



ASSESSING VIDEO RECORDING EVIDENCE IN THE AGE OF GENERATIVE AI

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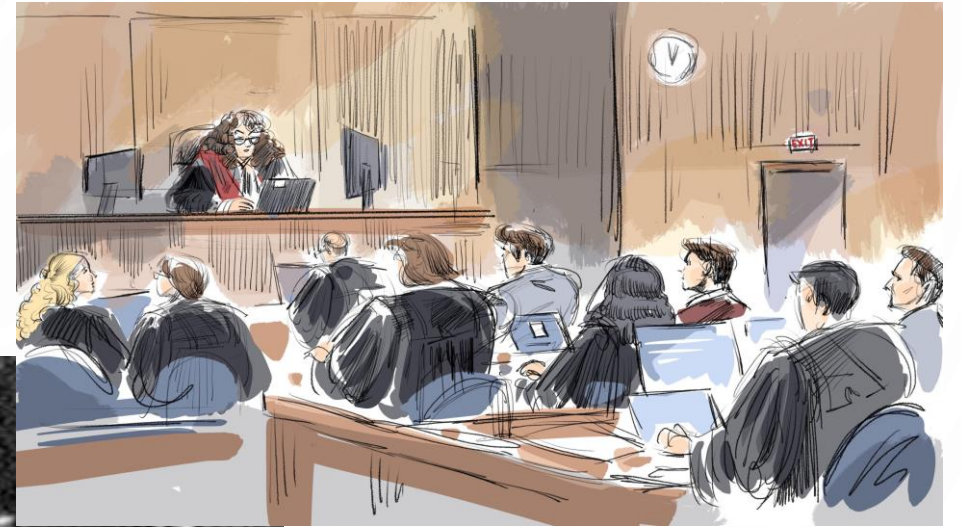
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VIDEO RECORDING EVIDENCE

“The video camera... is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed...”

R v Nikolovski, [1996] 3 SCR 1197 at para 21

VIDEO RECORDING EVIDENCE



DEEPPFAKES

“[T]he existence and widespread proliferation of AI technology capable of producing realistic deepfake videos are matters properly subject to judicial notice: see *R. v. Cheng*, 2025 ONCJ 252 at para 7. Anyone who spends time online has likely encountered well-known deepfake videos, particularly those featuring celebrities or politicians. These can be highly deceptive, making it challenging to discern what is authentic and what is fiction. Applications that help users create these videos are heavily marketed and promoted on various social media platforms, including Twitter/X and TikTok. Many more can be purchased and downloaded from various websites. Recently, the Supreme Court of Canada noted that the production of deepfakes through artificial intelligence for criminal purposes, such as the creation of child sexual abuse and exploitation material, is a “present and growing danger” see: *Quebec (Attorney General) v. Senneville*, 2025 SCC 33, at para 32.”

R v Medow, 2025 ONCJ 661 at para 54

DEEPPFAKES

“... [E]ven if a court diligently evaluates digital evidence, a deepfake video could be “authenticated” by a witness who might honestly but mistakenly believe it to be an accurate depiction of the events it purports to represent. Alternatively, a witness could intentionally deceive a court by claiming a video was authentic when, in fact, they knew it was not. I agree that the existence of deepfakes presents a potentially serious concern to the integrity of our justice system. However, the *admission* of digital evidence does not mean that its ultimate reliability should be presumed. By contrast, a rigorous analysis of the ultimate reliability of any type of digital evidence is always required.... “

R v Medow, 2025 ONCJ 661 at para 55

AI-GENERATED VIDEO EVIDENCE

- Two types of AI-generated evidence can come before courts (Grossman & Grimm, 2025):
 - **Acknowledged** AI evidence
 - Admissible so long as alteration not so substantial as to be misleading? (*R v Bulldog*, 2015 ABCA 251)
 - **Unacknowledged** AI evidence

AI-GENERATED VIDEO EVIDENCE

- The quality of AI-generated recordings is rapidly improving

2026: The Year Deepfakes Stop Being Detectable

2026 is the year deepfakes become impossible to detect. The tools to spot them? They don't exist yet.



Ahmed M. Abdelfattah

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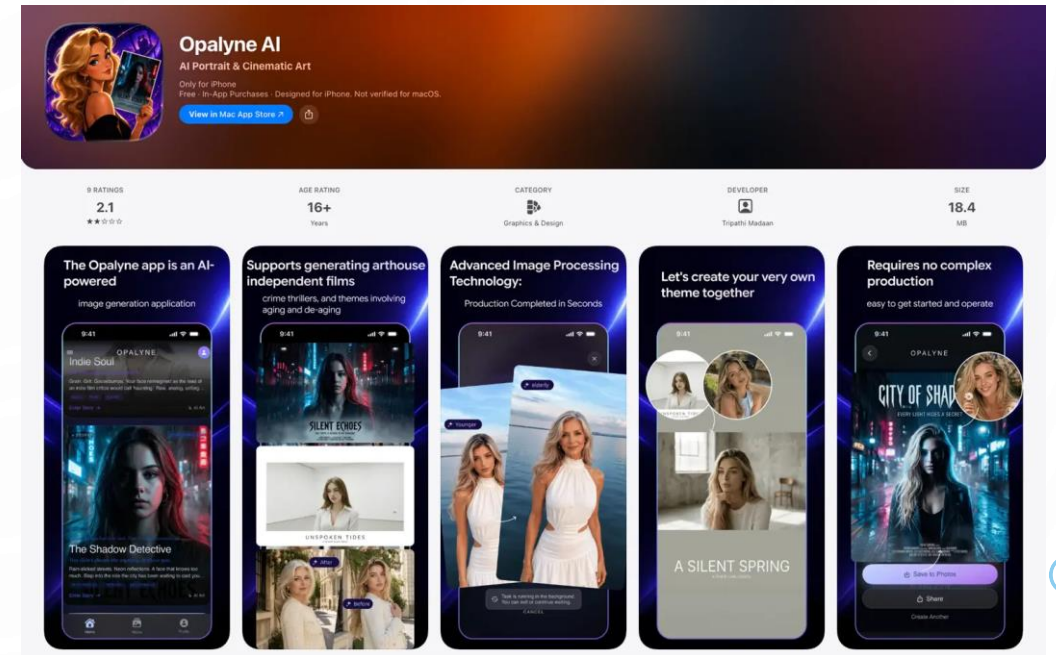
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See:

- [Lyu, 2025](#)
- [Abdelfattah, 2026](#)
- [Intect, 2026](#)

AI-GENERATED VIDEO EVIDENCE

- “Today, virtually anyone can make convincing fake images, audios, and videos for free, in under five minutes” (Grossman & Grimm, 2025)
 - See, e.g.: [Synthesia](#)



AI-GENERATED VIDEO EVIDENCE

- Deepfakes are becoming increasingly convincing, and there are no reliable methods for detection
 - 2024 U.S. study: over 50% of participants could not distinguish between AI-generated and genuine content
 - Humans confused by high-quality deepfakes 75.5% of the time



AI-GENERATED VIDEO EVIDENCE

- Deepfake detection technologies are not the answer: “as the discriminator gets better, so too does the generator, such that the two algorithms may be locked in a perpetual arms race” (Grossman & Grimm, 2025)

AI-GENERATED VIDEO EVIDENCE

- Two related concerns re: unacknowledged AI-generated video recording evidence:
 - Fabricated evidence will be treated as genuine
 - Genuine evidence will be dismissed as fabricated
 - “Deepfake defence” (Dixon, 2024) – relied on (unsuccessfully) in January 6 riot cases

ADMITTING DIGITAL EVIDENCE

- Video recording evidence falls within the broad definition of “electronic document” under s 31.8 of the *Canada Evidence Act*, RSC 1985, c C-5
- Must meet two threshold requirements to be admitted:
 - Authentication (CEA, s 31.1)
 - Codification of the common law authentication standard for real evidence (*R v CB*, 2019 ONCA 380)
 - Best evidence rule (CEA, s 31.2)

ADMITTING DIGITAL EVIDENCE

- **31.1** Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.
 - Very **low** threshold
 - “What is required is only some evidence that is logically probative of whether the electronic document is what it purports to be” (*R v Martin*, 2021 NLCA 1 at para 47)
 - Can be met through circumstantial evidence (*R v Hirsch*, 2017 SKCA 14; *R v Bulldog*, 2015 ABCA 251)
 - Whether the document actually **is** what it purports to be is a matter for determination by the trier of fact (*R v Ball*, 2019 BCCA 32)

ADMITTING DIGITAL EVIDENCE

- **31.2 (1)** The best evidence rule in respect of an electronic document is satisfied
 - **(a)** on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or
 - **(b)** if an evidentiary presumption established under section 31.4 applies.
- To meet under (a), the tendering party can adduce evidence (including witness testimony) that the electronic document system had the capacity to accurately record, maintain and display data. This can be done through inference if the witness testifies the information in the document is accurate (see *R v Vermeer*, 2023 BCCA 206 at paras 20-32)

CASE LAW: AI-GENERATED VISUAL EVIDENCE

- ***R v Elite Farm Services Ltd*, 2021 BCSC 1583**: former employee recorded numerous instances of animal cruelty at the production plant of EFS. Crown sought to adduce.
 - Defence argued distinguishable from security camera, “silent witness”, recordings made by biased, disgruntled employee, and unable to determine if recordings altered/changed. Employee deleted originals each day, no way to access metadata.
 - Proof a recording hasn’t been altered is not a precondition to admissibility

CASE LAW: AI-GENERATED VISUAL EVIDENCE

- ***R v Osman, 2022 ABCA 77***: accused argued RCMP had altered video recording of his interview.
 - Evidence admitted on *voir dire*, no evidence of alteration
 - Accused tendered an inconclusive forensic IT report re: the video as evidence at trial, which expressed some reservations about the lack of an original signature on the video file.
 - Low authentication threshold for video: “a substantially accurate visual depiction of what is recorded” (citing *R v Bulldog, 2015 ABCA 251*).

CASE LAW: AI-GENERATED VISUAL EVIDENCE

- ***R v MD, 2024 ABKB 104***: [audio rather than video recording] Case of historic child sexual abuse. Accused argued audio recording of him making inculpatory statements had been created by the complainant using AI.
 - Authenticated at *voir dire*.
 - Relied on as genuine at trial: nothing in the recording showed obvious signs of tampering, argument the statements could have been created using AI entirely speculative.

CASE LAW: AI-GENERATED VISUAL EVIDENCE

- ***Takeloo v Flahmeri, 2024 BCSC 2380***: Low-quality security camera footage of an accident delivered to ICBC by defendant's mother. Plaintiff's forensic expert received the videos from ICBC, had a new frame rate and a section was missing, production company logo present. Alleged that the defendant had altered the video before sending it to ICBC.
 - Videos of little probative value, likely tampered with, but video still provided some support for the plaintiff's version of events.

CASE LAW: AI-GENERATED VISUAL EVIDENCE

- ***R v Medow, 2025 ONCJ 661***: accused challenge of police bodycam and dashcam footage of him assaulting officer as digitally altered/deepfake fabrication.
 - Crown met burden of authenticating through collective testimony of officers.
 - Mere speculation by accused insufficient to preclude admissibility or diminish weight.

CASE LAW: AI-GENERATED VISUAL EVIDENCE

- ***R v Cheng, 2025 ONCJ 252***: Accused alleged home surveillance camera footage could have been altered to depict lawful visits as unlawful, in the context of a family law dispute.
 - Evidence of ex-partner and daughter re: the setup of the home surveillance system, extraction of SIM card, and denial of tampering, sufficient to admit by proving authenticity.
 - Video dispositive evidence: no evidence there had been any previous lawful visits, no evidence of tampering, consistent with daughter's actions in calling the police.

CASE LAW: AI-GENERATED VISUAL EVIDENCE

- ***Head v John Doe, 2026 BCSC 184***: Witness to motorcycle crash recorded accident on mounted GoPro camera, footage contradicted Head's version of events. Head pointed to an incorrect time stamp, interrupted chain of custody, and the unavailability of the original camera (and metadata) as raising potential footage had been tampered with.
 - Testimony from camera's owner as to how it was set up, how it was handled in the following days, and how the video was extracted = sufficient to authenticate
 - Video also ascribed significant weight: arguments raised by Head were speculative

CASE LAW: AI-GENERATED VISUAL EVIDENCE

- ***R v Flett, 2026 ABKB 296***: Snapchat videos depicting criminal activity screen recorded off witness' phone. Defence argued rise of AI deepfakes required courts rule video evidence inadmissible unless Crown prove they are real and unaltered.
 - GenAI has not changed the foundational principle that issues of distortion, alteration, and tampering are questions of weight, not admissibility.
 - “I do not rule out the possibility that, in an appropriate case, evidence of alteration or fabrication could be led at the admissibility stage in an attempt to overcome circumstantial evidence of authenticity... However, merely raising the spectre of “deepfakes” in the abstract is not enough to undercut circumstantial threshold authenticity.” (para 54)

ADMITTING DIGITAL EVIDENCE

- Example:
 - Crown tenders a video of the accused confessing to robbery
 - The accused argues the video is a complete fabrication, AI-generated
 - The complainant's ex-partner testifies that she recorded the video on her cellphone, and her cellphone was working properly and recording videos properly at the relevant time
 - **The video will be authenticated and admitted as evidence at trial**
 - Whether video is a fabrication is a matter going to **weight**

VISUAL EVIDENCE IS COMPELLING

- Concern with the current approach: visual evidence is extremely compelling (studies cited in Grossman & Grimm, 2025):
 - Nearly half of subjects who viewed an (altered) video depicting a peer cheating were willing to testify that *they personally witnessed* the cheating take place (compared to 10% who were only told about the cheating) (Wade et al, 2010)
 - Nearly all subjects who viewed a fabricated video of themselves cheating falsely confessed to the act (Nash & Wade, 2009)
 - 40% of subjects exposed to doctored photographs purportedly from their childhood reconstructed false memories based on those photos (Johnson et al, 2023)

VISUAL EVIDENCE IS COMPELLING

- Is the potential **prejudicial effect** of altered or fabricated visual evidence sufficiently high that it should be screened out at the **admissibility** phase?

SCREENING OUT AI-GENERATED EVIDENCE

- US Context: proposed amendment to Federal Rule of Evidence 901 (Rules Suggestion 25-EV-A, Delfino)
 - **Rule 901. Authenticating or Identifying Evidence**
 - **(a) IN GENERAL.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
 - (b) [examples of types of evidence that can satisfy the above requirement]
 - **901(c). Notwithstanding subdivision (a), if a party challenging the authenticity of computer-generated or other electronic evidence presents evidence sufficient to support a factual finding that the challenged evidence has been manipulated or fabricated, in whole or in part, by generative artificial intelligence, the proponent of the evidence must authenticate the evidence under subdivision (b) and provide additional proof establishing its reliability. The court must decide the admissibility of the challenged evidence under Rule 104(a).**
 - [Rule 104(a) is an equivalent to the current judicial gatekeeping role]

SCREENING OUT AI-GENERATED EVIDENCE

- Any modification to existing rules of authentication would need to address:
 - Burden on party challenging the evidence as AI-generated or altered
 - “sufficient evidence to support a factual finding”? Balance of probabilities? “Air of reality”?
 - What might this evidence look like?

SCREENING OUT AI-GENERATED EVIDENCE

- Any modification to existing rules of authentication would need to address:
 - Judicial determination re: AI-generation
 - Proponent must try to establish contested evidence **is not** AI-generated
 - Will expert evidence always be required?
 - AI-detection tools **not sufficient**
 - Where does gatekeeper role come into play?
 - If question of AI-generation is unresolved, when should a judge exercise their discretion to exclude the evidence?

SCREENING OUT AI-GENERATED EVIDENCE

- Example:
 - Crown tenders a video of the accused confessing to a robbery
 - The accused argues the video is a complete fabrication, AI-generated
 - The accused must back up this claim with some evidence
 - Inicia from the face of the video that it is a fabrication? Accused testimony? Forensic analysis? Ex-partner motive?

SCREENING OUT AI-GENERATED EVIDENCE

- Example:
 - The burden shifts to the Crown to establish its reliability: higher threshold than *CEA* s 31.1
 - Testimony from ex-partner + metadata + expert testimony?
 - If the evidence is determined to be AI-generated or altered, the judge should exclude
 - Risk of prejudicial effect of video on trier of fact removed (jury trials)
 - Residual gatekeeper discretion always at play

SCREENING OUT AI-GENERATED EVIDENCE

- Circumstantial evidence has been sufficient in numerous cases to **substantially rule out** the possibility that a video has been altered using GenAI
- Where the trier of fact is a judge alone, treating (genuine) authenticity as a matter of weight may be sufficient to appropriately deal with allegations of AI-fabrication
 - More significant concerns re: jury trials, and re: significantly prejudicial visual evidence

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