

ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

**UNIFORM NON-CONSENSUAL DISCLOSURE OF
INTIMATE IMAGES ACT
Report of the Working Group and Draft Uniform Act**

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Minutes and the Resolutions on this topic as adopted by the Conference at the Annual meeting.

Revised November 2020

This document is a publication of
the Uniform Law Conference of Canada.
For more information, please contact
ulccwebsite@gmail.com

Uniform Non-Consensual Disclosure of Intimate Images Act Report of the Working Group – November 2020

Introduction

[1] In 2018, a report was prepared by Hilary A. N. Young, Associate Professor, Faculty of Law, University of New Brunswick and Dr. Emily B. Laidlaw, Associate Professor, Faculty of Law, University of Calgary, subject-matter experts on the non-consensual disclosure of intimate images (NCDII).

[2] Their report addressed a need for a legislated harmonized approach to NCDII, the principles that should guide that exercise, a summary of existing legal models, and a list of issues that the project should address. In addition, it included a chart comparing the then existing Canadian legislation.

[3] The report was received by the Civil Section of the Conference. It resolved that work on this project continue in accordance with the directions of the Conference and there be a report back to the Conference at the 2019 meeting.

[4] At the annual meeting in 2019, the subject-matter experts presented a report entitled “Nonconsensual Disclosure of Intimate Images (NCDII) Tort”, recommending two separate statutory NCDII torts. The first would be a strict liability tort actionable by way of a simple fast-track proceeding primarily for declaratory and injunctive relief. The second would be a fault-based tort actionable through a more traditional proceeding for compensatory damages.

[5] One of the primary rationales for creating uniform NCDII torts, the report recommended, was to provide a more effective mechanism for victims of NCDII to obtain what they most want: removal of the content from the internet (to the extent possible) or de-indexing search engine results.

[6] The report also recognized that victims may be interested in damages, and it recommended mechanisms for obtaining damages. The proposal, though, was primarily guided by the goal of facilitating quick, cheap and effective takedowns and de-indexing of NCDII.

[7] The report also considered the role of internet platforms and other intermediaries in distributing intimate images. It noted that the major intermediaries all have terms of service that prohibit disclosure of intimate images in some manner. While the speed with which these matters are dealt with varies, this is a faster mechanism than most legal proceedings and it is cheap and requires no legal assistance. But the report also pointed out downsides to this approach.

[8] First, an internet intermediary’s decision to remove images applies only to that particular intermediary – an individual cannot be ordered to remove a post or not to

post elsewhere, nor does the process affect other intermediaries. Second, an internet intermediary may not think that its terms of service have been violated.

[9] The report discussed the need for a legislative approach to NCDII. It concluded that there was uncertainty as to what head of tort law or statute law may apply and that existing wrongs are not ideally suited to dealing with NCDII. Existing wrongs are generally complex, require a balancing of interests, and are hard to invoke without legal representation.

[10] Further, while NCDII is also a criminal offence in Canada, there are advantages of a civil recourse, which justify the creation of the recommended torts. Creating the possibility of a civil recourse would complement the existing Criminal Code provisions and could provide a broader range of remedies for complainants.

[11] The report identified several reasons why harmonized legislation among jurisdictions should be sought. In particular, the recommended torts would not be geographical in nature and it would be burdensome to require intermediaries to comply with different requirements in different provinces.

[12] The report included a chart outlining the proposed legislative response, as follows:

**Non-Consensual Disclosure of Intimate Images (NCDII) Tort
Report June 2019**

Summary

Fast-track NCDII Tort	NCDII Tort for Compensatory Damages
<p>Elements:</p> <ul style="list-style-type: none"> • The Plaintiff must prove that the defendant distributed an intimate image of the plaintiff. • No requirement to show non-consensually distributed. • Strict liability: lack of intent to publish and lack of knowledge would not be defences. • Cause of action for threat to distribute. • Defences: consent, public interest and other enumerated defences (e.g. good faith disclosure to law enforcement). • Remedies: declaratory relief and injunctions, nominal damages when appropriate. 	<p>Elements:</p> <ul style="list-style-type: none"> • Elements the same as for fast-track NCDII except that the absence of fault would be a defence and remedies would include compensatory damages.

Uniform Non-consensual Disclosure of Intimate Images Act
Report of the Working Group – November 2020

• Superior court proceeding.	
<p><u>Recommendations</u></p> <p><i>Distribution should be defined in terms of making images available to others. No knowledge or intent to distribute should be included in the definition.</i></p> <p><i>The definition of intimate image should include altered images, near-nude images and other images of a similar nature (toileting, dressing and undressing and upskirting), but should exclude wholly original content.</i></p> <p><i>While the plaintiff must prove she is depicted, it should not be a requirement that the plaintiff be identifiable by a third party, meaning that the person in the image is recognizable to a person other than the one depicted in the image.</i></p> <p><i>The defences for both the fast-track NCDII tort and the tort for compensatory damages should include consent, public interest and certain other enumerated defences (good faith disclosure to law enforcement etc.). Additional fault-based defences should apply only to the action for compensatory damages.</i></p> <p><i>Consent should be a defence to both NCDII torts. Knowledge of (a lack of) consent and (non) recklessness as to consent should not be elements or defences. Consent should explicitly be revocable.</i></p> <p><i>There should be a presumptive ban on the identities of minor plaintiffs, rebuttable only if minors wish to be identified.</i></p> <p><i>The cause of action should include threats to distribute intimate images.</i></p> <p><i>There should be no injury or harm element.</i></p> <p><i>For the tort action for compensatory damages, intent to publish the relevant image should be required, but should be presumed (i.e., lack of intent to publish is a defence).</i></p>	

[13] At the annual meeting in 2019, a Joint Session of the Criminal Section and the Civil Section received the report and directed that the Working Group prepare uniform legislation and commentaries in accordance with the recommendations made on Page 1 of the report and with the directions of the Conference, and report back to the Conference at the 2020 meeting.

[14] A Working Group was formed including the following members:

Hilary Young - New Brunswick
Dr. Emily Laidlaw - Alberta
Leslie Turner - Manitoba
Clara Cerminara - Alberta
Sue Gratton - Ontario

Uniform Law Conference of Canada

Peter J. M. Lown Q.C. - Alberta
Darcy McGovern Q.C. - Saskatchewan
Candace Whitney – Chair - Ontario
Kerri Sinclair – Drafter - British Columbia
Clark Dalton Q.C. - ULCC

[15] Members of the Working Group met by teleconference on several occasions from April 2020 to early July 2020 to consider a draft of the proposed uniform act.

[16] After presenting a report to a joint session of the Criminal Section and the Civil Section in August 2020, the working group met again on several occasions from September to November 2020 to consider the issues raised at the August meeting and the issues raised in a resolution passed by a joint session.

[17] The Uniform Law Conference of Canada gratefully acknowledges with sincere thanks the participants in the Working Group for their dedication and contributions to the product of our discussions. We especially thank Professors Dr. Emily Laidlaw and Hilary Young for their exceptional contributions in terms of preliminary reports and their participation in the discussions of the Working Group. We are indebted to the Province of British Columbia for providing us with drafting assistance. In particular, we offer our sincere thanks to our drafter, Kerri Sinclair, for her careful and lucid articulation of the principles adopted by the Working Group. Many thanks to all.

[18] What follows is a *Draft Uniform Non-consensual Disclosure of Intimate Images Act, 2020* based on the outline for the draft act presented in the 2019 report. This draft act and commentaries consist of the report prepared for discussion at the 2020 joint session of the Civil Section and the Criminal Section of the Conference as modified to include the results of the discussion of issues raised at the joint session.

DRAFT UNIFORM NON-CONSENSUAL DISCLOSURE OF INTIMATE IMAGES ACT, 2020

Contents

- 1 Definitions
- 2 Reasonable expectation of privacy
- 3 Torts
- 4 Application for declaratory and injunctive relief
- 5 Claim for damages
- 6 Burden of proof – reasonable expectation of privacy
- 7 Publication ban
- 8 Internet intermediaries protected from legal suit
- 9 Defence to application under section 4
- 10 Defences to claim under section 5
- 11 Consent revocable
- 12 Rights and remedies not limited
- 13 Commencement

GENERAL COMMENT

The primary objective of the act is to create an inexpensive, fast-track proceeding for victims to have NCDII removed from the internet. In some jurisdictions this might involve an application, with the matter determined based on affidavit evidence. The evidentiary burden on the applicant would be minimal and the primary remedies would be declaratory and injunctive, though nominal damages could be awarded. The goal is to give victims what they most want: the destruction, removal or de-indexing of the intimate image as cheaply and quickly as possible.

In addition to dealing with actual distribution of intimate images, the act also proposes to deal with threatened distribution of intimate images.

It is recognized, that some victims will want damages in addition to the destruction, removal or de-indexing of the intimate image. Therefore, the act also provides for a more traditional proceeding that places a greater onus on claimants. This proceeding may take longer to litigate and require the assistance of counsel but could result in significant damages awards.

The two proceedings in sections 4 and 5 are intended to be distinct and, in some cases, cumulative. For example, a complainant may initially wish to bring an application under section 4 in order to seek a quick takedown of an intimate image. Thereafter, the complainant, having suffered significant damages from the distribution of the intimate image, may choose to bring a section 5 proceeding to seek damages relief.

The civil remedies created by the act would complement existing criminal NCDII provisions. In 2015, the *Criminal Code* was amended to include a new non-consensual disclosure of intimate images offence (section 162.1). This is a hybrid offence, punishable by a maximum of 5 years on indictment. The 2015 reforms also included complementary amendments such as a notice and take-down provision which empower judges to order the removal of certain information from the Internet (s. 164.1), the power to prohibit a person convicted of NCDII from using the Internet (s. 162.2), restitution for victims relating to expenses relating to removing the images (paragraph 738 (1) (d)) and recognizance orders where a person fears that the NCDII may occur (s. 810). Other *Criminal Code* offences might also apply in certain circumstances (e.g., criminal harassment or uttering threats).

The civil remedies in this act are intended to give victims more control over the litigation process and provide an alternative to the strictures of the administration of criminal justice.

Two substantive differences between the *Criminal Code* offence in s.162.1 and the torts created by this act reflect deliberate policy choices. First, the distribution of altered intimate images can be tortious. This addresses the emergence of the relatively new and pernicious problem of “deep fakes”. Second, the torts allow recovery even if the complainant is not identifiable in the image. This addresses the issue of upskirting, for example.

Definitions

1 In this Act:

“**applicant**” means a person who makes an application under section 4;

COMMENT: This definition specifically applies to the fast-track provisions in section 4 as distinct from a “claimant” under the traditional tort remedy in section 5.

“**claimant**” means a person who makes a claim under section 5;

COMMENT: This definition specifically applies to the traditional tort remedy in section 5 as distinct from an “applicant” under the fast-track provisions in section 4.

“**court**” means the [each jurisdiction to add what court];

COMMENT: The act leaves the definition of “court” to be addressed by each jurisdiction. Jurisdictions have varying court structures and approaches to supporting self-represented litigants. Each jurisdiction is in the best position to determine which tribunal has the appropriate authority and is best placed to grant the fast-track remedy under section 4 and the more traditional tort remedy under section 5. Options might

include provincial court, superior court, the creation of a fast-track process in a superior court and/or an administrative tribunal.

Similarly, the act does not address specific measures that may be appropriate to protect access to justice for NCDII victims. Individual jurisdictions may wish to include provisions to assist vulnerable victims, such as child victims and victims of human trafficking, in accessing remedies under the act. These might include provisions for complainants to access legal aid, legal representation or the assistance of an agency like the Canadian Centre for Child Protection (C3P).

“distribute” means to transmit, publish or otherwise make available;

COMMENT: The concept of distribution is critical to the workings of the provisions of the act. Distribution is defined in terms of intimate images being made available to others. The tort does not require possession, authorship or endorsement of the intimate image. No knowledge or intent to distribute is included in the definition.

“internet intermediary” means an organization that hosts or indexes third party content through an online platform;

COMMENT: The definition of internet intermediary is intended to be functional and relatively narrow. Only organizations having the ordinary function of bringing together or facilitating transactions among third parties on an internet platform should be entitled to protection from law suits under s. 8. Individuals who host or index third party content are not intermediaries under this definition and should not be protected from lawsuits. This narrow definition is consistent with the remedial purpose of the legislation.

“intimate image” means a visual recording of an individual, whether or not the individual is identifiable and whether or not the image has been altered in any way, made by any means, in which the individual is or is depicted as

- (a) engaging in a sexual act, or
- (b) nude, nearly nude or exposing their genital organs, anal region or breasts, and

in relation to which the individual had a reasonable expectation of privacy at the time the recording was made and, if the recording has been distributed, at the time it was distributed;

COMMENT: The Working Group has intentionally adopted a definition of “intimate image” distinct from that in s.162.1 of the *Criminal Code*. In particular, a policy decision was made by the Working Group to provide remedies under the act in respect of altered images and images of unidentifiable individuals.

Altered Images - The definition of “intimate image” found in many jurisdictions includes a visual recording of a person made by any means, including a photograph, film or video recording. The Working Group considered whether the definition should capture altered images. It is increasingly common for altered images, video or sound, colloquially known as “deep fake” technology, to be created for the purpose of causing harm to an individual.

The Working Group agreed that the definition of intimate images under this act should include altered images, but the Working Group was mindful that some forms of altered images serve a public interest. The public interest defence set out in section 10(1)(c) would provide a defence for altered images created and shared in the public interest.

Images of Unidentifiable Individuals - The Working Group also considered whether the causes of action should apply only to images identifiable by a third party, such as situations where the individual is identifiable from the image, or through information connected to the image (e.g. the bedroom in the background is recognizable). Such a narrow definition would mean certain harmful scenarios would not be captured by the torts. For example, a person takes a selfie of intimate parts of her body and shares it with a partner, who distributes it to others without consent. The person knows it is her body even if no one else knows it is her. Further, the person may live in fear that she will be identifiable at some point in the future, whether because someone pieces together it is her, or the person who posted the image identifies it as her.

Current Canadian NCDII legislation uses definitions of intimate image which do not focus on the issue of whether the individual is identifiable in the image. Instead, the legislation refers to a “person depicted in the image” with roots in the right to privacy such that the recording was in circumstances giving rise to a reasonable expectation of privacy. This anchoring of the cause of action to the concept of privacy more readily enables an interpretation of intimate image that includes non-identifiable recordings, because the right to dignity captured by privacy is most readily implicated in this type of disclosure.

Despite this apparent flexibility of the definition of intimate image in current Canadian NCDII legislation, the Working Group felt that these definitions are unclear. The Working Group concluded that the uniform act should explicitly provide that a complainant need not be identifiable to a third party in order to have a cause of action. It is enough if the person can prove to the court that they are the person depicted in the image.

Under the fast-track process set out in Section 4, time is of the essence to arrest further distribution of an image to the extent possible. The Working Group concluded that a NCDII victim should be able to seek relief under the act without having to wait until they are identifiable and the worst damage possible is inflicted.

Explicitly including unidentifiable persons within the scope of the act enables a cause of action for both reputational harms and invasions of privacy. It also recognizes that sexual identity and sexual objectification are at issue regardless of whether a victim is identifiable. There is no reason in principle to protect identifiable victims over unidentifiable victims since both can experience severe emotional distress from distribution of such an image.

Nearly Nude Images - The definition of “intimate image” includes a visual recording of an individual who is nearly nude where there was a reasonable expectation of privacy at the time the recording was made and, if the recording has been distributed, at the time it was distributed. In principle, such photos are similar to nude intimate images in terms of the blameworthy conduct and the harm caused by their disclosure. In practice, it would be preferable for similar acts to be captured under the same legal framework.

Reasonable Expectation of Privacy - The Working Group concluded that a reasonable expectation of privacy is a necessary element of the definition of “intimate image”. The intent is that the act target nearly nude images where a reasonable expectation of privacy exists (such as “upskirting”) but does not apply to nude or nearly nude images where a reasonable expectation of privacy does not exist (such as a baby in the bathtub or a woman wearing a bikini on a public beach).

The Working Group considered but rejected an alternative suggestion to define “intimate image” in relation to the term “quality of confidence” as is used in tort claims for breach of confidence. Breach of confidence is a narrower concept than privacy and its structure (confidential information, communicated in confidence, misuse) is rigid compared to reasonable expectation of privacy. NCDII will continue to evolve and the tort of privacy developing in Canada enables a broader conception (than confidence) that clearly engages with the mischief being addressed by the act.

Wholly Original Content - The Working Group felt that the definition of “intimate image” should not encompass wholly original content, such as nude drawings or paintings of individuals, for the remedies contemplated under this act. For such content, other causes of action might be suitable, such as invasion of privacy, defamation or intentional infliction of emotional distress.

Differing Social and Cultural Norms – As a result of Canada’s diverse population and pluralistic traditions, individuals may hold a variety of views on what images may be considered “intimate”. For example, a photo taken by the spouse of woman not wearing a niqab or hijab, which was intended to remain private, may be considered by the woman to be intimate. The Working Group was sympathetic to the fact that the act does not offer a remedy in such cases but concluded that it was not possible in this targeted legislation to accommodate all conceptions of intimacy. Claims that do not involve “intimate images” as defined in the act may be pursued through general privacy legislation or common law privacy torts where such laws exist.

“**respondent**” means a person responding to an application made under section 4 or a claim made under section 5.

Reasonable expectation of privacy

- 2** For certainty,
- (a) an individual may have a reasonable expectation of privacy in an altered image, and
 - (b) a reasonable expectation of privacy is not lost by reason only of consent to distribution of the intimate image.

COMMENT: Section 2 clarifies the intent of the legislation that a reasonable expectation of privacy (a) may exist in an altered image (such as a “deep fake”), and (b) is not lost only by an individual consenting to the distribution of a intimate image.

It is important to make explicit in the act that consent to the distribution of an intimate image does not, by itself, affect a complainant’s reasonable expectation of privacy in the image. This is because a reasonable expectation of privacy at the time of recording and/or distribution of the image is an element of the definition of “intimate image”. Subsection 2(b) clarifies that an intimate image will remain an intimate image for the purposes of the act regardless of consent to distribution. Therefore, an individual may revoke consent to the distribution of an intimate image and still seek relief under section 11 of the act.

Torts

- 3** A person who distributes or threatens to distribute an intimate image commits a tort that is actionable without proof of damage.

COMMENT: Section 3 creates statutory torts similar in form to the tort created under the Uniform Privacy Act (Tort) (1994). A strict liability tort is actionable under section 4 and a fault-based tort is actionable under section 5. Distribution is defined in terms of making images available to others either by way of transmission, publication or otherwise. Both torts include threats to distribute intimate images in addition to the actual distribution of them.

Application for declaratory and injunctive relief

- 4** (1) An individual depicted in an intimate image may apply to the court for relief under this section.
- (2) Subject to section 6, if the applicant satisfies the court that
- (a) the image is an intimate image of the applicant, and
 - (b) the respondent distributed the intimate image,
- the court may do any or all of the following:
- (c) declare the distribution to have been unlawful;

- (d) order the respondent to make every reasonable effort to make the intimate image unavailable to others, including by
 - (i) destroying all copies of the intimate image in the respondent's possession or control,
 - (ii) having the intimate image removed from any platform operated by an internet intermediary, and
 - (iii) having the intimate image de-indexed from any search engine;
 - (e) order an internet intermediary or other person or organization to make every reasonable effort to remove or de-index the intimate image;
 - (f) order the respondent to pay nominal damages to the applicant;
 - (g) make any other order the court considers just and reasonable in the circumstances.
- (3) Subject to section 6, if the applicant satisfies the court that
- (a) the image is an intimate image of the applicant, and
 - (b) the respondent threatened to distribute the intimate image,
- the court may do any or all of the following:
- (c) declare the threat to have been unlawful;
 - (d) enjoin the respondent from distributing the intimate image;
 - (e) order the respondent to make every reasonable effort to make the intimate image unavailable to others, including by destroying all copies of the intimate image in the respondent's possession or control;
 - (f) order the respondent to pay nominal damages to the applicant;
 - (g) make any other order the court considers just and reasonable in the circumstances.

COMMENT: Section 4 reflects the primary objective of the act by creating a fast-track cause of action that can be heard expeditiously by way of an application for declaratory and/or injunctive relief. A jurisdiction should consider which tribunal in that jurisdiction would best achieve this objective. Relief under this section is obtained by an application as distinct from a claim under section 5 which sets out a more traditional form of relief in tort.

Section 4 requires the applicant to satisfy the court that (a) the image is an intimate image, as defined, of the applicant, and (b) the respondent distributed, as defined, (or threatened to distribute) the intimate image.

Section 4 sets out relief in respect of both actual and threatened distribution of an

intimate image in keeping with the definition of the tort in section 3.

There is no need for a complainant to prove that they suffered injury or harm in order to establish either the fast-track tort (section 4) or more traditional tort (section 5). The Working Group adopted this approach for two reasons:

First, the nature of the wrong is at least arguably an infringement of the right not to have such images published and is akin to a breach of the right to privacy. Even in the absence of any suffering or loss on the part of the complainant, there is an infringement of a right. Therefore, no proof of injury should be required.

Second, as a practical matter, injury, at least in the form of emotional distress, will effectively always be present. Requiring the complainant to prove this is unnecessarily burdensome.

Under the fast-track procedure in section 4, the court may make a declaration that the distribution was unlawful. It may order the respondent to make every reasonable effort to make the intimate image unavailable to others by destroying all copies of the intimate image in the respondent's possession or control, having the intimate image removed from any internet intermediary to which the respondent provided the intimate image, and having the URL page of the intimate image de-indexed from any search engine. The court may also order an internet intermediary or other person or organization to make every reasonable effort to remove or de-index the intimate image. Finally, the court may order the respondent to pay nominal damages to the applicant and make any other order the court considers just and reasonable in the circumstances.

A court order under section 4 will allow an applicant or respondent, depending on the order, to seek takedown or de-indexing of the content directly from internet intermediaries hosting the content, by sending the order to counsel at the intermediary's corporate office. Most internet intermediaries prohibit users from posting unlawful content. Therefore, a court order under section 4 will serve as compelling evidence that the intermediary's terms of service have been breached.

The provision for orders to be made against internet intermediaries or other non-parties to the application is consistent with Canadian common law as set out in *Google Inc. v. Equustek Solutions Inc.* 2017 SCC 34.

In the Working Group's opinion, most internet intermediaries are likely to comply with takedown or de-indexing orders issued under this act. The torts created by the act are narrow in scope and, in our view, compliant with the *Charter* and international human rights principles. As a matter of practice, most major intermediaries comply with local law. Therefore, there is no reason to believe that these companies will resist content removal.

Since the main focus of section 4 is the takedown or de-indexing of an intimate image, damages awards contemplated under this provision are meant to be nominal. Section 5 of the act provides a procedure following along the lines of traditional tort actions for more robust damages for the distribution of intimate images. This is appropriate since under section 4, there is no fault requirement, that is, there is no obligation to prove that the respondent knowingly or intentionally distributed the image.

The Working Group concluded that the act should not mandate particular details to be included in injunctive orders (such as a time frame for compliance by a respondent or intermediary). It was agreed that remedial flexibility should be left to the court.

In terms of limitation periods, it is intended that discoverability is the trigger, and jurisdictions determine what limitation period would apply.

Claim for damages

- 5 (1) An individual depicted in an intimate image may claim relief from the court under this section.
- (2) Subject to section 6, if the claimant satisfies the court that
- (a) the image is an intimate image of the claimant, and
 - (b) the respondent distributed the intimate image,
- the court may do any or all of the following:
- (c) declare the distribution to have been unlawful;
 - (d) order the respondent to make every reasonable effort to make the intimate image unavailable to others, including by
 - (i) destroying all copies of the intimate image in the respondent's possession or control,
 - (ii) having the intimate image removed from any platform operated by an internet intermediary, and
 - (iii) having the intimate image de-indexed from any search engine;
 - (e) order an internet intermediary or other person or organization to make every reasonable effort to remove or de-index the intimate image;
 - (f) order the respondent to pay damages, including compensatory, aggravated and punitive damages;
 - (g) make any other order the court considers just and reasonable in the circumstances.
- (3) Subject to section 6, if the claimant satisfies the court that
- (a) the image is an intimate image of the claimant, and
 - (b) the respondent threatened to distribute the intimate image,
- the court may do any or all of the following:
- (c) declare the threat to have been unlawful;

- (d) enjoin the respondent from distributing the intimate image;
- (e) order the respondent to make every reasonable effort to make the intimate image unavailable to others, including by destroying all copies of the intimate image in the respondent's possession or control;
- (f) order the respondent to pay damages, including compensatory, aggravated and punitive damages;
- (g) make any other order the court considers just and reasonable in the circumstances.

COMMENT: The wording of section 5 is identical to the wording of section 4 except that section 5 is framed as a claim for relief from the court (as distinct from section 4 which provides for an application for relief from the court) and the court can award a much larger array of damages including general, special, aggravated and punitive damages. Section 5 is designed to be the traditional type of tort claim and a jurisdiction should consider what tribunal would be most appropriate for such a claim.

Section 5, like section 4, sets out relief in respect of both actual distribution of an intimate image and threatened distribution of an intimate image, again in keeping with the definition of the tort in section 3.

As to the various heads of damages, it was thought that considerations relevant to general damages should include whether or to what degree the plaintiff is identifiable, the nature of the image, the nature and size of the audience to whom the image was distributed, and the effect on the plaintiff (embarrassment, distress etc.). This need not be an exhaustive list.

At common law, aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety. This is notwithstanding that they may duplicate either compensatory damages or punitive damages or both and lead to overcompensation. Upon reflection it was decided that the act allow for an award of aggravated damages.

Further, it was expected that punitive damages will often be awarded in these cases and, indeed, may often constitute a majority of a damages award. The usual rules governing punitive damages should apply. It was felt too that special damages should, of course, be recoverable where they can be established.

It is intended that a person be able to make an application under section 4 as well as a claim under section 5. As noted, section 4 is primarily aimed at a fast-track application to have intimate images taken down from an internet intermediary, whereas section 5 has a similar aim but also an ability to obtain much greater damages than under section 4.

Again, in terms of limitation periods it is intended that discoverability is the trigger, and jurisdictions determine what limitation period would apply.

Burden of proof – reasonable expectation of privacy

- 6 In an application under section 4 or a claim under section 5 the respondent has the burden of proving that the applicant or claimant, as applicable, did not have a reasonable expectation of privacy in the image at the time the recording was made and, if the recording has been distributed, at the time it was distributed.

COMMENT: A complainant must have had a reasonable expectation of privacy in an image at the time it was recorded and/or distributed, in order for the image to be actionable under the act. However, in keeping with the remedial purpose of the legislation, the burden of proof is on the respondent to rebut the inference that a reasonable expectation of privacy existed. This provision is intended to make it easier for NCDII victims to obtain relief. It may also serve to discourage the distribution of intimate images without clear permission to do so.

Publication ban

- 7 In an application under section 4 or a claim under section 5, as applicable, the court must order a ban on publication of the name of the applicant or claimant, as applicable, or other information likely to identify the applicant or claimant, unless the applicant or claimant requests that there not be a publication ban.

COMMENT: An important ancillary part of either an application under section 4 or a claim under section 5 is the requirement that the complainant's identity be protected by a publication ban unless the complainant requests otherwise. This is an unusual but necessary provision to achieve the act's remedial purpose. Open court proceedings to remove intimate images from the internet can have the perverse effect of further publicizing the content and increasing harm to the victim. The Working Group is concerned that victims of NCDII would be unwilling to avail themselves of the act in these circumstances, thereby defeating the purpose of the act and denying victims access to justice. A presumptive publication ban is also consistent with the underlying goal of providing victims with a streamlined, quick and inexpensive mechanism for seeking relief.

The Working Group spent a considerable amount of time in arriving at the wording of this section. Members weighed all of the competing factors such as: should the ban be automatic; should it be by way of application; and whether there should be a special provision for minors. In the end the Working Group settled on the proposed wording as balancing all of the factors relevant to the ordering of a ban.

The Working Group recognizes the fundamental importance of the open court principle generally. However, the presumptive publication ban in section 7 is specifically and narrowly tailored and essential to achieve the act's remedial purpose and to accommodate *Charter* principles.

Internet intermediaries protected from legal suit

- 8 (1) No application or claim may be brought against an internet intermediary if the internet intermediary has taken reasonable steps to address unlawful distribution of intimate images in the use of its services.
- (2) Nothing in this section limits the court's authority under section 4 (2) or 5 (2) to make an order against an internet intermediary or other person or organization.

COMMENT: The Working Group considered the question of whether internet intermediaries would be caught under the act. Based on the definition of distribution they likely would. The question arose as to whether it is appropriate for intermediaries to be liable for distributing intimate images in narrow circumstances.

The Working Group concluded that liability on the part of intermediaries as defined in the act would not be appropriate. Nor should intermediaries generally be named as parties and required to defend applications or claims under the act. This is not the purpose of the legislation and internet intermediary liability would have important implications for freedom of expression. However, it is important that intermediaries be responsible as third parties to carry out takedown and de-indexing orders issued under the act.

Therefore, the act provides that no application or claim may be brought against an internet intermediary if the internet intermediary has taken reasonable steps to address unlawful distribution of intimate images in the use of its services. But it was left that nothing in this section would limit the court's authority under section 4 (2) or 5 (2) to make an order against an internet intermediary.

The Working Group considered whether a "reasonable steps" threshold was sufficiently precise to define circumstances in which intermediaries should be protected from a legal suit. On balance, it was concluded that courts are familiar with the "reasonable steps" standard and it allows the necessary flexibility to adapt to technological change and evolving business models.

Defence to an application under section 4

- 9 A person is not liable under section 4 if the person proves that the person had the consent of the individual depicted in the intimate image to the distribution of the intimate image at the time when and to the extent that the intimate image was distributed by the person.

COMMENT: For section 4, the fast-track tort, the onus is on the respondent to prove that that person had the consent of the individual depicted in the intimate image to the distribution of the intimate image both, at the time when, and to the extent that, the intimate image was distributed by the person.

Consent in this context is a stricter test than in the context of the section 5 tort. In defending a section 4 application, only actual consent functions as a defence. An honest and reasonable belief that the person had the consent is insufficient. The logic is that where there is honest but mistaken belief in consent, an applicant should be able to get injunctive relief to get an image taken down. However, for damages in a section 5 proceeding, fault is required.

Defences to a claim under section 5

- 10** (1) A person is not liable under section 5 if the person proves that the distribution of the intimate image was made in any of the following circumstances:
- (a) the person did not intend to distribute the intimate image;
 - (b) the person had, or honestly and reasonably believed that the person had, the consent of the individual depicted in the intimate image to the distribution of the intimate image at the time when and to the extent that the intimate image was distributed by the person;
 - (c) the distribution was made in the public interest and did not extend beyond what was in the public interest.
- (2) Distribution of an intimate image is not made in the public interest solely because the individual depicted in the intimate image is a public figure.

COMMENT: For the traditional tort under section 5, a person otherwise liable under section 4, may prove:

- No intention to distribute the intimate image;
- The person had, or honestly and reasonably believed that the person had, the consent of the individual depicted in the intimate image to the distribution of the intimate image at the time when and to the extent that the intimate image was distributed by the person; or
- The distribution was made in the public interest and did not extend beyond the public interest.

Injunctive relief should be available regardless of the respondent's intention and even if there was an honest and reasonable belief in consent. However, under section 5, a more traditional tort proceeding for damages, fault is squarely at issue. Therefore, section 10 provides that an honest and reasonable belief in consent is a defence, as is a lack of intent to distribute as, for example, where someone carelessly loses a USB key or drops a photograph on the ground.

It should be noted that the defence of consent in both sections 9 and 10 focuses on whether the complainant consented to the distribution of the intimate image, assessed objectively. This is in contrast to some NCDII statutes that focus, instead, on the respondent's subjective *knowledge* as to the complainant's lack of consent or *recklessness* as to whether consent existed. Knowledge relates to fault and is distinct from the defence of consent. The Working Group prefers this simpler and clearer approach.

It is intended that distribution made in the public interest be broadly interpreted so long as that distribution does not extend beyond the public interest. The public interest would include such matters as law enforcement. It would also include distribution where the intent is to show that a distribution under the act has taken place (for example, a student disclosing to a teacher to assist in further investigations by the teacher).

Consent revocable

- 11 (1) If an individual depicted in an intimate image consents to distribution of the intimate image, and later revokes consent to distribution of the intimate image and communicates that revocation to a person who distributed the intimate image, the person who distributed the intimate image must make every reasonable effort to make the intimate image unavailable to others.
- (2) A person who does not make every reasonable effort under subsection (1) is liable for damages for any injury resulting from the failure to make that effort.

COMMENT: Consent once given can be revoked under the act. This provision is intended to address, among other things, the revenge porn scenario. For example, a woman may consent to limited distribution of an intimate image with her partner but change her mind once the relationship ends.

The Working Group decided that revocation of consent should impose on the respondent an obligation to make every reasonable effort to make the intimate image unavailable to others. Failure to do so could result in damages for any injury resulting from such failure.

Revocation of consent is consistent with the law of consent in tort generally. Consent to medical treatment may, for example, be revoked, as can consent to sexual contact. That consent is revocable may be implicit in the existing Canadian NCDII torts, though none make it explicit.

Subsection 2(b) of the act provides that consent to the distribution of an intimate image does not, by itself, affect a complainant's reasonable expectation of privacy in the image. Therefore, the image will remain an intimate image as defined by the act and revocation of consent will give rise to the relief in section 11. For example, a couple

may make a video for private use and have a reasonable expectation of privacy when the video is made. A woman may consent to her partner uploading the video to the internet but later change her mind. The video remains an intimate image and the woman would be able to seek takedown or de-indexing under section 11.

Rights and remedies not limited

- 12** The rights and remedies under this Act are in addition to any other right or remedy that may be available to an applicant, a claimant or a respondent.

COMMENT: Section 12 makes it clear that remedies under this act do not preclude any rights or remedies available to an applicant, a claimant or, indeed, a respondent.

Commencement

- 13** This Act comes into force on **[each jurisdiction to specify]**.

COMMENT: This is the standard form for the date of commencement for uniform acts.