of Europe and the other States signatory hereto...

Convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against cybercrime, *inter alia*, **by adopting appropriate legislation and fostering international co-operation...**

Believing that an effective fight against cybercrime requires increased, rapid and well-functioning international co-operation in criminal matters...



# Budapest Convention – Ch. II

## *Measures to be taken at the national level*

Art. 2 - Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, **the access to the whole or any part of a computer system without right...**

Art. 3 - ...**the interception without right, made by technical means, of non-public transmissions of computer data**

Art. 4. - ...**damaging, deletion, deterioration, alteration or suppression of computer data without right.**

Art. 5 - ...**hindering without right of the functioning of a computer system**

# Budapest Convention – Ch. II

(Section 1)

Each party shall adopt...

Title 2 – Computer forgery & fraud

Title 3 – Child pornography

Title 4 – Copyright (references WIPO Treaty)



# Budapest Convention – Ch. II

## Section 2 – Procedural Law

Preservation of data, search and seizure, real-time collection of data (!?!?)

→ Real-time collection has exceptions however



# Budapest Convention – Ch. III

## International Cooperation:

- General Principle of cooperation
- Extradition
- Mutual Assistance
- Sharing Info



# Canada - 342.1 Criminal Code

Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years, or is guilty of an offence punishable on summary conviction who, **fraudulently and without colour of right,**

- (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;
- (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).

# 342.1 Criminal Code - Definitions

***computer service*** includes data processing and the storage or retrieval of computer data;

***computer system*** means 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;

***function*** includes logic, control, arithmetic, deletion, storage and retrieval and communication or telecommunication to, from or within a computer system



# Article 6 Budapest Convention

Each Party shall adopt yada yada...

- a. the production, sale, procurement for use, import, distribution or otherwise making available of:
  - i. a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with Articles 2 through 5;...
- b. Possession of same





# 342.2 Criminal Code

342.2 (1) Everyone who, without lawful excuse, makes, possesses, sells, offers for sale, imports, obtains for use, distributes or makes available **a device that is designed or adapted primarily to commit an offence under section 342.1 or 430**, under circumstances that give rise to a reasonable inference that the device has been used or is or was intended to be used to commit such an offence, is

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

(b) guilty of an offence punishable on summary conviction.



# 342.1 – *R. c. Parent*

2012 QCCA 1653

- *Actus reus* and *mens rea* for 342.1
- Explains the “fraudulently and without colour of right” of 342.1



# 342.1 – *R. c. Parent*

2012 QCCA 1653

## Facts

- Parent was RCMP officer, had access to database with license plate numbers
- Ran 3 numbers for a private detective and gave him the owners of the cars
- RCMP policies say you shouldn't do that! And you may be prosecuted under 342.1



# 342.1 – *R. c. Parent*

## Facts / history

- Parent said “Hey I had a password and everything! I had the right to do it! I had no bad intent here, just helping out fellow law enforcement. I didn’t hide anything!”
- Cour du Québec judge agreed, says Parent did not act “fraudulently” as per 342.1, acquits

Q on Appeal → Did lower court err in interpreting *mens rea* of 342.1?

Held – Hell yes!



# *R c. Parent – Actus Reus for 342.1*

« l'appelante devait établir que l'intimé avait obtenu des services d'ordinateur, que cette utilisation était interdite et qu'une personne raisonnable placée dans les mêmes circonstances aurait convenu qu'il s'agissait là d'une activité malhonnête » (para. 37)



# *R c. Parent – Mens rea for 342.1*

« il est inutile de considérer l'opinion que l'accusé entretient quant au caractère moral de son acte.... S'engager dans cette voie serait une invitation à juger de la *mens rea* de l'accusé selon son propre schème de valeurs et le cas échéant de l'acquitter au motif qu'il estime n'avoir rien fait de mal. » (paras. 38-39)

« La poursuite devrait... démontrer une obtention par l'intimé de manière consciente et volontaire des services d'ordinateur. Cela nécessitait la **preuve de son intention de poser l'acte prohibé, sachant que son geste était interdit au regard des fins projetées par cet usage.** Il s'agit à mon avis de la *mens rea* requise » (para. 50)

# “fraudulently and without colour of right” of 342.1

“Fraudulently” means dishonestly and unscrupulously, and with the intent to cause deprivation to another person

“Without colour of right” means without an honest belief that one had the right to carry out the particular action. To establish “colour of right,” one would need to have an honest belief in a state of facts that, if they existed, would be a legal justification or excuse

→ Essentials of Canadian Law: Computer Law, 2 ed.



# s. 430 (1.1) Criminal Code

(1.1) 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.

Nb sentences → cause “danger to life”? **Life** imprisonment.





# Other “Cybercrimes” ...

- 163.1 Child pornography distribution
- 327 obtaining telecommunications services free of charge
- 172.1 luring a minor via telecommunication to commit any number of crimes
- 402.2 identity theft
- (...)

Prof. Alana Maurushat → **anything** can be a cybercrime  
(recall technology as instrument)



# Back to Elliot's Crime

“I started intercepting all the traffic on your network”

“When I decided to hack you”

“I own everything – all your emails, all your files, all your pics” (from Platosboys.com)



# Elliott's Defense?

“That's the part you were wrong about, Rohit.  
I don't give a shit about money.”

“But I'm only a vigilante hacker by night.  
By day, just a regular cyber-security engineer”



# Class question

Would Elliot be guilty under s. 342.1? 430 (1.1)?



# Elliott's defense per *R c. Parent*

« Le fait que l'intimé ait cru que la fin justifiait le moyen dénoncé et qu'il n'était pas à l'époque animé par aucune forme de turpitude morale ne pouvait en l'espèce constituer un moyen de défense. » (para. 67)



# The tearful farewells begin...

2017. The First class

2018. The class that never participated

2019. The class that really participated and thus redeemed my faith I could actually do this teaching thing

2020. The Zoom class

2021. The class that had to wear masks and attend school in questionable circumstances but who never complained one bit and participated right through their masks like they weren't even wearing them and was great and frankly made me embarrassed that I made a big deal about teaching live during the pandemic in the first place

2022. The class that: (i) sorta kinda but not really returned to normal; (ii) wouldn't shut up (in a good way!); and (iii) taught me that 2L's are alright



**THANK YOU IT'S BEEN FUN!  
GOOD LUCK IN YOUR EXAMS  
AND PAPERS!**

