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PRIVATE RECORDINGS AND PUBLIC RISK: THE BALANCE AFTER *R v BARABASH* REPORT OF THE WORKING GROUP

Prepared by
Josh Hawkes, QC
Alberta a

Fredericton
New Brunswick
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For more information, please contact
ulccwebsite@gmail.com

INTRODUCTION

[1] At the 2015 meeting of the Uniform Law Conference of Canada, Alberta introduced a resolution calling for a working group to monitor the interpretation and application of the "private recordings defence" as articulated by the Supreme Court of Canada in *R v Barabash* 2015 SCC 29.[1]

[2] As illustrated in the appendix, *Barabash* has yet to receive significant judicial consideration. However, existing trends involving the exchange of intimate images that may otherwise constitute child pornography give rise to concerns that should be the subject of further consideration. For the reasons that follow, it is recommended that Justice Canada undertake that task.

[3] Assessing the potential impact of *Barabash* on the scope of the "private recordings" defence requires an examination of the following:

a. The constitutional context and background for the "private recordings" defence.

b. The nature of the analysis of consent, unlawful sexual activity and exploitation after *Barabash*.

c. A brief overview of some current and emerging trends in relation to the vulnerability of children and the exchange of sexual images.

THE CONSTITUTIONAL CONTEXT AND THE DEFENCES "READ IN" BY *R V SHARPE*

[4] In order to place the decision of the Supreme Court in *Barabash* in perspective, some context regarding the origin and development of the "private recordings defence" is necessary.

[5] This defence was "read in" to the child pornography provisions by the Supreme Court of Canada in *R v Sharpe* in 2001 in order to preserve the constitutional validity of the provisions. Critical conceptual elements regarding the nature of the offence shape both the permissible scope of the provision and the contours of the "read in" defences. For these purposes, these conceptual elements include:

a. The nature of the constitutional values associated with freedom of expression in this context.[2]

[1] The text of that resolution, 2015 Alberta 02 is available on the ULCC website at http://www.ulcc.ca/images/stories/2015_pdf_en/2015ulcc0002.pdf. See also the following Blog: https://petersankoff.com/2015/06/01/ten-minutes-on-r-v-barabash-child-pornography-and-the-private-use-exception/.

[2] *R. v. Sharpe* 2001 SCC 2 at paras 23-5 [*Sharpe*].

b. The concept and constitutional significance of privacy and "privately held" material[3],

c. Whether the offence was broad enough to capture auto-depictions (relating to the use of the term "person" in the offence)[4]

d. The scope of "explicit sexual activity"[5],

e. The "dominant characteristic" and "sexual purpose" of the depiction[6]

[6] Against this backdrop, the Court concluded that the offence as drafted and interpreted would still capture two types of conduct that posed a "minimal risk" to children while constituting an unwarranted and unjustifiable infringement of freedom of expression and the value of individual self-fulfillment.[7]

[7] The first of these exceptions, "self-created expressive material", contains the following elements:

a. self –depiction

b. created by the person depicted alone

c. retained privately for personal use of that person.[8]

[8] The individual is thus singularly the creator, subject, custodian, and intended audience of the recording.[9]

[9] The majority of the Court concluded that such material could contribute to "adolescent self-fulfillment, self-actualization and sexual exploration and identity".[10]

[10] The second of these exceptions – "private recordings of lawful sexual activity" is said to contribute to the same goals while posing minimal risk to children. The elements of this exception, as described in *Sharpe* contain the following elements:

a. The possessor must have personally recorded or participated in the activity depicted.[11]

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[3] *Ibid* at paras 26-39.
[4] *Ibid* at paras 40-41.
[5] *Ibid* at paras 44-49.
[6] *Ibid* at paras 50-51.
[7] *Ibid* at paras 75-77 and 105.
[8] *Ibid* at paras 109 and 115.
[9] *Ibid* at para 115. Thus, compilations of material created by others does not fall within the exception, even where the compilation is created solely by the accused – see for example *R v T.W.* 2014 ONSC 4532 at paras 65-8.
[10] *Ibid* at para 109.
[11] *Ibid* at para 116.

b. The sexual activity depicted was lawful – ensuring consent and precluding exploitation and abuse.[12]

c. The recording must be held in strict privacy and intended exclusively for the private recordings of the participants.[13]

d. All depicted parties must consent to the recording.[14]

[11] It should be noted that this first requirement was subsequently omitted from the summary of the elements of the defence by the Supreme Court of Canada in *R v Barabash*.[15] The omission of that requirement was not inconsequential, as many of the recordings in that case were made by Barabash, but depicted sexual activity involving either the two children, or combinations of the children with a co-accused, Rollison.[16] Lower courts have opined on whether non-participants may record the activity and still fall within the exception.[17] Obviously, where the recorder is not one of the participants, other issues, such as the custody and control over the recording, as well as whose "self –fulfilment" was advanced by that recording, must be considered.

[12] *R v Barabash* was the first time that the Supreme Court commented on these issues, particularly in the context of relationships of vulnerability. [18]

[13] However, there are significant issues surrounding aspects of the exceptions that the Court declined to address. These gaps are the areas that warrant further examination as described below. Given the nature of some of these gaps, it is not surprising that they have yet to be reflected in the case law. A broader examination is required in order to properly understand the potential risks posed by the silence of the Court on these issues.

THE IMPACT OF *BARABASH* ON THE ANALYSIS OF CONSENT, UNLAWFUL ACTIVITY, AND EXPLOITATION

[14] Three interlocking and overlapping principles operate to regulate the scope of the constitutional defences created in *R v Sharpe*:

a. Consent

b. Unlawful Sexual Activity

c. Exploitation

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[12] *Ibid* at paras 106, 116 and 119.
[13] *Ibid* at paras 109 and 115-116.
[14] *Ibid* at para 116.
[15] *R v Barabash* 2015 SCC 29 at paras 18, 40 and 53 [*Barabash*].
[16] *Ibid* at para 7.
[17] See for example *R v Keough* 2011 ABQB 48 at paras 204-8.
[18] *Barabash*, *supra* note 15 at para 1.

[15] The overlap between these concepts governs the scope of these defences. Gaps or areas of uncertainty between the principles define the area of concern and illustrate the need for further consideration of these issues. While there is significant overlap between the analysis of all of these issues it is important to note that they are conceptually distinct and address different issues.

[16] In order to place these issues in context, a brief overview of the facts is necessary. Police began investigating after a complaint was received regarding a photograph of two 14 year old girls, K and D appeared on a social networking site. One of the girls was topless. The investigation ultimately led to the residence of Barabash, described as a typical "crack house".[19] Numerous video recordings were found depicting the girls in sexual activities with each other and with Rollison, a 40 year old friend of Barabash. Barabash was 60, and generally operated the camera.[20]

[17] The trial judge found that the "private recordings" defence applied, and acquitted both Rollison and Barabash.[21] The majority of the Alberta Court of Appeal overturned the acquittals and substituted convictions. They concluded that the "private recordings" defence contained an independent requirement that the sexual activity must not contain child exploitation or abuse in general, apart from specific criminal offences of abuse or exploitation. The dissenting justice concluded that the trial judge did not err, and that there was no separate requirement relating to factual exploitation.[22]

CONSENT

[18] Consent is relevant in relation to two separate elements – consent to the sexual activity, and consent to the recording of that activity.

[19] Consent is an obvious pre-condition to sexual activity, and indeed to any contact that would otherwise constitute assault. Several *Code* provisions and common law principles apply in determining the validity of consent. These include subsection 265(3), and section 273.1. As explicitly noted in subsection 273.1(3) the listed factors are inclusive and not exhaustive of other factors that may vitiate consent. A detailed analysis of the judicial consideration of these provisions is beyond the scope of this paper.

[20] With respect to consent to the sexual activity, the Court noted that the statutory age restrictions, sexual activity in the context of prohibited relationships, prohibited sexual relationships, and the other vitiating circumstances surrounding consent all apply to restrict the scope of the "private recordings" defence. [23]

[19] *Ibid* at paras 5 and 7.
[20] *Ibid* at para 7.
[21] *Ibid* at para 10.
[22] *Ibid* at para 13.
[23] *Ibid* at paras 20-24, 33-5 and 40-43.

[21] The Court noted that separate consent was required with respect to the recording of sexual activity. They also noted the inherent risks of such recordings in the digital age, and the particular vulnerability that may be experienced by a child who does not have custody or control of the recording.[24] While they observed that giving children express rights of return or destruction of the material would be consistent with the constitutional objectives of the defence, they expressly declined to make a definitive ruling on those issues.[25] They also noted that common law principles in relation to consent continue to apply in the absence of express statutory provisions.[26]

[22] Other cases may assist in illustrating how factors such as fraud or non-participation in the act or the recording may serve to exclude the impugned activity from the "private recordings" defence. For example, in *R v Bono* the defence was found not to apply where the consent was obtained by fraud (Bono claimed to be 16 years old in the online relationship. In fact, he was 52.), and the accused did not participate in the recording. These factors, among others, removed his conduct from the scope of the defence.[27] However, the Court has also noted that not every deception or untruth in the context of a sexual relationship will vitiate consent or constitute fraud.[28] Whether that approach would translate directly into this unique context is uncertain.

UNLAWFUL SEXUAL ACTIVITY

[23] The Court focused on the limits to lawful sexual activity, noting subsequent statutory changes raising the age of consent applicable in the circumstances of this case to 16.[29] The defence could not apply to activities that also constituted separate offences, such as incest or any of the other enumerated sexual offences in relation to children.[30] They also concluded that the defence would not apply where the Crown could prove beyond a reasonable doubt that the relationship between the adults and children depicted was tainted by exploitation, dependency, abuse of authority or a position of trust.[31]

[24] The potential for a direct collision between paragraph 172.1(1)(a), which prohibits, among other things computer communication with a person under 18, and the "private recording" defence as interpreted in *Barabash* is also an issue warranting further consideration. If the "private recording" defence would apply to images taken in person, then would the use of a computer system (web cam or cell phone where the recorder takes control of the device) to record that same image automatically bring the conduct within the scope of para. 172.1(1)(a)? Strong arguments

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[24] *Ibid* at para 25.
[25] *Ibid* at paras 28-30.
[26] *Ibid* at para 47.
[27] *R v Bono* 2008 Canlii 51780 (Ont. SC) at paras 22-25. It should be noted that the conduct in *Bono* would also be excluded under the *Barabash* formulation of the defence for these reasons, as well as for the fact that there was other unlawful conduct – invitation to touching and luring present on the admitted facts.
[28] See for example *R v Hutchinson* 2014 SCC 19 at paras 29-41 and 63-74.
[29] *Ibid* at paras 21-24.
[30] *Ibid* at paras 20-24.
[31] *Ibid* at para 23.

can be made that such an extension would be consistent with both the purpose of para. 172.1(1)(a) and the significant risks of exploitation and manipulation that are inherent in that medium of communication.[32]

EXPLOITATION AND SEXUALLY EXPLICIT RECORDINGS

[25] The Court considered whether exploitation should be considered separately in the context of this analysis, or whether it was included in the pre-existing analysis of consent and lawfulness. They concluded that a separate analysis of exploitation was unnecessary, and further, that an examination of the related concept of mutuality of benefit was unhelpful. [33]

[26] With respect, this analysis misses the significance of the element – it is not aimed solely at privacy, but should also include considerations of broader factors relating to power imbalance and vulnerability.[34] That imbalance may also arise from, or be exacerbated by, the power inherent in the possession and control over such images.[35]

[27] Apparent consent to sexual activity will be vitiated where the Crown can prove beyond a reasonable doubt that the activity occurred in a prohibited relationship of trust, authority, dependency or exploitation.[36] The non-exhaustive list of indicia of exploitation contained in subsection 153(1.2) of the *Code* must be considered. The Court clarified that no predicate offence under section 153 is necessary to trigger this analysis. Rather, they held that it is an integral part of the private recordings defence requiring independent assessment.[37] Further, such apparent consent must not be "taken at face value", but rather, the entirety of the relationship must be examined on a holistic basis. The Court opined that a "robust" analysis of exploitation is required where these or other indicia are present.[38]

[28] In particular the Court noted that the trial judge erred in this case by failing to consider the cumulative impact of the circumstances of vulnerability (the significant age difference, the drug addiction of the children, the fact that they were otherwise homeless, that they had experienced exploitation in underage prostitution).[39] They also noted that he erred in focusing on whether the activities depicted were voluntary rather than on the nature of the relationship in which the activities took place.[40]

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[32] *R v Legare* 2009 SCC 56 at paras. 1-2.
[33] *Barabash, supra* note 15 at paras 31-53.
[34] *R v Cockell* 2013 ABCA 112 at paras 38-40, leave denied at 2013 Canlii 67704.
[35] It is hardly surprising that consensual images are sometimes retained and used in a manner that negates that consent. See for example, *R v L.W.* 2006 Canlii 7393 (Ont.CA). As a matter of policy it is far from clear that this risk should be borne by the subject of the recording, particularly where other indicia of vulnerability are present.
[36] *Barabash, supra* note 15 at paras 34-5.
[37] *Ibid* at para 36.
[38] *Ibid* at paras 36 and 42-43.
[39] *Ibid* at para 55.
[40] *Ibid* at paras 56-60.

THE REMAINING QUESTIONS

[29] As noted earlier, the Court declined to definitively rule on issues relating to demands for return or destruction of the images in question, while noting that such a power would properly balance the risk of harm against the constitutional value reflected in the creation of the recording.[41] They also declined to address the separate issue of whether indicia of exploitation could vitiate the consent to record the activity in question, noting that such a conclusion was not needed on the facts of this case, and that such a conclusion could have far reaching implications.[42]

[30] While such caution to confine a ruling to the facts of a case is both welcome and appropriate, further examination of the gap identified in *Barabash* and of these other unresolved issues is appropriate for three reasons.

[31] First, the magnitude of the potential harm is significant. If vulnerable teens may be persuaded to permit photographs of nude posing to be taken by another in circumstances that are not otherwise unlawful (posing without implicit or explicit invitation or intent to engage in other sexual activity) under the guise of the "private recordings" defence, they may be exposed to significant harm.

[32] The reasoning of the Court in addressing this concern is significant, and is reproduced in full below:

> *[46] The concerns raised by the Crown's example can only arise where the subject of the recording does not involve any touching or invitation to touching that would be caught by s. 153. As the Attorney General of Ontario submitted in these proceedings, it is quite possible that s. 153could apply to the example of the still photos of nude posing. The language in s. 153 is broad and captures any invitation to sexual touching of others or oneself. It is not clear that there would be many instances where a still photograph is taken by the dominant person in the context of an exploitative relationship that did not involve any invitation to sexual touching. In such circumstances, consent to the sexual activity and to the act of recording will often be intertwined, and thus captured by s. 153.*
>
> *[47] This is not to say that where the recording is concerned the young person's consent is necessarily a simple question of yes or no. Should a case arise in which no underlying sexual activity exists that could be caught by the Criminal Code's provisions related to sexual exploitation, it may be that an exploitative relationship would be relevant to the common law rules of consent in the context of consent to recording.*
>
> *[48] However, this is not the case to decide whether an exploitative relationship can vitiate consent to the recording. Circumstances where the exploitation is not*

[41] *Ibid* at paras 28-30.
[42] *Ibid* at paras 47-8.

> *captured in the lawfulness analysis are not likely to arise frequently — and they do not arise in this case. The extent to which an exploitative relationship may vitiate consent generally under the common law was not clearly developed in the courts below or in the factum of the Crown. I think it best to leave this question about the common law principles of consent to a case with a proper record and argument. The implications may be far reaching.*[43]

[33] A recent online article summarized the resulting gap as follows:

> *For example, if an adult, in an exploitative relationship, takes nude photographs of a minor, but never touches the minor or invites the minor to touch them, then the offence of sexual exploitation is arguably not made out. As a consequence, such an adult could benefit from the Private recordings Exception despite exploiting a minor to obtain child pornography - an apparent loophole (albeit narrow) around the Court's primary objective in Barabash of preventing the exploitation of minors. On this point, the Court observes that consent to recording is typically intertwined with consent to sexual activity, which would leave the minor with protection under the Criminal Code. But the Court also concedes that this may not always be the case (at paras 46-47). Indeed, the Crown 's factum in Barabash (at para 124) makes this very point, referring to R v Hewlett, 2002 ABCA 1 79, where three teenagers responded to a modeling advertisement in which they were offered drugs and alcohol in exchange for their consent to taking explicit pictures. Without analyzing exploitation in such a case, "a predator need only manipulate his or her victim to the point of obtaining consent to be free from criminal sanction" (Cockell at para 37).*[44]

EMERGING TRENDS

[34] It is difficult, if not impossible to assess the true scope of the "nude posing" issue, without the assistance of law enforcement and specialized prosecutors involved in related investigations and prosecutions. However, publicly available sources indicate that the exchange of nude or sexualized images by teens for money or other consideration may be a significant issue. For example, according to Fortune Magazine, SnapChat has about 100 million daily users, and more than 7 billion videos and photos are shared via the app per day.[45] According to some research,[46] about 13% of users admitted to using SnapChat for sending nude pictures.

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[43] *Ibid* at paras 46-8.
[44] *Keep it to Yourself: The Private recordings Exception for Child Pornography Offences,* p.7, available online at http://ablawg.ca/2015/06/23/keep-it-to-yourself-the-private-use-exception-for-child-pornography-offences/.
[45] http://fortune.com/2016/01/12/snapchat-facebook-video-views/.
[46] https://www.survata.com/blog/is-snapchat-only-used-for-sexting-we-asked-5000-people-to-find-out/.

[35] There are multiple internet marketplaces that offer to buy photos of girls. Offers differ from promising "Full nudity is not required, you only need to 'go' as far as you are happy" to straightforward "Make money selling naked pictures of yourself";[47]

[36] There are multiple questions and offers posted on various forums and internet sources where girls ask where and how they can sell nude pictures of themselves or offer to sell their pictures, and there are multiple posts where girls share their experience of selling their nude photos and advice on where and how it can be done;[48] SnapChat recently launched an app SnapCash for fast and easy money transfer, and it offers an easy option of selling nude pictures.

CONCLUSION

[37] In that context, it is difficult to accept the assertion of the Court in *Barabash* that activity deliberately designed to avoid existing legal restrictions would be either be rare or exceptional. Further investigation of this risk is required.

[38] Second, the vulnerability of teens and young adults to sometimes subtle manipulation in other contexts of sexual exploitation is well established. There is no reason to think that they would be less vulnerable in this context. In fact, the opposite may be true. A request for a nude or suggestive web cam encounter may seem far less threatening or dangerous than more invasive requests that would fall clearly within the scope of existing luring, sexual touching, or sexual exploitation offences.

[39] Third, while judicial restraint is admirable, *Barabash* provides a clear indication that careful examination and policy analysis is needed to ensure that the constitutional balance struck by the Court in *Sharpe* continues to excuse only that conduct that poses a minimal risk of harm to children.

APPENDIX A: JUDICIAL TREATMENT OF BARABASH

[40] The decision of the Supreme Court of Canada has only been cited by 6 other cases to date. Only 3 of these decisions are generally related to child exploitation. In *R v Vigon*, the Alberta Court of Appeal makes reference to *Barabash* in conjunction with a proposition that consent in the context of a prohibited relationship provides no defence.[49] The second, *R v Rhode*, made a passing reference to the private recordings defence in circumstances where it did not apply as the sexual activity was otherwise unlawful.[50]

[41] The third case, *R v Thomas John Brown*, illustrates an application of *Barabash* in circumstances where photographs, involving nude posing, were taken. In that case, *Brown*, 18,

[47] Example of such offers may be like these: "Welcome to Sellnudes.com. If you're an attractive female between the ages of 18-29, we'd like to talk to you about buying your nude photos or/or videos".
[48] One of the common places for sharing this information is www.sextingforum.net.
[49] *R v Vigon* 2016 ABCA 75 at para 1.
[50] *R v Rhode* 2015 SKQB 353 at paras 18-9.

persuaded a 13 year old complainant to send pictures of herself in various stages of nudity.[51] The complainant and the accused never met, but only corresponded through social media. In those conversations, she identified herself as under 14 years of age at the material time.[52] The accused requested that she send him naked pictures. Ultimately, she complied.[53] She explained that she did so because she had low self-esteem at the time, and that she was afraid that he would stop speaking with her online, or that he would spread false rumors about her.[54] The online relationship lasted for approximately 3 months. The trial judge characterized the exchanges as revealing her naiveté and his persistence in graphic sexual conversations. She repeatedly expressed reluctance. In some of the messages, he either asked her to touch herself, or indicated that he would like to meet with her and initiate a sexual relationship.[55] The accused maintained that he never shared the photographs with others or sent them to anyone. However, the picture of the complainant's vagina was the wallpaper photograph on his cellphone.[56]

The trial judge apparently agreed that the defence could not apply in the circumstances of this case as the complainant was too young to consent, that the accused had effectively counseled the commission of the offense of making child pornography, and that the accused was neither depicted in, nor the person who recorded the images in question. He also noted that the accused did not delete the photographs despite requests that he do so.[57]

[51] *R v Thomas John Brown* 2015 Canlii 78997 (NL. PC.) at paras 1, 81-3, 95 and 114.
[52] *Ibid* at paras 18-20.
[53] *Ibid* at para 21.
[54] *Ibid* at paras 22.
[55] *Ibid* at paras 24-9.
[56] *Ibid* at paras 40-44, 50 and 54.
[57] *Ibid* at paras 74-8, 83-4 and 102-4.