

# Civil Remedies for NCDII

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INTIMATE IMAGES LEGISLATION CPD - JULY 17, 2020

# CIVIL REMEDIES FOR NCDII

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# Legislative Regime

*The Intimate Image Protection Act* became law in Manitoba in November, 2015. This statute creates the statutory tort of non-consensual distribution of intimate images.

Similar legislation has been passed in most Canadian provinces.

# Definition of "intimate image"

**"intimate image"** means a visual recording of a person made by any means, including a photograph, film or video recording,

(a) in which the person depicted in the image

(i) is nude, or is exposing his or her genital organs or anal region or her breasts, or

(ii) is engaged in explicit sexual activity;

(b) which was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of the image; and

(c) if the image has been distributed, in which the person depicted in the image retained a reasonable expectation of privacy at the time it was distributed.

# Definition of “distribution”

## **Interpretation: distribution of intimate images**

For the purpose of this Act, a person distributes an intimate image if he or she knowingly publishes, transmits, sells, advertises or otherwise distributes or makes the image available to a person other than the person depicted in the image.



# Statutory cause of action

## **Non-consensual distribution of intimate images**

A person who distributes an intimate image of another person knowing that the person depicted in the image did not consent to the distribution, or being reckless as to whether or not that person consented to the distribution, commits a tort against that other person.

## **Action without proof of damage**

An action for the non-consensual distribution of an intimate image may be brought without proof of damage.



## **When expectation of privacy not lost**

In an action for the non-consensual distribution of an intimate image, the person depicted in the image does not lose his or her expectation of privacy in respect of the image if he or she

- (a) consented to another person recording the image; or
- (b) provided the image to another person;

in circumstances where that other person knew or ought reasonably to have known that the image was not to be distributed to any other person.

## **Defence — public interest**

It is a defence to an action for the non-consensual distribution of an intimate image if the distribution of the intimate image is in the public interest and does not extend beyond what is in the public interest.

# Statutory Remedies

## Remedies

In an action for the non-consensual distribution of an intimate image, the court may

- (a) award damages to the plaintiff, including general, special, aggravated and punitive damages;
- (b) order the defendant to account to the plaintiff for any profits that have accrued to the defendant as a result of the non-consensual distribution of the intimate image;
- (c) issue an injunction on such terms and with such conditions that the court determines appropriate in the circumstances; and
- (d) make any other order that the court considers just and reasonable in the circumstances.





## **Consideration re award of damages**

In awarding damages in an action for the non-consensual distribution of an intimate image, the court must not have regard to any order made under clause (1)(b).

## **Publication ban**

In an action for the non-consensual distribution of an intimate image, the court may make an order prohibiting the publication of the name of any party to the action or any information likely to identify a party if it considers the making of the order to be in the interests of justice.

## **Other rights not affected**

A right of action under this Act is in addition to, and does not affect, any other right of action or remedy available to a person under another Act.

# Other causes of action

- ▶ Breach of privacy (Privacy Act)
- ▶ Breach of confidence
- ▶ "Intrusion upon seclusion"
- ▶ *Ad hoc* fiduciary duty
- ▶ Infliction of mental distress

## *Jane Doe 464533 v. N.D.*

Defendant posts intimate video of plaintiff on pornography website without plaintiff's consent. Police decline to assist plaintiff because she is over 18. Defendant removes video from website after plaintiff contacts his mother. Defendant briefly participates in litigation but is noted in default.

**2016 ONSC 541** – Motion for default judgment granted. Plaintiff awarded damages in the amount of \$105,500 and costs in the amount of \$36,208.73. Justice Stinson relies on principles governing damages for sexual assault to calculate plaintiff's damages.

**2016 ONSC 4920** – Default judgment to be set aside upon payment of costs thrown away in the amount of \$10,000.

**2017 ONSC 127** – Leave to appeal to Ontario's Divisional Court denied.

# *Roque v. Peters*

Plaintiff has brief relationship with Brandon Police officer and is subsequently short listed as a candidate to join the BPS. Defendant is the officer's common-law spouse, a former BPS civilian employee and aware that the Plaintiff is seeking to join the BPS. Defendant obtains intimate images of the Plaintiff from her partner's e-mail account and without her consent provides them to the Brandon Police Service via USB and e-mail in February, 2017. Senior officers of the BPS eventually destroy the USB with a hammer. Plaintiff does not become a Brandon Police officer and numerous criminal investigations ensue.

Plaintiff sues the Defendant in November, 2017. Defendant brings third party claims against her former partner, one of his friends and the City of Brandon. The third party claims against the Defendant's former partner and his friend are both dismissed. Trial is scheduled for weeks of February 8 and 15, 2021 in Brandon.



## Key Legal Issues:

What constitutes an “intimate image”?

Can the Defendant rely on the public interest defence?

Can a defendant with a history of NCDII rely on this defence?

What cause of action(s) are available for images that are not “intimate”?

Will the Court recognize the existence of an *ad hoc* fiduciary duty?

What are the Plaintiff’s damages?

What is the liability, if any, of the City of Brandon to the Defendant?

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