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Keep It To Yourself: The Private Use Exception for Child Pornography Offences

By: Joshua Sealy-Harrington and Ashton Menuz

Case Commented On: *R v Barabash*, [2015 SCC 29](#)

Last month, the Supreme Court of Canada revisited the Private Use Exception – a defence to the possession and creation of child pornography – in *R v Barabash*, [2015 SCC 29](#). The unanimous judgment, authored by Karakatsanis J, clarified the analytical framework relating to the Private Use Exception and elaborated on how courts should assess exploitative relationships in which child pornography may be made. This post explains the Private Use Exception, describes its evolution in the jurisprudence, and explores questions left unanswered by the Court's decision in *Barabash*.

The Facts in *Barabash*

In 2008, two 14 year-old girls, K and D, ran away from an adolescent treatment centre in High Prairie, Alberta to stay with 60 year-old Donald Barabash. Both girls had “difficult pasts”, including drug addiction, criminal history, family issues, and in K’s case, a history of sex work (at para 4). During their stay with Barabash, K and D engaged in sexual activities with each other and 41 year-old Shane Rollison. These activities were generally recorded by Barabash, though K and D operated the camera at times as well.

The police began investigating Barabash and Rollison after receiving complaints about a photo posted to Nexopia, a Canadian social networking site. The photo depicted K and D, with one of them topless. As a result, the police searched the Barabash residence, where they found a number of materials they identified as child pornography.

Following the investigation, Barabash and Rollison were both charged with offences under the *Criminal Code*, [RSC 1985, c C-46](#). Specifically, both were charged with making child pornography (*Criminal Code*, [s 163.1\(2\)](#)) while Barabash alone was charged with possessing child pornography (*Criminal Code*, [s 163.1\(4\)](#)). In response, both Barabash and Rollison argued that their making and possession of child pornography was legal because it fell within the scope of the Private Use Exception. The “core issue” at trial (and on appeal) was the availability of the Private Use Exception as a defence to the charges above (at paras 1, 9, and 11).

Explaining the Private Use Exception

It may come as a surprise to some that it is legal to create and possess child pornography as long as it is held for private use (an oversimplification, to be fair). But the Private Use Exception is a logical extension of the legal framework surrounding sexual activity involving minors.

Child pornography is media that depicts sexual activity with, or that displays the sexual regions of, a person under the age of 18 (*Criminal Code*, [s 163.1\(1\)](#)). But there is no blanket prohibition on persons under the age of 18 engaging in sexual activity. Indeed, the *Criminal Code* permits certain minors to engage in sexual activities subject to numerous protections seeking to protect them from harm.

First, the *Criminal Code* incrementally increases the capacity for a minor to consent to sexual activity as they increase in age. A minor under 12 years old is incapable of giving consent to sexual activity (*Criminal Code*, [ss 150.1\(1\)-\(2.1\)](#); *Barabash* at para 20). In contrast, a minor that is 12-15 years old can consent to sexual activity with a partner that is close in age or, if the minor is 14 or 15, with a partner who is their spouse (*Criminal Code*, [ss 150.1\(2\)-\(2.1\)](#); *Barabash* at para 22). While there is no upper age limit on the person a 16 year old minor can consent to sexual activity with (*Criminal Code*, [s 150.1\(1\)](#)), all minors benefit from the limits placed on legal consent that adults benefit from. For example, at any age, consent is vitiated if it is obtained by force, threats, fraud, or the exercise of authority (*Criminal Code*, [s 265\(3\)](#)) or if it is obtained in other problematic circumstances, such as where the complainant is incapacitated (*Criminal Code*, [s 273.1\(2\)](#); *Barabash* at para 21).

Second, the *Criminal Code*'s provisions relating to sexual exploitation provide further protection to minors. Specifically, a person who is sexually active with a minor (even with the minor's consent) will still be convicted of an offense if their relationship with the minor is exploitative (*Criminal Code*, [ss 150.1\(2\)-\(2.1\)](#) and [153](#); *Barabash* at para 34). This provides residual protection to minors from ages 16 to 17 who are too old to benefit from the limits on consent described above.

In sum, minors can, in certain circumstances, legally engage in sexual activity, even with adults – but can they record it? Minors aged 13-17 can engage in legal sexual activity, but the *Criminal Code* ostensibly criminalizes making recordings of such sexual activity. This is where the Private Use Exception steps in. There would be some contradiction in letting minors engage in sexual activity while criminalizing the recording of it for private use. In consequence, the Private Use Exception acts as a defence to various child pornography-related offences to permit the making and creation of child pornography that meets certain criteria (*Barabash* at para 16). For example, the Private Use Exception could apply to prevent the conviction of two 17 year old partners who innocently take nude photographs of each other. However, the Private Use Exception could also apply to prevent convictions in less benign circumstances, as the cases discussed below demonstrate.

To avoid confusion, we note that there were material amendments made to the *Criminal Code* between the time when the facts in *Barabash* occurred and when the Court's decision in *Barabash* was released. In particular, during this intervening time the age of consent was raised from 14 to 16 (*Criminal Code*, [s 150.1\(1\)](#), *Barabash* at para 7). As a consequence, the current legal framework governing a minor's consent described above did not apply to *Barabash* or *Rollison* whose impugned acts predated the amendments resulting in the current legal

framework. Indeed, if the facts in *Barabash* were to occur in the present day, Barabash and Rollison would be precluded from arguing the Private Use Exception as a defence because 14 year old minors (like K and D) can now only consent to sexual activity with partners who are close in age or who are their spouse.

Evolution of the Private Use Exception in the Jurisprudence

A preliminary overview of how the Private Use Exception has evolved in the jurisprudence facilitates an analysis of the Court's reasoning in *Barabash*.

The evolution of the Private Use Exception, in respect of Alberta courts, can be distilled to three key stages, namely:

1. the origin of the Private Use Exception in *R v Sharpe*, [2001 SCC 2](#);
2. the extension of the Private Use Exception in *R v Cockell*, [2013 ABCA 112](#); and
3. the return to the original Private Use Exception in *Barabash*.

In *Sharpe* (2001), a majority of the Supreme Court held that the offences of possessing and making child pornography, while largely justified under section 1 of the *Charter*, captured two categories of privately held material which did not strike the proper balance between preventing harm to children and protecting freedom of expression (at paras 103-105). In respect of one of those categories – private recordings – the Supreme Court created the Private Use Exception, which is a defence to child-pornography offences if three criteria are satisfied:

1. lawfulness *i.e.* any sexual activities depicted in the recording must be lawful;
2. consent to recording *i.e.* all parties must consent to the recording; and
3. privacy *i.e.* the recordings must be kept in strict privacy and intended for private use exclusively by:
 - a. the creator; and/or
 - b. those depicted in the recordings.

(*Sharpe* at paras 116 and 128; the “Original Private Use Exception”).

Next, in *Cockell* (2013), the Alberta Court of Appeal extended the Original Private Use Exception by reading in two additional “standalone” criteria, namely:

1. absence of factual exploitation *i.e.* the circumstances must show that the minor’s consent was not obtained through exploitation or abuse *in fact*, regardless of whether any exploitation offences are made out *in law*; and
2. mutuality of benefit *i.e.* the parties must intend for the recordings to be used by all those involved in its creation.

(*Cockell* at paras 36-41; the “Extended Private Use Exception”).

Sharpe and *Cockell* set the stage for *Barabash* (2015). At the Alberta Court of Queen’s Bench ([2012 ABQB 99](#)) both Barabash and Rollison were acquitted because the court held that the Original Private Use Exception was the governing law and that both men satisfied its criteria (at paras 275-78). However, both men were convicted at the Alberta Court of Appeal ([2014 ABCA 126](#)) which held that the Extended Private Use Exception was the governing law and that both men failed to meet its additional criterion of lack of factual exploitation (at paras 28 and 35-37).

Reconciling these differing approaches was at the heart of the Supreme Court's decision in *Barabash*.

The Supreme Court's Decision in *Barabash*

In *Barabash*, the Court was asked to clarify the elements of the Private Use Exception, and in particular where the concept of exploitation fits into the Private Use Exception's analytical framework (at para 2).

The Court situates the concept of exploitation under the lawfulness criterion from *Sharpe*, and in consequence, rejects "absence of factual exploitation" as an additional standalone criterion for the Private Use Exception (at para 31). The Court also rejects the standalone criterion of "mutuality of benefit" (at para 52). As a result, the Court reaffirms the analytical framework of the Original Private Use Exception provided in *Sharpe* (at para 18). Specifically, the Court reaffirms that when a person possesses a visual recording created by or depicting that person (see para 16), the three part conjunctive test for the Original Private Use Exception – lawfulness, consent to recording, and privacy – still applies (at paras 18 and 53).

A summary of the Court's observations in respect of each of the three criteria follows.

Criterion 1: Lawfulness

First, the Court holds that the Private Use Exception can only apply to private recordings if the sexual activity recorded is itself lawful (at para 20). It follows that a minor:

1. must consent to sexual activity, if any, depicted in the recording (*Criminal Code*, [ss 150.1\(2\)-\(2.1\)](#), [265\(3\)](#), and [273.1](#)); and
2. cannot be sexually exploited (*Criminal Code*, [ss 150.1\(1\)-\(2.1\)](#) and [153](#)).

(*Barabash* at paras 20-24).

As discussed above, *Criminal Code* provisions relating to consent and sexual exploitation operate to protect minors from harm. The consent of minors aged 12-15 is subject to various limits (*Criminal Code*, [ss 150.1\(2\)-\(2.1\)](#)), while minors aged 12-17 are protected from sexual exploitation (*Criminal Code*, [ss 150.1\(1\)-\(2.1\)](#) and [153](#)).

Specifically in respect of sexual exploitation of a minor aged 16-17 (a "young person"; *Criminal Code*, [s 153\(2\)](#)), sexual activity, or an invitation of sexual activity, can only be lawful if the relationship with the young person does not involve:

1. a position of trust or authority;
2. dependency; or
3. exploitation.

(*Criminal Code*, [s 153\(1\)](#); *Barabash* at para 34).

Moreover, in assessing exploitation, the Court looks at "the nature and circumstances of the relationship", including the following "non-exhaustive list of indicia":

1. the age of the young person;

2. the age difference between the accused and young person;
3. the evolution of the relationship; and
4. the degree of control or influence that the accused has over the child.

(*Criminal Code*, [s 153\(1.2\)](#); *Barabash* at para 36).

The legislative limits above restrict the circumstances in which sexual activity with a minor is lawful, and in turn narrow the scope of the Private Use Exception (*Barabash* at para 23). In particular, the *Criminal Code* offences relating to exploitation of minors restrict the availability of the Private Use Exception, even in circumstances where a minor legally consents to the sexual activity depicted (*Barabash* at para 35).

Given the above, the Court rejects the Extended Private Use Exception's additional “absence of factual exploitation” criterion because it is largely “redundant” with the lawfulness criterion, which takes sexual exploitation into account (at para 43). In effect, the Court subsumes the “absence of factual exploitation” criterion from the Extended Private Use Exception into the lawfulness criterion of the Original Private Use Exception.

In our view, the Court’s rejection of a standalone “absence of factual exploitation” criterion is sound. If such a criterion were to exist, it would result in the absurd consequence of it being legal to ‘factually exploit’ a minor for sexual activity, but illegal to factually exploit a minor for sexual recordings. There are already multiple provisions in the *Criminal Code* devoted to preventing the sexual exploitation of minors (*Criminal Code*, [ss 150.1\(1\)-\(2.1\)](#) and [153](#)) and if any of those provisions are violated, recordings relating to that exploitation will not be protected by the Private Use Exception – an already “robust analysis” (*Barabash* at para 43). Further, as Professor Peter Sankoff observes, tying lawfulness under the Private Use Exception to an established body of jurisprudence addressing sexual exploitation is a “richer”, “broader”, and “clearer” approach to applying the Private Use Exception than the creation of a new absence of factual exploitation criterion (see [Ten Minutes on R v Barabash, Child Pornography and the Private Use Exception](#), at 8:40 (“Ten Minutes on Barabash”)).

Criterion 2: Consent to Recording

Second, in addition to consenting to the sexual activity, the minor must also consent to that activity being recorded (*Barabash* at para 25).

As “exploitation” is addressed under the lawfulness criterion of the Original Private Use Exception, the Court holds that there is no consideration of exploitation in respect of the minor's consent to the recording (at paras 48-49). However, the Court concedes that there may be instances in which consent to the recording is itself acquired through exploitation (at paras 45-47); a potential blind spot in the Original Private Use Exception (the first point discussed below under “Commentary”).

Criterion 3: Privacy

Third, the Original Private Use Exception will only apply if the recording is kept in strict privacy and intended for private use only by the creator and/or persons depicted in the recording (*Barabash* at para 26). Interestingly, by restricting access to those who either (1) created the recording or (2) are depicted in the recording, the Court seemingly prohibits a minor from taking

a sexually explicit photo of themselves and sharing it with a partner (the second point discussed below under “Commentary”).

While the Court restricted legal disclosure of child pornography to those involved in its recording, the Court did not go as far as the Alberta Court of Appeal in *Cockell* and insist on the minor using the recordings – the “mutuality of benefit” criterion. Rather, the Court held that the element of privacy requires only that the benefits derived from the recording are restricted to the individuals involved (*Barabash* at para 52). What these benefits consist of and which of the parties involved receive these benefits is for the determination of the individuals themselves (at para 52). In consequence, the Original Private Use Exception dismisses the added mutuality of benefit criterion found in the Extended Private Use Exception.

In our view, the Court’s rejection of the mutuality of benefit criterion is, like its rejection of the absence of factual exploitation criterion, sound. While the Court held that such a criterion would “unnecessarily complicate the private use exception test while providing little benefit” (at para 52) we would add that such a criterion would contradict the principles in *Sharpe* seeking to promote sexual exploration by minors (see *Sharpe* at para 109). Dictating to a minor that they can only meaningfully explore their sexuality by jointly possessing and viewing explicit photos with their partner is unnecessarily restrictive. Indeed, Joshua addressed, in a previous article, how ostensibly one-sided sexual activities can nonetheless reflect the meaningful sexual autonomy of both partners involved (see [Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent](#) at 145-46).

We note that the Court, in *obiter*, suggests that the element of privacy imports continued control over the recording in question such that the minor may be able to demand the destruction of the recording at a later date (at paras 27-30; the third topic discussed below under “Commentary”).

Application

Applying the three part Original Private Use Exception test above, the Court allowed the appeals and ordered a new trial (at para 63).

The Court found that the trial judge erred in law in his analysis of lawfulness, and in particular, in his analysis of whether or not the relationships in question were sexually exploitative. Specifically, in respect of sexual exploitation, the trial judge’s analysis improperly focussed on “the voluntariness of the particular activities, instead of on the nature of the relationship between the parties” as required by the *Criminal Code* (*Barabash* at para 56; emphasis in original). While the trial judge did consider factors relevant to exploitation (such as age disparity), he erroneously considered those factors “one at a time” rather than assessing “whether they cumulatively resulted in an exploitative relationship” (at para 55; emphasis added).

The Court ordered a new trial (rather than making its own ruling on the evidence) because the trial judge’s error had a material bearing on the acquittals (see para 62). Specifically, the Court held that the trial judge’s factual findings did not inevitably lead to a lack of exploitation in this case because the evidence was equivocal in respect of exploitation (at paras 58-61). On one hand, multiple factors raised the risk of sexual exploitation, including K and D’s homelessness, addictions, and need for shelter from *Barabash* and *Rollison* (see para 60). On the other hand, K and D were lucid enough to consent, initiated and directed many of the sexual activities, and willingly consented to the making of the recordings (see para 59). As a consequence, a new trial,

at which a judge can properly address whether the sexual activity was lawful under the Private Use Exception (*i.e.* non-exploitative), was necessary (see para 62).

Commentary: Unanswered Questions from *Barabash*

Barabash brings significant analytical clarity to the Private Use Exception. Still, it leaves some questions unanswered, including:

1. Can a minor be lawfully exploited for sexually explicit photographs?
2. Can a minor share sexually explicit “selfies” with their partner? And
3. Can a party later retract consent to recording?

1. Can a Minor be Lawfully Exploited for Sexually Explicit Photographs?

First, how should courts deal with child pornography lawfully obtained through exploitation? As described above, the Original Private Use Exception rejects the additional “absence of factual exploitation” criterion included in the Extended Private Use Exception. It follows that the second criterion under the Original Private Use Exception – consent to recording – does not take exploitation into account (*Barabash* at para 49). But what if child pornography is obtained through “lawful” exploitation (*i.e.* exploitation that falls short of sexual exploitation under the *Criminal Code*, [s 153](#))?

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 Use 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 179](#), 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).

In the end, the Court refrains from opining on this issue, stating that it will be dealt with when such facts are brought before it (at para 48). At that time, it will be interesting to see how the Court responds. While permitting the exploitation of children to obtain child pornography appears to be something that ought to be criminalized, such a view runs contrary to the offence of sexual exploitation under the *Criminal Code* (which would not apply to procuring photographs through exploitation without touching or an invitation thereof). It likewise runs contrary to the Court’s exclusion of exploitation from the consent to recording criterion under the Original Private Use Exception. In consequence, to criminalize possession of child pornography lawfully obtained through exploitation would either require a revision to the Original Private Use Exception or the expanding of sexual exploitation beyond its prescribed requirements under the *Criminal Code*. As the Court has just recently reaffirmed the Original Private Use Exception and as it is well-established that *Criminal Code* offences should be interpreted in favour of the accused when multiple interpretations are available (*R v CD*, [2005 SCC 78](#) at para 50) it is

unclear how a court could convict someone merely for obtaining nude photographs of a minor through exploitation.

In any event, we tend to support the Court’s decision to remain silent on this issue. The Court correctly observes that it may be misguided to opine on the issue of consent to recording when it was not an issue in the facts of *Barabash* (at para 32), when the common law of consent was “not fully argued” before it or the courts below (at para 32), and when the implications of altering the common law of consent “may be far reaching” (at para 48).

2. Can A Minor Share Sexually Explicit “Selfies” With Their Partner?

Second, it is unclear how the courts will deal with a minor taking a sexually explicit photo or video of themselves (a “Selfie”) and sending it to a partner (which, if sent by text message, is known as “Sexting”). While the concept of Sexting a Selfie is not addressed in either the reasoning or facts in *Barabash*, it is an example worthy of discussion, particularly given the increasing use by minors of technology that involves the private sharing of photographs and videos, such as Instagram and Snapchat. Indeed, the police were tipped off about *Barabash* in this very case because of photos posted to a social media platform, Nexopia (see para 7).

The discussion above addressed only private recordings because that is the type of child pornography at issue in *Barabash*. But *Sharpe* actually read in two exceptions to child-pornography offences under the *Criminal Code*, namely, exceptions applying to:

1. self-created expressive material (the “Personal Use Exception”); and
2. private recordings of lawful sexual activity (the Private Use Exception, discussed above).

(Collectively, the “*Sharpe* Exceptions”; *Sharpe*, at para 128).

Despite the [documented frequency of minors Sexting Selfies](#), it appears as though such recordings would not qualify under either of the *Sharpe* Exceptions.

The inapplicability of the Personal Use Exception to Sexting Selfies is clear. The Court’s summary of the Personal Use Exception in *Sharpe* (at para 128), which was not at issue in *Barabash* (see para 16), states that the Personal Use Exception applies only to “expressive material created through the efforts of a single person and held by that person alone, exclusively for his or her own personal use.” It follows that when a minor sends a sexually explicit Selfie to their partner, neither can benefit from the Personal Use Exception because it would apply, at most, to Selfies that are held exclusively by the minor who took the Selfie.

Indeed, the Court’s elaboration on the *Sharpe* Exceptions suggests that the Personal Use Exception does not apply to Selfies in any circumstance, even those held privately by the person who took the Selfie. Admittedly, the Court states that the Personal Use Exception applies to “visual expressions [...] created through the efforts of a single individual and held by that person for his or her eyes alone” (at para 115). This passage suggests that the Personal Use Exception applies to Selfies held exclusively by the person who took the Selfie. But the Court later states that the Private Use Exception applies to “auto-depictions, such as photographs taken by a child or adolescent of him- or herself alone, kept in strict privacy and intended for personal use only” (at para 116). As this passage expressly deals with Selfies, it appears that the Court intended the Personal Use Exception to be limited to “visual expressions” like drawings, not actual recordings, like photographs.

In contrast, the Private Use Exception appears to apply to Selfies, but arguably not when they are shared with a partner. The Court’s summary of the Private Use Exception in *Sharpe* (at para 128) which it reaffirms in *Barabash* (at para 16) states that the Private Use Exception applies only to “a person’s possession of visual recordings created by or depicting that person.” In consequence, when a minor sends a sexually explicit Selfie to their partner, arguably neither can benefit from the Private Use Exception because the recipient neither participated in the creation of, nor is depicted in, the recording.

The Court’s elaboration on the Private Use Exception provides further support to the inapplicability of the Private Use Exception to Sexting Selfies. As stated above, the Court appears to limit the application of the Private Use Exception to Selfies “intended for personal use only” (at para 115). Similarly, the Court, in elaborating on the Private Use Exception, reiterates that “the person possessing the recording must have personally recorded or participated in the sexual activity in question” (at para 39) and that the recording must be “intended exclusively for private use by the creator and the persons depicted therein” (at para 26). Indeed, the Court specifically discusses the example of minors exchanging sexually explicit photos, and that discussion seems to suggest that Selfies would not fall within the Private Use Exception:

[F]or example, a teenage couple would not fall within the law’s purview for creating and keeping sexually explicit pictures featuring each other alone, or together engaged in lawful sexual activity, provided these pictures were created together and shared only with one another (at para 116; emphasis added).

Similarly, the Court in *Barabash* states that “private use is limited to use by the creator and the persons depicted, and nobody else” (at para 52).

In sum, the Court in *Sharpe* and in *Barabash* appears to hold that if a minor takes a sexually explicit Selfie and sends it to their partner, both partners will be criminally liable.

That said, neither *Sharpe* nor *Barabash*, in respect of their facts, dealt specifically with minors exchanging sexually explicit Selfies. Further, the broader principles described in *Sharpe* arguably apply to minors exchanging sexually explicit Selfies. The majority in *Sharpe* read in the Private Use Exception because of the significance of private recordings to “adolescent self-fulfilment, self-actualization and sexual exploration and identity” (at para 109). Surely a partner need not press the button on the camera for the exchange of sexually explicit photos to engage with adolescent sexual exploration.

In our view, whether the exchange of Selfies should be protected by the *Sharpe* Exceptions is legitimately controversial. On one hand, we would guess that [most sexually explicit photos exchanged by minors are Selfies](#) (though Canada seems to [lack studies in this regard](#)). As a consequence, excluding what could be the most common way minors choose to explore their sexuality with their partners through photographs from protection intended to preserve that exploration seems misguided. Insisting that a minor’s partner literally take the photo, when that minor may only be comfortable with sending an explicit photo which they have taken (and retaken, and possibly edited) themselves, significantly depreciates the sexual autonomy of minors which the Private Use Exception seeks to preserve. Indeed, requiring that the photo be taken by a minor’s partner may pressure minors to be in sexually compromising positions earlier than they are comfortable with since some minors may be comfortable with sharing nude photos but uncomfortable with being nude in the presence of their partner (where the pressure for sexual

activity may be more intimidating). On the other hand, permitting a minor to take sexually explicit Selfies and send them to others may raise concerns about proliferating child pornography and facilitating the manipulation of minors by sexual predators. In particular, if Sexting Selfies can qualify under the Private Use Exception, then adults will be able to convince minors through online exchanges to send them sexually explicit photos that could be protected by the Private Use Exception. While insisting that the adult take the photo may seem misplaced, a minor may very well be comfortable sending a photo of themselves, but uncomfortable being physically present with the adult when the photo is taken, which could indirectly result in fewer minors being manipulated by adults since there will be no legal means (that they are comfortable with) of sharing sexually explicit photos with those adults.

Regardless of whether Sexting Selfies should be included within the scope of the *Sharpe* Exceptions, greater clarity in respect of how the law should address such materials will be a welcome addition to the Supreme Court's next foray into child pornography laws.

We note, parenthetically, that *Cockell* involved sexually explicit Selfies (see para 42). Interestingly, the Court of Appeal did not reason that the accused could not benefit from the Private Use Exception in respect of those Selfies because he was neither depicted in them nor created them (pursuant to para 116 of *Sharpe*). Instead, the Court of Appeal merely mentioned that some of the recordings at issue were Selfies in passing while discussing the (now defunct) mutuality of benefit criterion (at para 42).

3. Can A Party Later Retract Consent To Recording?

Third, how should courts deal with the situation when a party to a recording later retracts their consent to the recording (either by demanding its return or destruction)? While this issue is clearly in *obiter* as retracting consent was not at issue in *Barabash* (at para 27) it nonetheless raises interesting questions to explore.

According to the Court, a party's right to later retract consent to recording follows from how applying the Private Use Exception depends on the "ongoing nature of the possession" (at para 29). For example, privately-held recordings that are protected by the Private Use Exception are no longer protected by the Private Use Exception the moment they are shared with third parties, even if that sharing occurs decades later. And that sharing may not only make the current possession of that child pornography illegal; it may reach back in time to make its creation illegal as well (see *Sharpe* at para 118). In this way, the Private Use Exception is a 'living defense' that must be tested against the entire history of the recording, not just the moment the recording is created. As a consequence, the Court reasons that the minor's ongoing consent to the recording could, likewise, be a 'living' requirement of the Private Use Exception which, if retracted, may vitiate the protection of the Private Use Exception (*Barabash* at para 29).

To be clear, the Court, even after acknowledging that this issue is in *obiter*, uses equivocal language regarding the right for a minor to retract consent to recording and vitiate the Private Use Exception (e.g. "[i]t may well be" and "*Sharpe* suggests" that a minor has such a right; at para 30). Indeed, the Court expressly states that it "would not make any final pronouncement" on this issue (at para 30).

Still, the Court outlines persuasive *obiter* commentary in favour of minors retaining the right to retract consent to recording. Specifically, the Court describes how providing such a right would further the principles underlying the Court's decision in *Sharpe* and balance the right to freedom

of expression with protecting children from harm, such as the anxiety or stress they may feel about having such a recording in the possession of another person (at para 30). But as the Court provides only limited *obiter* commentary on this issue, the Court provides no guidance as to the process or implications of a child requesting that the recording be destroyed. How long would the person possessing the recording have to delete it before being subject to criminal liability? If the person refrained from deleting it, under what offence would they be charged? Can the adult demand that the recording be destroyed even if the minor wishes to preserve it? What if the recording contains two minors, one who later demands that it be destroyed, and another who insists on its preservation? All of these questions will require further clarification from the Court when facts engaging those questions ultimately arise.

In particular, it is relatively unique for a private citizen to have the power to transform legal conduct into criminal conduct at their sole discretion and possibly years after the initially non-criminal activity took place. However, in *Ten Minutes on Barabash*, Professor Sankoff notes (at 11:07) that this unconventional application of the criminal law follows from the unique ongoing operation of the Private Use Exception. Any material showing a minor engaged in sexual activity is “frozen in time” (at 12:19) and would be child pornography, even many years later, but for the presence of the Private Use Exception (which requires the consent of all parties to the recording). As a consequence, according to Professor Sankoff, the Private Use Exception no longer applies when a minor retracts their consent to the recording. While we agree with Professor Sankoff that a recording will likely transform into illegal child pornography “at [the] very moment” a party later retracts their consent (at 12:35), clearer guidelines in respect of how that retraction must be communicated to the individual possessing the recording and reasonable parameters for destroying the recording (*e.g.* how it should be destroyed, how much time you have to destroy it) are important to ensure that such an offence does not cast too broad a net of criminal liability.

Conclusion

Barabash brings greater clarity to the analytical framework for the Private Use Exception. At a minimum, this clarity should result in courts applying the Private Use Exception with greater precision and consistency. At best, with effective outreach to minors, this clarity may help provide young people with clearer parameters in respect of exploring their sexuality while being secure from abuse and exploitation. Still, even with the greater clarity brought by *Barabash*, many questions remain unanswered. Hopefully, with the clear foundation provided in *Barabash*, courts will be better-equipped to grapple with these new questions as they arise.

It is understandable for the Court to refrain from providing specific legal guidance on the unanswered questions discussed above given that none were present on the facts in *Barabash*. Indeed, the many nuances described above demonstrate how factually complex these issues can be and how attempting to address them without the benefit of specific facts and arguments may be premature. That said, clarity in the criminal law is fundamental to a just society (*R v Levkovic*, [2013 SCC 25](#) at paras 33-34). With these questions left unanswered, there is significant

ambiguity in what conduct is legal and how courts should treat it, particularly the conduct of minors exchanging sexually explicit Selfies. Only time will tell how these issues will be addressed in future cases. For now, it may be best for minors to keep things to themselves.

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