Separating Spouses, Technology, and the Criminal Law[1]

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A. Overview

We live in a world of technology and it is inextricably linked to our everyday existence.[2] For the majority of us, it is difficult to imagine life without telephones, cell phones, computers, emails, text messaging, on-line banking, on-line hotel and flight booking, Google searching and the like. A person's entire life – sometimes very secret parts of their life – can be traced through what Justice Fish described in *R. v. Morelli*,[3] as a "roadmap of [their] cybernetic peregrinations". Using technology to surreptiously capture private communications can represent what Justice LaForest *R. v. Duarte* called "the greatest leveler of human privacy ever known".[4]

The *Criminal Code* creates offences that reflect the societal concern for protecting individuals from the use of technology to easily invade their constitutionally entrenched privacy interests. While certain devices can provide a fertile source of information for disgruntled spouses endeavoring to discover things about one another, pursuing this route may land them in more than just family court proceedings. The spouse who seeks to access the private technological spheres of his or her spouse is in danger of committing more than one different criminal

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[1] I am grateful to Fredrick Schumann, Associate at Stockwoods LLP, for his insightful comments on and editing of this paper.

[2] The most recent national statistics suggest that 79.4 percent of Canadian households have computers and 78.4 percent have Internet access. See: Statistics Canada, *The Daily: Survey of Household Spending*, 2008 (Ottawa: StatCan, 18 December 2009); Statistics Canada, *The Daily: Survey of Household Spending*, 2010 (Ottawa: StatCan, 25 April 2012) at 2. By comparison, in 1998 only 49 percent of Canadian households had a computer: CRTC, *Broadcast Policy Monitoring Report 2005* (Ottawa: CRTC, 29 June 2005) at s. VI.A, tbl. 6.1. According to Statistics Canada, in 2010, Canadians made 114 million e-commerce transactions worth 15.3 billion: *E-Commerce in Canada: Pursuing the Promise*, Report of the Standing Committee on Industry, Science and Technology, May 2012, 41st Parliament, pp. 4-5.

[3] *R. v. Morelli*, 2010 SCC No. 8 at para. 3. See also: *R. v. Cole*, 2012 SCC 53; *R. v. Vu*, 2013 SCC 60.

[4] *R. v. Duarte*, [1990] 1 S.C.R. 30 at para. 22, citing from the dissenting judgment of Justice Douglas in *United States v. White*, 401 U.S. 745 (1971).

offences. Family clients and their lawyers should have a keen appreciation for where those dangers lie. This paper focuses on the more obvious criminal offences that family law clients and their lawyers risk committing when dealing with technology.

B. Part VI of the *Criminal Code*: "Invasion of Privacy"

Part VI of the *Criminal Code* ["*Code*"] creates five offences, which relate to three types of conduct: (i) the unlawful interception of "private communications" (see ss. 184(1) and 184.5); (ii) the unlawful possession of surreptitious listening devices (s. 191); and (iii) the unlawful disclosure of intercepted private communications (ss. 193, 193.1).

(i) The Interception Offences: Sections 184(1) and 184.5

Section 184(1) of the *Criminal Code* makes it a straight indictable criminal offence, punishable by up to five years imprisonment, to intercept the private communications of an individual. Section 184(1) reads:

> Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, willfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

There are three elements to the s. 184(1) offence. An accused must willfully: (1) use an electro-magnetic, acoustic, mechanical or other device; (2) to intercept; (3) a private communication. All of these terms are statutorily defined in s. 183 of the *Criminal Code*. The definitions are broad and capture a great deal of conduct.

- *Electro-magentic, acoustic, mechanical or other device*

Section 183 of the *Code* defines this term as meaning "any device or apparatus that is used or is capable of being used to **intercept** a private communication … [emphasis added]".[5] This is a broad definition. Devices that are capable of intercepting can range all the way from sophisticated technology used by law enforcement when intercepting calls over telephone lines,

[5] Hearing aids that do not provide for "better than normal hearing" are exempt from this definition.

to pen recorders placed in pockets, to a recording machine installed on a telephone line in the basement of a house, to a glass pressed up to a wall and used to listen through.

Critically, the device or apparatus used must be "capable" of intercepting private communications. As such, to complete the definition of "electro-magentic, acoustic, mechanical or other device", one must understand the definitions of "intercept" and "private communication".

- "*Intercept*"

Section 183 of the *Code* defines "intercept" as including "listen to, record or acquire a communication or acquire the substance, meaning or purport thereof". Note the disjunctive use of "or" in this definition. The simple act of listening in on a private communication could constitute an "intercept" within the s. 183 statutory definition.[6] Importantly, there need not be a permanent electronic record made of a communication for an interception to happen. As such, provided a device or apparatus is used to listen in on a private communication, an "intercept" within the meaning of s. 183 has occurred.

For years, it was thought that the meaning of "intercept" required that the listening or recording be *contemporaneous* with the communication itself.[7] In *R. v. TELUS Communications Co.*, Justice Abella, on behalf of herself and two other members of the Supreme Court of Canada, recently questioned the need for "intercept" to have a contemporaneous sense.[8] As she noted, where law enforcement wishes to seize text messages that are stored on a telecommunication provider's computer system, on a prospective basis, a wiretap authorization is required because any such seizure would constitute an "intercept".

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[6] While sometimes, to avoid absurdity in a statute, "or" will be read as "and" and *vice versa*, no such absurdity exists here. See: Sullivan and Driedger on *The Construction of Statutes* by Ruth Sullivan, 4th ed. (Toronto: Butterworths, 2002) at pp. 66-68; *Guest v. Royal & Sun Alliance Insurance Co. of Canada* 2004 NLCA 13.

[7] See, for instance: *R. v. Giles,* [2007] B.C.J. No. 2918 (Sup. Ct.) at para. 38.

[8] *R. v. TELUS Communications Co.* (2013), 294 C.C.C. (3d) 498 (S.C.C.).

While this view was only expressed by a minority of the court, it is important to stay alive to this issue as the jurisprudence evolves.[9] A rule that the simple seizure of a text message, email, or other form of written electronic communication that has crystallized somewhere on a computer or electronic device constitutes an "intercept" will have serious implications for those who access others' electronic communications. If this approach to "intercept" were to take hold, a person printing or saving the emails of his or her spouse, would be intercepting those emails.

- "*Private Communication*"

For purposes of Part VI of the *Code,* "private communication" is defined as:

> any oral communication, or any telecommunication, that is 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 ….[10]

This definition captures any communication – an oral communication or a telecommunication – that originates in Canada, that is received in Canada, or that is intended by the originator to be received in Canada. It also requires that it be "reasonable" for the originator to expect that the communication will not be intercepted by anyone other than the recipient.

There is a rich body of jurisprudence examining when it is "reasonable" to expect that a communication will not be intercepted. That jurisprudence tends to arise out of s. 8 *Charter* claims, where criminally charged persons claim that their reasonable expectation of privacy has been infringed by the state.[11] To determine whether a communication is "private", in the sense

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[9] Justice Moldaver, on behalf of two members of the court left open the question of whether the definition of "intercept" includes non-contemporaneous seizure of communications. The dissenting judgment of Justice Cromwell, joined in by the Chief Justice, found that a seizure contemporaneous with the communication occurring is required to trigger the concept of an "intercept".

[10] This definition also covers "radio-based telephone communication[s]". Radio-based telephone communications are also defined within s. 183 to include "any radiocommunication within the meaning of the *Radiocommunication Act* that is made over apparatus that is used primarily for connection to a public switched telephone network".

[11] See, for example, *R. v. Carter,* [2011] O.J. No. 6298 (Sup. Ct.); *R. v. Levy,* [2013] O.J. No. 2999 (Sup. Ct.).

that the originator could reasonably expect that no one other than the recipient would intercept the communication, judges look not only at the subjective expectations of the parties to the communication but also to what a reasonable person would expect in the circumstances.[12]

Courts are reluctant to hold that a communication is not expected to remain private, and they do so only rarely.[13] Certainly, and for the purposes of this paper, any spouse attempting to intercept the communications of their partner can land them in serious trouble. One should proceed with extreme caution.

A "telecommunication" is defined under the *Interpretation Act*[14] as including the transmission of a "writing" or "intelligence of any nature" by a "wire, radio, visual or other electromagnetic system". "Writing" is defined within the same provision to include "any mode of representing or reproducing words in visible form". This is an expansive definition. It is difficult to imagine a non-oral communication that does not fall within this definition. As such, by integrating both oral and telecommunications within the definition of "private communication" in Part VI of the *Code,* Parliament has covered off all forms of telephone, cell phone, technological and oral communications.

There are some limited statutory exceptions to the offence. Section 184(2) permits the interception of a private communication where one of the parties to the communication has consented. The exception that is most applicable to a family law situation arises out of s. 184(2)(a) of the *Code*, where a person may record a communication provided that he or she is a party to that communication.[15]

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[12] *R. v. Patrick*, 2009 SCC 17; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Tessling*, 2004 SCC 67.

[13] See some examples cited in: Hubbard et al., *Wiretapping & Other Electronic Surveillance,* (Toronto: Canada Law Book, loose leaf), chp. 13.3, pp. 13-3-13-4. For instance, 911 calls will not be considered to constitute a private communication.

[14] R.S.C. 1985, c I-21, s. 35

[15] See s. 184(2)(a) of the *Code*. There are other statutory exceptions to the offence, including where law enforcement intercept communications in emergency circumstances and where those engaged in communication services intercept communications in the normal course of providing those services.

Section 184.5 of the *Code* makes it an offence to intercept by "electro-magnetic, acoustic, mechanical or other device, maliciously or for gain, a radio-based telephone communication". This too is a straight indictable offence and punishable by up to five years' imprisonment. This offence, for all intents and purposes, operates almost identically to the s. 184(1) offence. It was added to the *Code* in 1993 in order to address a gap in the legislation in relation to cellular telephone communications. In some early cases, courts had decided that cell phone communications may not constitute "private communications". So s. 184.5 was enacted.

The element "maliciously or for gain" does not appear in the s. 184(1) offence. While this expression has not been defined precisely by either the courts or Parliament, according to Robert Hubbard et al's excellent text, *Wiretapping & Other Electronic Surveillance*, "gain" likely means attempts to steal money or expose trade secrets, while "maliciously" likely means with an "ulterior purpose, with *mala fides*, or with intention to injure".[16]

Where does this leave the family law client? The broad definitions of the three components of the s. 184(1) offence and the components of the s. 184.5 offence make them easy to commit. The prohibited act is nothing more than intercepting a private communication with a device. The interception, as broadly defined, must be done *willfully.* There need not be any particular motive behind the willful interception. While the client can intercept a communication to which he or she is a party, intercepting communications where he or she is not a party could land the interceptor in a great deal of trouble.

(ii) Possession Offence: Section 191 *Criminal Code*

Section 191(1) of the *Code* makes it an offence to possess, sell, or purchase an "electro-magnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications". This is an indictable offence punishable by up to two years' imprisonment.

[16] Robert Hubbard *et al., Wiretapping & Other Electronic Surveillance, (*Toronto: Canada Law Book, loose leaf), chp. 13.5, p. 13-7.

While there are numerous exceptions to this offence, found within s. 191(2), none of them would apply to a spouse possessing a device that is "primarily useful for surreptitious" interceptions.[17]

The offence only targets the possession of devices whose designs are "primarily useful" for surreptitiously intercepting private communications. As such, a common tape recorder will not transgress the provision. As noted by Justice Finlayson in *R. v. McLelland*: "Almost any tape-recorder can be used for an illegal purpose … but the design of the tape-recorder remains innocent."[18] In contrast, in *R. v. Alexander,* the Ontario Court of Appeal upheld a conviction under s. 191 for possessing a clock radio that was capable of acting as a camera and audio recorder.[19]

(iii) Unlawful Use and Disclosure of Intercepted Private Communications: Sections 193 and 193.1 *Criminal Code*

Family lawyers take note. Where clients have intercepted private communications by means of electromagnetic, acoustic, mechanical or other devices without the consent of a party to the communication, use and disclosure of that communication *may* constitute an offence, prosecutable by indictment and punishable by up to two years in prison. It is the person who discloses the communication that runs the risk of criminal liability. Section 193(1) reads:

> 193. (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device **without the consent,** express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, **every one who, without the express consent** of the originator thereof or of the person intended by the originator thereof to receive it, **wilfully**
>
> > (a) **uses or discloses the private communication** or any part thereof or the substance, meaning or purport thereof or of any part thereof, or
> >
> > (b) discloses the existence thereof,

[17] The exceptions apply to the possession of interception devices by law enforcement and so on.

[18] *R. v. McLelland* (1986), 30 C.C.C. (3d) 134 (Ont. C.A.) at pp. 142-43.

[19] *R. v. Alexander* (2005), 206 C.C.C. (3d) 233 (Ont. C.A.), leave ref'd [2006] 1 S.C.R. v. 352.

> is guilty of an indictable offence ….[20] [emphasis added]

If a communication has been intercepted with consent, s. 193(1) does not apply. If neither party consented, then the interceptor has very possibly committed a s. 184(1) offence and the difficulties presented by the s. 193(1) offence may pale in comparison. Nonetheless, it is important to understand how the use and disclosure of a non-consent intercepted communication may aggravate matters and, in fact, have the tendency to expose the disclosing lawyer to criminal liability.

As set out in the provision above, without consent it is an offence to disclose the very existence of any such intercepted private communication. As noted in *United States v. Wakeling*:

> Section 193(1) of the *Criminal Code* makes it an indictable offence, absent consent, to disclose private communications intercepted by means of an electronic or other device (pursuant to judicial authorization or not), or to disclose the existence of same, all subject to certain exceptions ….[21]

Assuming one would ever want to use or disclose a private communication intercepted by their client in breach of s. 184(1) of the *Criminal Code*, s. 193(1) and (2) should be studied before doing so. If neither party to the communication consents to its use and disclosure, then it can only be used or disclosed if one of the exceptions in s. 193(2) applies. The most relevant exception for lawyers is s. 193(2)(a), which applies where private communications are used "in the course of or for the purpose of giving evidence in any civil or criminal proceedings or any other proceedings in which the person may be required to give evidence on oath".

The question becomes what "in the course of or for the purpose of giving evidence" means. In *Tide Shore Logging Ltd. v. Commonwealth Insurance Co.,*[22] the court determined that the words

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[20] For all intents and purposes, s. 193.1 of the *Code* is a mirror image of s. 193(1), with the exception that it relates to radio-based telephone communications.

[21] *United States of America v. Wakeling,* [2012] B.C.J. No. 2057 (C.A.) at para. 33.

[22] *Tide Shore Logging Ltd. v. Commonwealth Insurance Co.* (1979), 47 C.C.C. (2d) 215 (B.C.S.C.) at para. 15. See also: *Ault v. Canada (Attorney General)* [2007] O.J. No. 4927 (Sup. Ct.) at paras. 29-32; *Law Society of Upper Canada v. Canada (Attorney General),* [2008] O.J. No. 210 (Sup. Ct.); *Children's Aid Society of the District of Thunder Bay v. S.D,* [2011] O.J. No. 2074 (Ct. Jus.) at paras. 57-9.

"for the purpose of giving evidence" may include pre-trial production in civil proceedings as well as giving evidence at the trial proper.[23]

Even if disclosure is made in compliance with s. 193(2)(a), regard must be had to relevance and third party privacy interests. Cases dealing with requests in criminal cases for disclosure of intercepted communications suggests that s. 193(2)(a) only authorises use or disclosure that is *relevant* to the proceeding.[24] This approach, if applied in Ontario, might restrict s. 193(2)(a) to communications that are relevant or producible according to the rules of civil evidence and procedure.

A lawyer whose client has intercepted private communications must be cautious not to aggravate the matter and commit an offence themselves. As noted in *Watts v. Klaemt*, an individual who had intercepted his neighbour's radio-based telephone communications, and then disclosed them to her neighbour's employer, had committed "two criminal offences":

> He unlawfully intercepted a radio-based communication by means of a mechanical device contrary to s. 184.5(1) of the *Criminal Code* and he wilfully disclosed a radio-based telephone communication without the consent of the parties to the communication contrary to s. 193.1(1) of the *Criminal Code*.[25]

Damages were awarded in this civil case.[26]

Importantly, s. 194 of the *Criminal Code* allows for punitive damages up to $5,000 to be awarded as part of the sentencing process where someone is convicted under ss. 184, 185.5, 193 or 193.1. The award of damages goes to the aggrieved party.

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[23] These same words appeared in the previous s. 178.2(2)(a).

[24] See, for example: *R. v. Siemens* (1998), 122 C.C.C. (3d) 552 (Alta. C.A.); *R. v. Guess* (2000), 148 C.C.C. (3d) 321 (B.C.C.A.), leave ref'd 152 C.C.C. (3d) vi; *R. v. Guilbride*, [2001] B.C.J. No. 2108 (Prov. Ct.); *R. v. Adam*, [2006] B.C.J. No. 919 (Sup. Ct.).

[25] *Watts v. Klaemt*, [2007] 11 W.W.R. 146 (B.C.S.C.) at para. 22.

[26] It should also be noted that in this case, the trial judge observed that s. 193.1 of the *Criminal Code* refers to "radio-based telephone communication[s]" and does not require that the definition of "private communication" within s. 183 of the *Code* be met.

C. Parts IX and XI of the *Criminal Code*: Rights of Property and Wilful and Forbidden Acts

Outside of Part VI of the *Code*, and its focus on intercepting private communications, Parliament has made other efforts to protect privacy in relation to data found on computers and other electronic devices. Owing to the fertile body of information available about spouses on computers and similar devices, it is understandable that spouses may be sorely tempted to access that information to use in a family court proceeding. That temptation should be resisted: there is a serious risk that a spouse may unwittingly commit a criminal offence. Clients should be cautioned about this fact.

Section 342.1 of the *Criminal Code* creates four offences related to the unauthorized use of a computer service or system. It reads:

> 342.1 (1)Unauthorized use of computer – Every one who, **fraudulently and without colour of right**,
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> > (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 an offence under section 430 in relation to 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)
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or is guilty of an offence punishable on summary conviction. [emphasis added]

Section 342.1(2) includes definitions for many of the concepts found in s. 342.1(1). Those definitions make the offence broad indeed. For purposes of this paper, the more relevant definitions are as follows:

- A “computer service” includes any “data processing and the storage and retrieval of data”.

- A "computer system" is a "device that, or a group of interconnected or related devices one or more of which,

    (a) Contains computer programs or other data …".

- "[D]ata means representations of information or of concepts that are being proposed or have been prepared in a form suitable for use of a computer system."

- "[E]lectro-magnetic, acoustic, mechanical or other device" has the same meaning as in s. 183 (above), but for the fact that it refers to interception of a function of a computer system, as opposed to a private communication.

- "[F]unction includes logic, control, arithmetic, deletion, storage and retrieval and communication or telecommunication to, from or within a computer."

- "[I]ntercept" has the same definition as in s. 183, but for the fact that it refers to intercepting a computer system, rather than a "private communication.

Bearing in mind the scope of these definitions, one can imagine all kinds of scenarios where family law clients can run afoul of the criminal law. The most common scenario arises where, contrary to s. 342.1(1)(c), an individual, directly or indirectly, fraudulently and without colour of right, uses a computer system with intent to commit an offence under s. 342.1(1) (a) or (b) or under s. 430 of the *Code.*

"Fraudulently and without colour of right" is an expression found in the long-standing theft provisions of the *Code.*[27] In that context, fraudulently has been judicially defined as meaning that the act is not done by mistake and that the person doing the act knows that the property taken is the property of another.[28] It must be executed with knowledge of the circumstances. It must also be done without colour of right, meaning that the person cannot hold a subjective belief that he or she had a proprietary or possessory right to the thing taken or done. As noted by Mr. Justice Martin in *R. v. DeMarco*:

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[27] For instance, s. 322 of the *Criminal Code.*

[28] *R. v. DeMarco,* [1973] O.J. No. 533 (C.A.); *R. v. Neve,* 1999 ABCA 206; *R. v. Pace,* [1965] 3 C.C.C. 55 (N.S.S.C.).

> The term "colour of right" generally, although not exclusively refers to a situation where there is an assertion of a proprietary or possessory right to the thing which is the subject matter of the alleged theft. One who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right", even though it may be unfounded in law or in fact. *Reg. v. Howson*, [1966] 2 O.R. 63. The term "colour of right" is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done: *Reg. v. Howson, supra*. The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact.[29]

In the *Ontario Specimen Jury Instructions (Criminal),* the following charge to a jury is recommended in relation to this term in the context of a s. 322 theft prosecution:

> A person takes (converts) property "fraudulently and without colour of right" if they take (convert) the property *intentionally*, knowing that it was the property of another person, and knowing that they were *not* legally entitled to take (convert) the property.
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> The taking (converting) is *not* done "fraudulently and without colour of right" if it was done *without* knowledge that the property belonged to another person. … Similarly, the taking (converting) is *not* done "fraudulently and without colour of right" if the person taking (converting) it did *not* know that s/he was not legally entitled to take (convert) the property ….[30]

In order to be convicted under s. 342.1(1) the Crown must prove that the accused knew that the computer system, data and the like belonged to someone else and that the accused knew that he was not legally entitled to engage in the act. In relation to the s. 342.1(1)(c) offence, likely the most commonly breached one in the family law context, the mental element – or *mens rea* – for the offence is using the system fraudulently, without colour of right, and with the intent to commit the enumerated offence.

Those offences fall within ss. 342.1(1)(a), (b) and 430 of the *Criminal Code.* Section 430 of the Code gives rise to mischief offences. Section 430(1.1) makes it an offence to commit mischief in relation to data as follows:

> 430(1.1) Mischief in relation to data – Every one commits mischief who **willfully**
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> (a) destroys or alters data;

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[29] *R. v. DeMarco, supra,* at para. 8.

[30] The Honourable Mr. Justice David Watt (writing extra-judicially), *Ontario Specimen Jury Instructions (Criminal),* (Toronto: Thomson Carswell, 2002).

(b) renders data meaningless, useless or ineffective;
(c) obstructs, interrupts or interferes with the lawful use of data; or
(d) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.

This is a hybrid offence where the Crown can proceed by summary conviction or by indictment. For purposes of this provision, "data" has the same meaning as in s. 342.1 of the *Code*, as set out above. The *actus reus* requires nothing more than the circumstances set out in the provision. The *mens rea* requires a willful act, but nothing further. In other words, there need not be any particular motive for willfully destroying, obstructing, or interfering with the data.

The "colour of right" concept also applies to the "mischief to data" offence, thanks to s. 429(2). Therefore a person who honestly believes that he is legally entitled to commit the act will not be guilty of the s. 430(1.1) offence.[31] However, s. 429(3)(a) provides that a "partial interest" in the data destroyed or damaged is not a defence if the person causes the destruction or damage. Likewise s. 429(3)(b) provides that even a "total" interest in the data is not a defence if the destruction or damage is done "with intent to defraud". Therefore a person who deletes even his own electronic records or communications in order to stymie his spouse's family law claim may commit the offence under s. 430(1.1).

Note that s. 342.1(1)(c) of the *Code* creates the additional offence of *using a computer system* to commit an offence under section 430(1.1). While there is little to no law telling us exactly what this web of provisions means, it is certainly capable of broad application, and family lawyers and their clients should proceed with appropriate caution.

D. Conclusion

Going through family law proceedings can be stressful enough. Combining them with criminal charges is best avoided. As such, and despite the tempting source of information that technology presents, clients should pause and think hard, preferably with advice about the risk of criminal liability, before proceeding.

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[31] See *R. v. Watson* (1999), 137 C.C.C. (3d) 449 (Ont. C.A.).

Special caution is required when contemplating the interception of private communications, such as the surreptitious recording of a conversation. Such recordings can only be made where one party to the communication consents to the interception. In practical terms, this means that a client may record a conversation that he or she is having with his or her spouse but may not record a conversation that the spouse is having with someone else when the client is not present. Failing to respect this rule constitutes a serious criminal offence.

Further, any intercepted private communication can be used or disclosed in a family proceeding only where one of the parties to the communication consents either to the original interception or to the use or disclosure in the subsequent proceeding, or where the s. 193(2)(a) exception applies. Since lawyers are usually involved with using and disclosing evidence in court proceedings, it is important to be familiar with the definition of this offence – not just to protect the client but to protect oneself.