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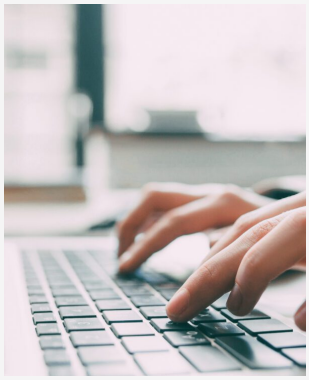
What cloud platforms, social media sites and other 'Internet intermediaries' need to know about B.C.'s new Intimate Images Protection Act and Regulation



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On January 29, 2024, the *Intimate Images Protection Act* (the Act) and *Intimate Images Protection Regulation* (the Regulation) will come into force in British Columbia.

Under the federal *Criminal Code* in Canada, it is a criminal offence for a person to publish intimate images of another person without their consent. However, the B.C. legislature adopted the Act and Regulation to provide new civil remedies for complainants whose intimate images have been published or shared without their consent. In particular, the Act and Regulation provide complainants with an opportunity to seek civil damages, and a civil remedy, to have their images deleted, taken down, or de-indexed online.

The core provisions of the Act and Regulation provide remedies for complainants from a court or the Civil Resolution Tribunal (the Tribunal) in B.C. against individuals or entities that post intimate images of complainants without their consent.

The Act and Regulation also provide new remedies for complainants against entities that host, or otherwise index, third-party content through their online platform. Such entities are considered "Internet intermediaries" under the Act. For example, cloud platforms, social media sites and video platforms could all be considered internet intermediaries.

All Internet intermediaries — i.e., all entities with platforms where videos or images can be hosted, or otherwise indexed — should be aware of the implications of the Act and Regulation. Under the headings below, we have provided a short summary of the takeaways of the Act and Regulation for Internet intermediaries.

What is considered an intimate image?

Intimate images include pictures and recordings, whether or not the person can be identified, and whether or not the image is altered, where the person is engaging in sexual

acts and is nude or nearly nude (s. 1 of the Act).

When will an Internet intermediary get notice if it is affected by the Act/Regulation?

A person whose intimate image was shared does not need to give notice to Internet intermediaries prior to seeking relief. The person can, but does not need to, notify the Internet intermediary that the individual is going to court or the Tribunal. This can be done without any notice (s. 5(6) of the Act).

Practically, this means an Internet intermediary may only receive notice of a court or the Tribunal application *after* a decision-maker has made an order affecting that Internet intermediary.

Possible court/tribunal orders

If a court or the Tribunal agrees that an intimate image has been shared online without consent, it can order an Internet intermediary to do any of the following:

- remove the image(s) from any platform operated by the Internet intermediary, and any other electronic forms of application, software, database or communication methods
- delete or destroy all copies of the image(s)
- de-index the image(s) from any search engines (s. 5(2)(c) of the Act)

There does not appear to be any penalty against an Internet intermediary for the sole reason that an intimate image exists on a platform. Administrative penalties, however, can apply if an order is not followed (see below).

How long does an Internet intermediary have to comply with a court/tribunal order?

It is unclear how long an Internet intermediary will have to comply with an order. There is no specified time in the Act/Regulation, for example, that an Internet intermediary has to de-index an image.

In our experience, most search engines and social media sites have existing protocols to remove intimate content from their platforms. But the Act and the Regulation may affect whether those protocols are compliant with a court or Tribunal order in Canada. The Act and Regulation may also allow a complainant to seek relief beyond an Internet intermediary's existing protocols. In addition, there are ongoing jurisdictional issues associated with the ability of a court or Tribunal to order a foreign entity to remove content from its website or platform. There also may be practical and logistical issues associated with de-indexing an image that has been posted by a third party on a search engine or platform.

Failure to comply with an order may result in administrative penalties

The Act/Regulation also includes remedies for a complainant against an Internet intermediary.

If an Internet intermediary *fails to comply* with an order (for example, it does not ensure an image is de-indexed), that may result in an administrative penalty.

Financial consequences are capped at a maximum of $5,000/day, and up to a total of $100,000 (s. 9(1)(b) of the Regulation).

Taking reasonable steps to address unlawful distribution of an image

An Internet intermediary will not be liable if there is evidence that it took reasonable steps to address the unlawful distribution of the intimate images (s. 12 of the Act). It is unclear, however, from the Act and Regulation what constitutes “reasonable steps”.

This new legislation creates new risks for search engines and social media sites that are accessible by Canadians. The above summary is not, however, exhaustive. Nor does it substitute for legal advice. We strongly recommend that Internet intermediaries consult with a lawyer if they believe intimate images may be hosted/indexed on their platforms, if they are faced with a court or Tribunal application regarding same, or have been served an order.