

DEEPPFAKES: CUTTING-EDGE, CUTTING RIGHTS!

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Introduction to AI, AI image generator, Deepfakes

This report examines the threats and abuses posed by AI-generated tools, particularly deepfake technology, as highlighted by public incidents of Non-Consensual Disclosure of Intimate Images (“**NCDII**”) online. It will explore the detrimental effects of deepfake technology and outline the legal frameworks available to prosecute individuals who share intimate images without consent in BC, Canada.

What is AI?

The definitions of Artificial Intelligence (“**AI**”) is a truly transformative technology with a proliferation of definitions. The Organisation for Economic Cooperation and Development (**OECD**) has defined AI as “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.”¹

According to the **OECD**, AI can use machine or human inputs to:

- perceive real and/or virtual environments
- abstract such perceptions into models through analysis in an automated manner
- use model inference to formulate options for information or action

AI and its impact are seen across industries, with image generation being a notable area of advancement. Yet, it also presents considerable risks to the privacy of personal images.

¹ Florian Martin-Bariteau & Teresa Scassa, “Introduction” in Florian Martin-Bariteau & Teresa Scassa, eds., **Artificial Intelligence and the Law in Canada** (Toronto: LexisNexis Canada, 2021), page 1, 2.

What is AI generated image?

AI generated image is a new image produced by AI generative models without human intervention. New images are created based on a set of input parameters or conditions. By using machine learning algorithms, AI image generators can absorb vast datasets of images and generate new images that resemble in style and content.

DALL-E, a **GPT** specialized AI image generator created by **OpenAI**, can create an image from scratch from a text description.² At present, the number of popular AI image generators is over 50.

What are Deepfakes?

Deepfakes are realistic but fake videos where someone appears to be in a video they were never actually part of. Deepfake technology uses AI to swap one person's face in a video with another's by employing biometric data collected from images of that person's face.

For malicious purposes, Deepfakes have been used widely to create non-consensual sexual videos of women. Open source deepfake technology allow individuals with basic programming knowledge and photos of the target produce convincing fake video at home.

The trend gained attention with the spread of fake adult videos of celebrities on platforms, highlighting the issue of consent and challenges of detection.³

The harm of Non-Consensual Sexual Deepfakes

Women are the main targets of non-consensual sexual deepfakes, disproportionately subject to the associated harm.

These realistic videos risk the sexual autonomy of depicted women by taking away their control over how their sexuality and bodies are presented, effectively making them tools for the creator's own malicious purposes.

² OpenAI GPT Image Generator, available at < <https://chat.openai.com/g/g-pmuQfob8d-image-generator> >, retrieved on 2023-12-01.

³ Jane Bailey, Jacquelyn Burkell, Suzie Dunn, Chandell Gosse & Valerie Steeves, "AI and Technology Facilitated Violence and Abuse" in Florian Martin-Bariteau & Teresa Scassa, eds., **Artificial Intelligence and the Law in Canada** (Toronto: LexisNexis Canada, 2021), ch. 10 page 4.

The women whose faces are shown in deepfake videos experience tangible harm including fear, anxiety, depression, humiliation, a diminished sense of self-determination, and a significant invasion of privacy. Those victims are exploited without their consent and beyond their control.⁴

Public Figures as victims of deepfakes

Donald Trump

Donald Trump, the former President of U.S, was a victim of deepfake videos. Flemish Socialist Party in Belgium created a fake video of Trump purportedly urging the country to **exit** the Paris climate agreement. This deepfake was designed not to deceive but to spark debate on climate change. The video features Trump criticizing Belgium's climate policy and ends with a call to action for renewable energy and public transport investment.

Despite the video's intentions, some viewers did not realize it was a fabrication, highlighting the persuasive power of deepfakes. This case illustrates the dual-edged sword of deepfake technology: while it can engage people in important issues, it also harbors the potential for confusion and misinformation if not clearly labeled as artificial.⁵

Taylor Swift

The most recent public figure victim is Taylor Swift, one of the most influential Singer in the world. The explicit deepfake images of Swift have not only violated her privacy but have also spotlighted the broader implications of such technology, particularly for survivors of sexual abuse.

This concern coincides with British Columbia's implementation of the Intimate Images Protection Act, which directly addresses deepfake imagery and strengthens the legal framework to prosecute those sharing intimate images without consent. This move is a step towards holding creators and social media platforms accountable for their roles in disseminating harmful content.⁶

⁴ Jane Bailey, Jacquelyn Burkell, Suzie Dunn, Chandell Gosse & Valerie Steeves, "AI and Technology Facilitated Violence and Abuse" in Florian Martin-Bariteau & Teresa Scassa, eds., **Artificial Intelligence and the Law in Canada** (Toronto: LexisNexis Canada, 2021), ch. 10 page 5.

⁵ Luke Hurst, AI deepfakes are being weaponised in the race for US president - and Trump is the latest target, Euronews, 2023-06-09, available at < <https://www.euronews.com/next/2023/06/09/ai-deepfakes-are-being-weaponised-in-the-race-for-us-president-and-trump-is-the-latest-target>>, retrieved on 2024-03-15.

⁶ Pornographic deepfakes of Taylor Swift sparked widespread concern. BC introduces the Intimate Images Protection Act to address deepfake images, Battered Women's Support Services, 2024-01-29, available at < https://www.bwss.org/pornographic-deepfakes-of-taylor-swift-sparked-widespread-concern-bc-introduces-the-intimate-images-protection-act-to-address-deepfake-images/?mc_cid=9f235b8cfb&mc_eid=9f50febb83>, retrieved on 2024-03-15.

Legal protections in British Columbia for deepfake victims

Civil Resolution Tribunal and *Intimate Image Protection Act*

In British Columbia, the Civil Resolution Tribunal (“**CRT**”), part of the British Columbia public justice system, offers an online accessible, affordable way to resolve disputes without needing a lawyer or attending court.⁷

The Intimate Images Protection Act (“**IIPA**”), passed on March 6, 2023, and came into force on January 29, 2024, giving the CRT jurisdiction to resolve claims about non-consensual sharing of intimate images, including altered images like deepfake.⁸

What is an intimate image?⁹

IIPA defines an image, video or livestream is intimate if it looks like you are:

- Nude or nearly nude, or Engaging in a sexual act, or
- Exposing your genital organs, anal region, or breasts

The image, video, or livestream:

- Doesn't have to show your face or be recognizable as you
- Can be real or altered

This could include situations like:

- Images taken in a sexual context, like a selfie or a sex tape
- Images of sexual activity, but not nude or nearly nude
- Images taken in a non-sexual context, like a bathroom
- Upskirt pics or hidden cameras
- **Altered images that look like you, like a realistic Photoshop or deepfake.**

⁷ BC Civil Resolution Tribunal, available at <<https://civilresolutionbc.ca/>>

⁸ BC Civil Resolution Tribunal, “Intimate Images,” available at < <https://civilresolutionbc.ca/solution-explorer/intimate-images/> >, retrieved on 2023-12-01.

⁹ *Ibid.*

What does it mean by sharing without my consent?¹⁰

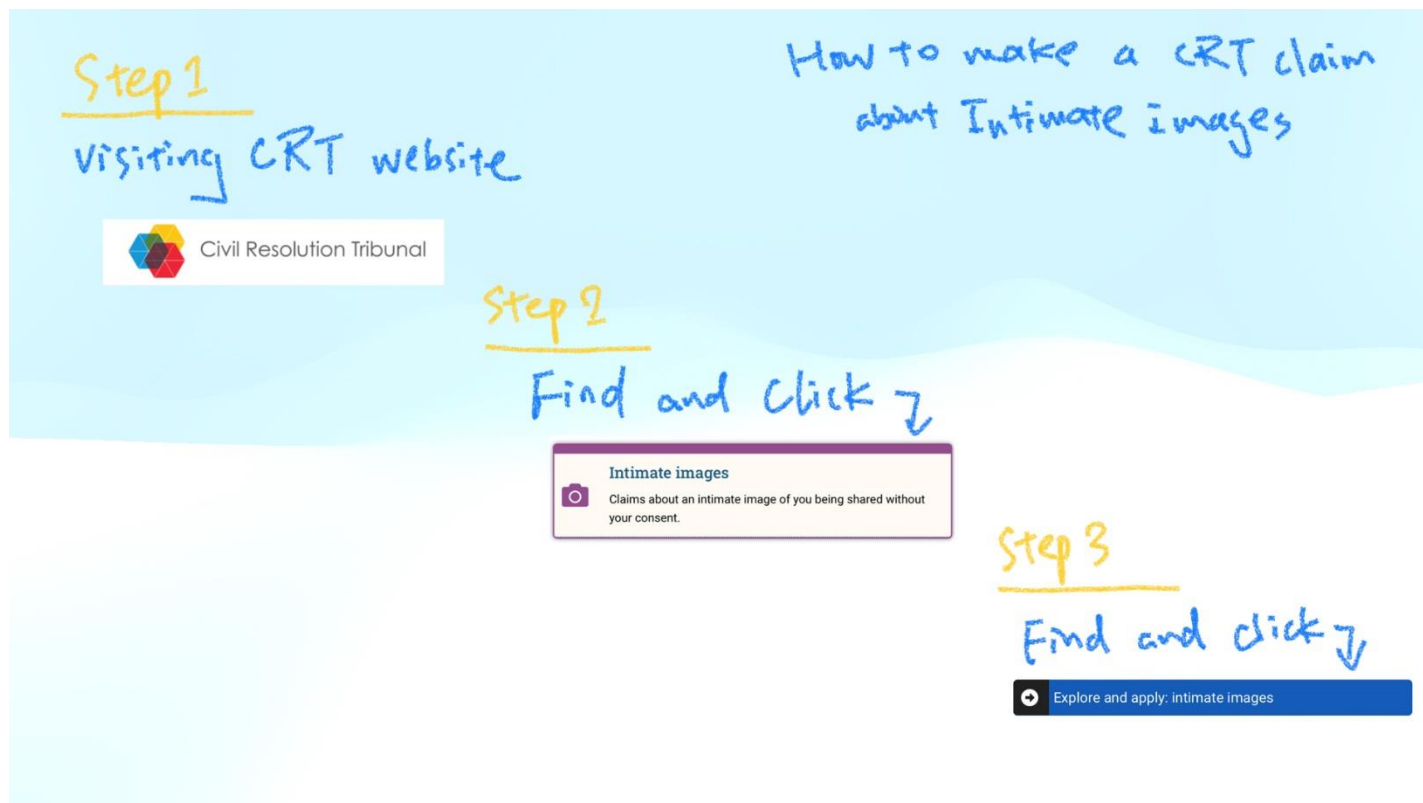
If someone shares your intimate image with other and you did not agree to that, it is a violation of your privacy, and it is against the law under the **IIPA**, and may also be a criminal offence under the **Criminal Code** of Canada.

Under following circumstances, your intimate images are shared without your consent, and this is not your fault:

- Someone you're in a relationship with shared or threatened to share an intimate image of you
- "Sextortion" where someone makes demands and says if you don't obey, they'll send your intimate image to someone or post it online
- Being pressured or bullied in some other way into taking an intimate image
- Finding intimate images of yourself online that you didn't upload yourself

How to make a claim?

You can make a claim through following instructions on the CRT's [website](#):



Step 1
visiting CRT website

How to make a CRT claim about Intimate Images

Civil Resolution Tribunal

Step 2
Find and click ↓

Intimate images
Claims about an intimate image of you being shared without your consent.

Step 3
Find and click ↓

Explore and apply: intimate images

¹⁰ BC Civil Resolution Tribunal, "Intimate Images," available at < <https://civilresolutionbc.ca/solution-explorer/intimate-images/> >, retrieved on 2023-12-01.

What claim options are offered by CRT?

If the sharing or threat happened on or after March 6, 2023, you could:¹¹

Type of Claim	Description	Recipient of Payment/Penalty
Intimate Image Protection Order	A " take-down " order requiring the removal of the image or preventing its share. Legal and must be followed.	
Damages	Compensation for harm caused by the sharing or threats of sharing the image.	Payable to the individual
Penalty for Non-Compliance with Intimate Image Protection	A financial penalty imposed if someone does not comply with an intimate image protection order.	Payable to the BC government

For people under 19 who wants to make a claim to CRT?¹²

Age Group	Representation Requirement	Additional notes
Under 12	Only through a litigation guardian (usually a parent or legal guardian).	
12 or 13	Must be represented by an adult you trust (not necessarily a parent).	This representative has the authority to speak to the CRT on your behalf. Provide name and contact info of representative.
14 or Over	Can make a claim on your own or have an adult you trust represent you.	If choosing representation, they have the authority to speak on your behalf. Provide name and contact info of representative.

Note: A litigation guardian is a representative for a person too young to participate in the CRT process, or for an adult with impaired mental capacity. A litigation guardian is usually a parent or other legal guardian.

¹¹ BC Civil Resolution Tribunal, "Frequently Asked Questions," available at < <https://civilresolutionbc.ca/solution-explorer/intimate-images/> >, retrieved on 2023-12-01.

¹² *Ibid.*

How can CRT help me?¹³

Issuing Legal orders

The **CRT** can make legal orders that are enforceable in court. Under the **IIPA**, the **CRT** can issue protection orders that require an intimate image be **deleted, de-indexed, and/or removed from** a website or social media platform. If a person or internet platform doesn't comply with a protection order, you can ask the **CRT** to order an **administrative penalty**. Administrative penalties are payable to government. You can also ask the **CRT** to order someone pay compensation (known as "damages") of up to \$5,000.

Claims to Court vs Claims to **CRT**

You can make a claim for damages (compensation):

- At the CRT for up to \$5,000,
- At the BC Provincial Court for \$5,000 - \$35,000,
- At the BC Supreme Court for any amount.

But if you make a **CRT** claim for damages, you **abandon** your right to a claim for any amount over \$5,000.

You can make a claim for an **administrative penalty only** at the **CRT**, not a court.

If you need support and help, you can call the following services

Service	Description	Toll Free at
Intimate Images Protection Service	The BC government's Intimate Images Protection Service offers emotional support, general information and referrals. They may also be able to help you with the CRT process and sending intimate image protection orders. If you're under 19, they might need you to have a parent or guardian involved when you use their services, but they won't contact your parent or guardian without your permission.	1-833-688-4381
Society for Children & Youth BC	Society for Children & Youth BC offers legal support if you're under 19 for problems related to family law, child protection, a breach of your human rights and many other legal issues.	1-877-462-0037
VictimLinkBC	VictimLinkBC is available 24/7 for confidential, multilingual service across BC and the Yukon.	1-877-462-0037

¹³ BC Civil Resolution Tribunal, "Frequently Asked Questions," available at < <https://civilresolutionbc.ca/solution-explorer/intimate-images/> >, retrieved on 2023-12-01.

Canada's proposed law, Bill C-63, to guard against online harms¹⁴

Prime Minister Justin Trudeau's government has tabled its long-awaited legislation to better protect Canadians, and particularly youth, against online harms.

Bill C-63 proposes to:

1. **Target specific types of harmful content**, especially *NCDII* including deepfakes that “sexually victimizes a child or revictimizes a survivor.”
2. **Add fresh responsibilities for online platforms** that urge them to reduce exposure to harmful content by “continuously” assessing risks, developing mitigation strategies and providing tools for users to flag harmful content.
3. **Create a new regulator and a new ombudsperson**, who have the power to order the removal within 24 hours of images share without an individual's consent.
4. **Strengthen reporting around child pornography**. The government plans to create authority to centralize mandatory reporting of child pornography through a designated law enforcement body. It would also extend to 5 years the current 2 years limitation period of prosecution.

Our expectations of privacy in different circumstances

Under the *IIPA*, besides original intimate images defined in above section, there is a reasonable expectation of privacy in:

- An intimate image that has been altered, and
- An intimate image in which the individual is not identifiable

Canadian common law also established detailed analysis on reasonable expectation of privacy in the case *R v Jarvis*.

In *Jarvis*¹⁵, an English teacher was charged with voyeurism for secretly recording female students without their consent, focusing on their faces, upper bodies, and breasts with a camera hidden in a pen. This behavior was against school board policy. The charge, under s. 162(1)(c) of the Criminal Code, hinges on making recordings in situations where individuals expect privacy, for a

¹⁴ Stephanie Taylor, Five things to know about Canada's proposed law to guard against online harms, ctnnews, 2024-02-27, available at <<https://www.ctvnews.ca/politics/five-things-to-know-about-canada-s-proposed-law-to-guard-against-online-harms-1.6785283>>, retrieved at 2024-03-17.

¹⁵ R. v. Jarvis, 2019 SCC 10 (CanLII), [2019] 1 SCR 488, headnote, <<https://canlii.ca/t/hxj07>>, retrieved on 2023-11-27.

sexual purpose. The teacher admitted to making the recordings, leaving the court to decide if the students had a reasonable expectation of privacy and if the recordings were for a sexual purpose.

The trial judge affirmed the privacy expectation but acquitted the teacher, doubting the sexual motive. The Court of Appeal found this acquittal wrong but agreed on the privacy aspect, maintaining the acquittal. On appeal, it was decided that the recordings indeed violated the students' expectation of privacy, leading to the teacher's conviction.

In the analysis of **Jarvis**, Supreme Court of Canada (**SCC**) gave examples of some expectation of privacy in “public” places:¹⁶

It is reasonable for us to retain certain level of expectation of privacy with respect to observation or recording in a public or semi-public space. The following chart summarizes the examples given by the **SCC** in **Jarvis** indicating that whether observation or recording would generally be regarded as an invasion of privacy depends on a variety of factors.

Circumstances	Have Reasonable expectation of privacy?	Privacy will be violated if:
In Sexual activity with another person	Yes	that other person, without her knowledge, video recorded the two of them engaging in the activity.
	With consent to film sexual activity,	There is no waiver of an expectation that third parties will not secretly observe or record them engaging in that activity.
In a communal women’s change room at a public pool	Yes, but would expect to be observed incidentally by other users.	observed by the public, or by photographed or video recorded while undressing.
lying on a blanket in a public park	expect to be observed by other users of the park or to be captured incidentally in the background of other park-goers’ photographs	one would use a telephoto lens to take photos up her skirt.

¹⁶ **R. v. Jarvis**, 2019 SCC 10 (CanLII), [2019] 1 SCR 488, para 38 to 41, < <https://canlii.ca/t/hxi07> >, retrieved on 2023-11-27.

In Other public circumstances	The use of a cell phone to capture upskirt images of women on public transit,
	The use of a drone to take high-resolution photographs of unsuspecting sunbathers at a public swimming pool
	The surreptitious video recording of a woman breastfeeding in a quiet corner of a coffee shop would all raise similar privacy concerns

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