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UNIFORM LAW CONFERENCE OF CANADA

NONCONSENSUAL DISCLOSURE OF INTIMATE IMAGES DISCUSSION PAPER

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Introduction

[1] The following document was prepared by the nonconsensual disclosure of intimate images (NDII) subject-matter experts, Emily Laidlaw and Hilary Young. It briefly sets out the justification for harmonized NDII legislation, the principles we believe should guide this exercise, a summary of existing legal models, and a list of issues that the project should address. In addition, it includes a chart comparing existing Canadian legislation. This document is intended to inform discussion at the ULCC August 2018 meeting in Quebec City.

1. Need for a Harmonized Legislative Approach

[2] There are two aspects to this question: the first is the need for legislation, as opposed to a common law approach. The second is the need for harmonization.

[3] With regard to the need for legislation, at present in the provinces without legislation there is uncertainty as to the unlawfulness of NDII at common law. While likely tortious throughout Canada, it is unclear whether it is an invasion of privacy, intentional infliction of nervous shock, breach of confidence or some other tort. It could also violate statutes (*e.g.* privacy, copyright).

[4] In addition to this uncertainty, existing wrongs, and especially invasion of privacy, are not ideally suited to dealing with NDII. They are complex, require a balancing of interests, and are hard to invoke without legal representation.

[5] Further, while NDII is also a crime in Canada, there are advantages of a civil recourse, which justify the creation of a tort. These include the remedies potentially available to complainants (*e.g.* technical solutions such as content takedown) and the control the complainant has over the litigation process.

[6] With regard to harmonization, there are several reasons why it should be sought. These torts are not geographically limited (*i.e.,* the internet is accessible world-wide). Having different rules apply simultaneously to the same conduct is problematic from a rule of law perspective, but also for practical reasons such as that it creates a risk of forum shopping and regulatory arbitrage. The recent Supreme Court of Canada decision in *Goldhar v Haaretz* suggests that several or all provinces might have jurisdiction over an act of NDII. To the extent that the substantive rules vary, plaintiffs may well select their forum based solely on these differences and defendants might capitalize on these differences to argue for a different forum. In our view, the above creates a hurdle to access to justice justifying harmonization.

[7] Another reason for harmonization is that, assuming NDII legislation speaks to the issue of internet intermediary responsibility (as, to varying extents, the Saskatchewan, Manitoba and Alberta statutes do), it would be burdensome to require intermediaries to comply with different requirements in different provinces. This hardship would be felt particularly by small and medium-sized intermediaries. For example, the law of New Brunswick might shield intermediaries from responsibility to remove an intimate image, or impose obligations, while the law of Ontario might not.

2. **Guiding Principles**

[8] The principles that the subject-matter experts propose to be guided by are as follows. All things being equal, a legislated NDII tort:

- should be simple;
- should be effective;
- should promote access to justice;
- should allow for quick content removal (in addition to other remedies);
- should reflect the emotional difficulty involved in commencing an NDII proceeding;
- should protect the plaintiff's privacy;
- should not unduly burden internet intermediaries;
- should take into account the gendered nature of the tort;
- should not unduly infringe freedom of expression;
- should serve as a deterrent; and
- should not rely on the creation of new government infrastructure in order to be effective.

3. Existing models

[9] Existing models for NDII liability, particularly Canadian ones, will inform the Committee's work. There are, broadly speaking, three types of approach in Canada and abroad. The first is to create no statutory torts, leaving NDII to the common law. The second is to create a broad statutory tort covering online harms or a large subset of them. A third is to create a statutory tort that explicitly addresses NDII. Although we briefly review each of these models, we quickly reject the first and second for reasons of both practicality and principle. We focus instead on different ways of approaching the third option, which we subdivide into models 3a and 3b.

[10] The first model is to deal with NDII under existing common law and statutory torts, especially privacy torts. This is the approach in several Canadian provinces and the United Kingdom. In Ontario, for example, NDII has been treated as a public disclosure of private facts, an intentional infliction of nervous shock and a breach of confidence.[i] We reject this model, however, for the same reasons we suggest the need for a harmonized legislative approach. There is a lack of certainty around applicable causes of action, the torts tend to impose significant burdens on plaintiffs and they tend to require extensive balancing of interests that may not be appropriate or necessary in a NDII context.

[11] The second model is to address NDII within general cyberbullying or internet harms legislation. As with the first approach, such laws deal with issues other than NDII. Unlike the first approach, the emphasis is on certain wrongs committed with the help of communications technology. Nova Scotia has taken this approach with its original *Cyber-Safety Act* (found to be unconstitutional). It now adopts a hybrid model in its new *Intimate Images and Cyber-protection Act*, which treats NDII differently than other kinds of cyberbullying. Australia's *Enhancing Online Safety Act* and New Zealand's *Harmful Digital Communications Act* are other examples of legislation targeted at online harms more generally. While there are advantages of this model, its broad approach makes it less appropriate for uniform legislation

and would require greater consideration of issues such as free speech than are likely necessary for more targeted legislation.

[12] The third model is to have legislation specifically targeted at non-consensual sexual content online. Most Canadian provinces that have legislated to date have adopted this model. Saskatchewan, Manitoba and Alberta have taken this approach as, it seems, will Newfoundland. (Nova Scotia does this as well to the extent that its statute treats NDII differently than cyberbullying generally.) This is also the model we recommend, as it has the advantage of tailoring procedures and remedies to the issue of non-consensual sexual content, which is in some ways simpler to deal with than other violations of privacy, which may involve extensive balancing of interests.

[13] There remains, however, an issue of scope. One possibility is to define the tort in terms of intimate images of identifiable people, as Saskatchewan, Manitoba and Alberta have done. The Uniform Law Commission also narrowly defines intimate image in its draft recommendations, focusing on visual representations (explicitly excluding drawings etc. due to First Amendment concerns) of identifiable individuals. We'll call this model 3a.

[14] There is a need to discuss whether the harm sought to be remedied by these torts should be framed *somewhat* more broadly in order to capture changes in technology and wrongs similar to NDII but that do not involve images of identifiable people. We'll call this model 3b. Consider two examples. In the first, upskirting images (pictures taken up a woman's skirt without her knowledge) are posted to the internet. Assuming they do not identify the plaintiff, this conduct is not captured by model 3a, which is limited to images of *identifiable* plaintiffs. In the second example, the defendant posts information on a site pretending to be the plaintiff, inviting strangers over for free rough sex and providing the plaintiff's home address. The underlying sexualized harm is arguably similar to that with NDII, but again the conduct would not constitute NDII under model 3a because it does not involve an *image* of the plaintiff. Thus, model 3b is considerably narrower in scope than model 2, but broader than 3a in that it allows for harms similar to NDII, but not requiring an image of an identifiable plaintiff. Its advantages include flexibility and not being limited to one technology. Its primary disadvantage is that it may be difficult to define this scope without becoming too broad.

[15] No legislation of which we are aware follows model 3b.

4. Issues to be Considered

[16] Some issues to be considered are:

a) **Scope**: whether to take a broader approach or one narrowly targeted at NDII; should the focus be only on images?; possible overlap with criminal law; definite overlap with privacy and IP law; women only?; adults only?
b) **type of court/proceeding**: superior v. small claims v. ADR; application v. action
c) **nature of the substantive wrong**: fault standard; lack of consent required?; harm required?; identifiable plaintiff required?; definition of intimate image; based on expectations of privacy?; definition of distribution, application to downstream sharing…
d) **defences**: public interest?; limitations?
e) any **presumptions/reverse onuses**

f) **internet intermediary responsibility/liability**: any obligations imposed on intermediaries; when, if ever, they're liable under the tort
g) **parental liability:** some legislation limits parental liability for children's acts
h) **anonymity**: publication bans?; if so, presumed?
i) **Remedies**: re: damages, specify the relevant criteria as in NS leg?; caps?; relation to typical damages in privacy torts & defamation; re: injunctions and other takedown orders, when available?; how quickly?; defendant v intermediary's responsibility?; other kinds of relief, e.g. declaratory orders?; different rules for takedowns than for damages?
j) **Jurisdiction**: need for special rules to avoid forum shopping/avoid uncertainty over who has jurisdiction and who is FNC?
k) provision for **review of legislation**?
l) Connection between this legislation and any **supports for plaintiffs**

[17] Of these, we believe the most difficult will be: setting the scope, determining the fault standard; constructing takedown mechanisms that will be effective in different jurisdictions; and ensuring quick and inexpensive access to justice. Somewhat less difficult is the issue of how to treat those who subsequently share posted images.

5. Next Steps

[18] The next steps are to discuss the project and its scope at the August 2018 ULCC meeting. If the project is approved, a working group will begin reviewing and discussing issues identified in this report, with feedback from the ULCC August 2018 conference. Members will prepare a comprehensive policy paper for discussion at the 2019 ULCC conference. The final stage would be to incorporate feedback and draft model legislation with explanatory notes.

Template Canadian legislation

**Newfoundland and Labrador introducing legislation Fall 2018*
**Template is focused on Canadian legislation, but comparison of other legislation, in particular Australia and New Zealand frameworks, will be undertaken later.*

<table>
<tr><th></th><th>Alberta</th><th>Saskatchewan</th><th>Manitoba</th><th>Nova Scotia</th><th>Brief comparison</th></tr>
<tr><td>Definition of intimate image</td><td colspan="4">“intimate image” means a visual recording of a person made by any means, including a photograph, film or video recording,
(i) in which the person depicted in the image
(A) is nude, or is exposing his or her genital organs or anal region or her breasts, or
(B) is engaged in explicit sexual activity,
(ii) which was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of that image, and
(iii) 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;
AB s. 1(b); SK s. 7.1; Man s. 1; NS s. 3(f)</td><td>Identical</td></tr>
<tr><td>Definition of distribution</td><td colspan="4">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.
AB s. 2; SK s. 7.3(2); Man s. 1(2); s. 3(d)</td><td>Identical or virtually identical</td></tr>
<tr><td>Reasonable expectation of privacy</td><td colspan="4">Reasonable expectation of privacy not lost if consented to another person recording the image or shared it with another provided the other person knew or ought reasonably to have known the person depicted in the image did not consent to further distribution.
AB s. 5; SK s. 7.4; Man s. 12; NS s. 4</td><td>Similar</td></tr>
<tr><td>Public Interest Defence</td><td colspan="4">It is a defence if the distribution of the intimate image is in the public interest and does not extend beyond what is in the public interest.
AB s. 6; SK s. 7.6; Man s. 13; NS s. 7</td><td>AB, SK, Man identical; NS substantively identical.</td></tr>
<tr><td>Tort basis of cause of action</td><td colspan="3">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 is reckless as to whether or not that person consented to the distribution, commits a tort against that other person.
AB s. 3; SK s. 7.3; Man s. 11(1)</td><td>No. Provides that an individual whose intimate image was distributed without consent or is the victim of cyber-bullying, or if a minor, his/her guardian, may apply to the Court for an order (see remedies below). NS s. 5

Preserves right of action under common law or by statute. NS s. 10</td><td>Man and AB identical; SK substantively the same; NS different.</td></tr>
</table>

				Identifies factors to consider in making an order (repetition, vulnerability, intention, extent of distribution etc.) **NS s. 6(7)**		
Proof of Injury	An action for distribution of an intimate image without consent may be brought without proof of damage. **AB s. 4; SK s. 7.3(3); Man s. 11(2)**					AB, SK, Man virtually identical. NS legislation silent.
Remedies	The court may award damages, order the defendant to account for any profits they have accrued resulting from the distribution of the intimate image and issue an injunction on such terms that is appropriate in the circumstances. **AB s. 7; SK s. 7.7; Man s. 14; NS ss. 6(3) & (4)**					All provinces offer identical remedies. NS provides for additional remedies.
Publication Ban	Publication ban of identifying information if in the interests of justice. **SK s. 7.8; Man s. 15**			Mandatory Publication ban for minors. **NS s. 8(1)** Upon applicant request, publication ban of identifying information (intimate images). **NS s. 9(1)**		Some form of publication in SK, Man and NS. AB legislation silent.
Parental Liability	Limits liability of parents unless the parent directly participated in the distribution. **AB s. 8**					AB[ii]
Reverse Onus		Distribution is presumed not to have been made with the consent of the person depicted in the image; defendant must establish that he/she had reasonable grounds to believe he/she had ongoing consent for distribution of that intimate image. **SK s. 7.5**				SK
Agency			Minister may designate a director to oversee services available to victims, including by an authorized agency. **Man ss. 2-10.** Current designated agency is the Canadian Centre for Child Protection.	Minister may designate agency (currently CyberSCAN) to provide information and education, advisory services to public bodies, voluntary dispute		Man and NS both task an agency or appointed Commissioner in regulatory role.

			Support provided includes information or assistance about technical solutions, dispute resolution, and legal remedies. Also available to individuals who believe their intimate image is *about* to be distributed without their consent. **Man s. 3**. Includes power to send written notices to the image possessor. **Man s. 4**		resolution service. **NS s. 12(1)**	
Small Claims			Removes requirement that all actions under the *Privacy Act* must be heard in QB paving the way for an action in Small Claims court. **SK s. 4**			SK
Cyberbullying				Scope of NS legislation wider – addresses both cyberbullying and non-consensual distribution of intimate images.		Nova Scotia

[i] *Doe 464533 v N.D.*, 2016 ONSC 541, although this decision was set aside on a motion to set aside default judgment.

[ii] Note that s. 3(2) of Nova Scotia's repealed *Cyber-Safety Act* and s. 2(2) of a private member's bill in Manitoba, Bill 214, the *CyberBullying Prevention Act*, proposed holding parents liable for the conduct of child defendants.