

# KEEPING CURRENT

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## Breach of privacy and unauthorized access to electronic information in spousal dispute (*Chen v. Huang*)

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While it may be commonplace for spouses to share access to computers and online accounts in a matrimonial home, one has a right to a reasonable expectation of digital privacy from their spouse, just as with any person. This can become a significant issue in matrimonial disputes since family members may have the means to access each other's technological devices, emails and social media accounts without consent.

In *Chen v. Huang*, [2024 ONSC 1173](#), during the course of a matrimonial proceeding, the husband produced several of the wife's confidential texts and Facebook messages, which she had never shared with him.

The wife alleged that the husband had used his computer history to "hack" into her emails and Facebook postings, which he was able to do because she had previously used his computer to access her accounts during their marital relationship. She did not anticipate that the husband would use her login information to access her private and confidential emails and Facebook messages.

The wife then brought a motion for a declaration that the applicant husband breached the tort of intrusion upon seclusion by accessing several emails and her private Facebook postings.

The tort of intrusion upon seclusion involves three elements: (i) intentional or reckless conduct; (ii) an invasion into one's private affairs or concerns without lawful justification; and (iii) an invasion that a reasonable person would regard as highly offensive causing distress, humiliation, or anguish: *Jones v. Tsige*, [2012 ONCA 32](#).

In response to the motion, the husband argued that he did not breach his wife's privacy rights because the electronic communications were only included in his settlement conference brief, which he believed were not publicly available. He also argued that the issue should be deferred to trial where the evidence could be tested by cross-examination, but he did not otherwise deny the wife's allegations.

In the [decision](#), the motion judge held that the elements of the tort of intrusion upon seclusion were met.

With respect to the first element, the husband did not deny, either in his affidavit or through submissions, that he *intentionally* used his computer history to “hack” into the wife’s private accounts to access the emails and Facebook messages. He did not deny that he obtained the emails and Facebook exchanges without the wife’s knowledge or consent.

With respect to the second element, the husband attempted to rely upon case law suggesting that improperly obtained written communications, such as emails, cannot be used as evidence because their probative value did not outweigh their prejudicial effect. However, the motion judge rejected this argument and found the surreptitiously obtained emails and private Facebook postings were evidence of the elements of the tort of intrusion upon seclusion. Consequently, the emails and Facebook exchanges were relevant and any prejudice to the husband was not established.

Additionally, the motion judge rejected the husband’s argument that because he had only obtained a few emails and Facebook exchanges, the intrusion did not reach the threshold of a violation. Rather, the intrusion by the husband was significant not only in terms of the number of intrusions but because the purpose of the surreptitious intrusion was to gain an advantage against the wife in the family law proceedings.

Lastly, the motion judge explained that surreptitious obtaining of a spouse’s private communications by an adverse spouse to use against them in family law proceedings is not to be sanctioned and will, absent extraordinary circumstances, be highly offensive and cause distress, humiliation or anguish/mental distress to the privacy holding spouse from the objective perspective of the reasonable person. Persons in spousal relationships are particularly vulnerable to having their private and confidential communications intercepted by their partners who will often have enhanced access to them for

reasons such as this current case, where the wife routinely used the husband’s home computer.

The motion judge specifically rejected the husband’s argument that the issue of his unauthorized access to his wife’s private communications should be deferred to trial. The husband had every opportunity to respond to the specific allegations in his responding affidavit for the motion but was silent on the wife’s allegations. There was nothing that required an assessment of credibility and the facts at issue were not complex nor in dispute.

In the [result](#), the motion judge granted a declaration that the husband had committed the tort of intrusion upon seclusion with respect to his wife’s emails and Facebook communications that he produced in the litigation. The motion judge held that the declaration would send a message to the husband that such interceptions into the wife’s personal, private, and confidential electronic communications will not be tolerated. The court did not assess damages or make any other consequential orders as the wife had not included a claim for such relief in the application.

The decision affirms that unauthorized access to a spouse’s personal, private, and confidential electronic communications will not be tolerated, particularly where a spouse does so to gain the upper hand in legal proceedings. In appropriate cases, damages and/or other consequential relief may also be awarded when sought by the party whose information is accessed. For instance, in *DTop of Form*

*ixon v. Lindsay*, [2021 ONSC 1360](#), the court ordered a party never to directly or indirectly by any means intercept or access their spouse’s personal email account(s) or make copies of their personal email communications. In this case, however, the wife only sought declaratory relief regarding the tort of intrusion upon seclusion. The balance of the issues between the parties will be adjudicated at trial.



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If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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