Nudes for the People?
How the Dissemination of Intimate Images can be in the Public Interest

By Christine Williams

There are laws in Canada against the dissemination of another individual's intimate images without their consent. Such conduct, also known as revenge pornography, is now a crime in Canada and can be recovered from in a civil court. Many Canadians would agree that the non-consensual distribution of another's intimate images should lead to criminalization and victims of this conduct should be able to recover through civilly. Revenge porn is a heinous act, a horrible breach of trust, and can lead to severe pain and suffering for victims. However, there exists one defence to this conduct: if the distribution of the image would be in the interest of the public and if the distribution does not extend beyond what is in the public interest. What does this mean? In what circumstances would the distribution of someone else's intimate images be in the interest of the public?

In 2014, Parliament passed the *Protecting Canadians from Online Crime Act*.[1] Among other internet-related conduct, this Bill added a provision into the *Criminal Code* against the non-consensual distribution of intimate images. Pursuant to section 162.1(2) of the *Code,* an intimate image includes three elements. First, an intimate image can be any visual recording, including a photograph, film or video recording, that depicts a person either in the nude or exposing their genital organs, anal region or breasts, or engaging in explicit sexual activity. Second, the recording must have been recorded in circumstances that gave rise to a reasonable expectation of privacy. Lastly, an intimate image requires that the person in the image retained a reasonable expectation of privacy when the image was distributed. The defence can be found in section 162.1(3), which states that "No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good." When would this defence apply?

In Manitoba, there exists the *Intimate Images Protection Act* which creates the tort for the non-consensual distribution of intimate images.[2] This *Act* enables a victim of revenge pornography to sue the individual who distributed their images without their consent. The *Act* clarifies that a person's reasonable expectation of privacy will not be diminished if they had been

[1] *Protecting Canadians from Online Crime Act,* SC 2014, c31.
[2] Bill 38, *The Intimate Image Protection Act*, 4th Sess, 40th Leg, Manitoba, 2015.

the one who originally provided the image or if they had consented to having been recorded or filmed. This part of the legislation is a clear effort to minimize victim blaming against those who willing sent intimate images of themselves to their partner but did not consent to the image's further distribution. What matters most is that the person distributing the image knew or ought to have reasonably known that the image was not to be distributed to others. The *Act* interprets "distribution" of an intimate image as when a person knowingly publishes, transmits, sells, advertises or otherwise distributes or makes the image available to a person other than the one who initially received the image. The only defence to this tort can be found in in section 13, which states that it is a defence to this action if the distribution is "in the public interest and does not extend beyond what is in the public interest." Again, what would this entail?

It is clear that both the criminal and civil legislation infringe upon a person's freedom of expression. In Canada, freedom of expression, freedom of speech, and freedom of the press are values which citizens hold dear. Without these fundamental freedoms, Canadian society would be drastically different. Freedom of the press, in particular, is essential to a society which values public accountability. Without freedom of the press, those in the highest positions of power could act without fear of exposure and it could lead to a society plagued with corruption. With this in mind, it can be easy to see why Parliament and the government of Manitoba thought it was essential to include a defence to revenge pornography-type conduct when it is in the interest of public. Therefore, when would this defence arise?

Many can remember the Anthony Weiner wiener sexting scandal. Anthony Weiner was a US politician when he sent a number of women unsolicited links to his nude pictures on Twitter. During their investigation, the FBI also found that he had sent nude pictures to underage women, an act which sent him to federal prison for a number of months.[3] The photos that he sent were eventually picked up by online media outlets and re-published on their own pages. Pursuant to Canadian laws, the moment his intimate images were disseminated without his consent, Weiner became a victim of revenge pornography. However, this sexting scandal soon became a catalyst for the importance of the exception to this type of criminal conduct because it exemplified the law's impact on the freedom of the press. The public dissemination of Weiner's intimate images was interpreted as falling into the defence of revenge pornography because the distribution of his intimate images was understood as having been in the interest of the public.

[3] https://en.wikipedia.org/wiki/Anthony_Weiner_sexting_scandals.

In order for this defence to have held up in Canadian courts (criminal or civil), the distribution of the images must have, first, been in the interest of the public and, second, not have extended beyond what was in the public interest. It seems probable that the first part of the test would require finding that the story itself was in the public's interest. Was it important for the public to know what Weiner had done? This question would likely be answered in the affirmative because Weiner was a politician who had been voted into power by members of his constituency. Those people deserved to know that their representative was sending unsolicited pictures of his genitals to women and underaged girls.

The next question is then whether or not those members of the public needed to see the actual images or if the story without the images would be adequate. I personally would not have had to have seen the photos to decide that I would not want someone like Anthony Weiner continuing his role as my political representative; however, others may disagree. There could be instances where, without the publication of such images, someone like Weiner would deny the entire story. Perhaps in circumstances like that, where without the images the story could not be otherwise conveyed, then the defence to the revenge pornography charge could apply. However, in the circumstances such as the Anthony Weiner scandal, where Weiner was not only found guilty in a court of law but he publicly admitting to sending the images, I do not believe this defence would stand.

One example where the defence to the distribution of intimate images without consent may apply is in the situation where the image could be used to prove that a sexual assault occurred. The distribution of such images, however, would not be to the public, it would only be to the prosecution and to the judge. I believe the images being disseminated to a judge would be in the public's interest, but the distribution of the images would likely go beyond what is in the public's interest if it were to be distributed to the public at large.

When it comes down to the requirements of the defence, it is hard to imagine instances where the distribution of certain images would be in the interest of the public without going beyond the public interest. Despite the importance of the freedom of the press, the dissemination of another's intimate images without their consent seems to always go beyond what is in the public's interest. There is no doubt, however, that criminal defence lawyers and judges will come up with creative ways of arguing and interpreting this defence.