To: Vincent Cardi, Chair, ULC Committee on Unauthorized Disclosure of Intimate Images
Louise Nadeau, Vice-Chair
From: Mary Anne Franks, Reporter
Re: Reporter's Notes re: Feedback on First Reading Draft—Civil Remedies for Unauthorized Disclosure of Intimate Images Act (the "CRUDIIA")
Date: October 30, 2017

Explanation of Notes

The following is my attempt to summarize and respond to the feedback from Commissioners and Observers on the first reading of CRUDIIA. Where I felt that a revision or comment was necessary, I have flagged it below. I submit, along with this memo, a revised draft of the Act (including a revised prefatory note) and a compilation of the state civil statutes to which I make reference in these notes.

Section 2 – Definitions

1. Consent - Sec. 2(1)

Issues: Clarify whether consent can be implied or coerced; whether consent should be written/signed; whether written consent should provide safe harbor; whether consent can be revoked; scope of consent; spheres of consent; suggestion to look to employment law for definitions; whether consent is different for minors/can minors consent; relationship between consent and reasonable expectation of privacy; whose burden it is to prove consent; should act provide factors for court to consider whether consent was given/valid; whether Sec. 3(B)(2) should be moved to definition or omitted.

Response: I think that several of the general issues raised regarding the quality and scope of consent do need to be clarified. Most state civil laws do not specify what is meant by consent. North Carolina and Texas specify that consent must be "affirmative" and "effective," respectively, but do not offer further explanation. One exception is Wisconsin's statute:

> "Consent" means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):
> **1.** A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
> **2.** A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

This is an appealing definition for its specificity; the presumptions of incapability might be useful in cases involving patients in nursing homes and other care facilities.

With regard to revocation, my sense is that consent cannot be revoked, but unsure if this needs to

be or how this should be addressed in the act.

With regard to questions about minors and consent, my sense is that the interaction between this act and child pornography/minors' sexual consent issues will be determined by existing provisions in individual state laws and that it would create more confusion than clarity to attempt to address them in this act.

Action: Addressed many of these issues in comment; deleted Sec. 3(B)(2).

2. Disclose – Sec. 2(2)

Issues: Would hanging a photograph on an office wall constitute disclosure?

Response: My instinct is yes.

Action: Briefly addressed in comment.

3. Identifying characteristics - Sec. 2(3)

Issues: Does this include the face? What if the individual is not identifiable from original disclosure, but a separate posting includes information? Does the answer change according to whether the two posters act in concert?

Response: The definition includes faces or other body parts that make a person identifiable. "Identifiable" should include images that are identifiable through the original disclosure or by subsequent posts. My sense is that both posters could be liable, whether or not they acted in concert. Texas's statute may be useful here:

> "(4) the disclosure of the intimate visual material reveals the identity of the depicted person in any manner, including through:
> (A) any accompanying or subsequent information or material related to the intimate visual material; or
> (B) information or material provided by a third party in response to the disclosure of the intimate visual material."

Action: Partial addressed in comment.

4. Individual v. person – Sec. 2(4); 2(7)

Issues: Is "individual" different from "person"? Should "individual" or "person" be defined?

Response: Rule 305 of the ULC Drafting Rules provides a uniform definition of person: ""Person" means an individual, estate, business or nonprofit entity. The term does not include a public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity." As this definition includes non-human entities, I think it is important to use a more restrictive term like "individual" to refer to the living human beings who can be affected by this

conduct.

Action: I added a proposed definition of "individual" and inserted the definition of "person" as per Rule 305.

5. Intimate image - Sec. 2(5)

Issues: Does this include paintings? Manipulated photographs? Is including "nipple" too broad? Should "bodily fluids or excretions" be used instead of "semen"? Should definition be different when depicted individuals are children (concern about "baby in the bath" photos)/how interact with child pornography laws? Should list be restrictive or non-restrictive ("includes" vs. "means")?

Response: The definition includes all images that are actual visual depictions of an individual or are virtually indistinguishable from such depictions. It does not include paintings, drawings, etc.

"Female post-pubescent nipple" should be included, as this is a part of the body traditionally considered to be intimate.

The definition should not be extended to "bodily fluids or excretions" instead of being limited to semen, as this creates a danger of overbreadth. For example, it would seem to allow for the inclusion of images of fully clothed individuals covered in sweat. The term "includes" makes it possible for other appropriate situations to be included that are not explicitly enumerated.

The question of minors and nudity is tricky, but this might be best resolved by individual states' child pornography definitions. If we wished to address this in the act, Wisconsin's statute might be useful example, as it attempts to address some of the concerns relating to minors: "The parent, guardian, or legal custodian of the person depicted if the private representation does not violate s. 948.05 or 948.12 and the posting or publication is not for the purpose of sexual arousal, gratification, humiliation, degradation, or monetary or commercial gain."

Action: Partially addressed in comment.

6. Online identifier – Sec. 2(6)

Issues: Should the wording be changed from" means" to "includes," that is, should the list be restrictive or non-restrictive?

Response: My sense is that this should remain restrictive, but can be made more open-ended.

Action: Inserted "or similar identifiers."

7. Person 2 (7)

Inserted.

8. Other issues (2)

Does "depict" need to be defined? Should "expectation of privacy" be defined? If so, can there be a presumption with regard to minors?

Response: Unsure.

Action: None.

Section 3 – Protection of Private Visual Material

Intent – Sec. 3(a)

Issues: What is the appropriate level of intent – intentional, knowing, reckless, negligent? What about original v. secondary disclosers?

Response: There are two kinds of intent at issue: intent in the disclosure, and intent with regard to lack of authorization. The committee was divided regarding whether the standard should be intentional or negligent and has so far decided on negligence for both.

Original v. secondary disclosers are treated the same, but Section 230 provides immunity for secondary disclosers if they are providers or users of an interactive computer service and the content was provided by a third part.

Action: Addressed in comment.

Scope - Sec. 3(a)

Issue: Should act apply to audio recordings, as New Jersey and Arkansas do in criminal statute?

Response: No, as this would raise serious First Amendment overbreadth issues.

Action: None.

Consent – Sec. 3(2) (now deleted)

Issue: (2) Silence or lack of protest or resistance by itself is not consent, should be moved to definitions or deleted.

Action: Deleted.

Reasonable Expectation of Privacy - 3(b)(1)

Issues: Should reasonable expectation of privacy be defined or left open? Should act offer factors to determine?

Response: Unsure. Here are some provisions from state civil statutes:

California: "(1) The distributed material was created under an agreement by the person appearing in the material for its public use and distribution or otherwise intended by that person for public

use and distribution.
(2) The person possessing or viewing the distributed material has permission from the person appearing in the material to publish by any means or post the material on an Internet Web site.
(3) The person appearing in the material waived any reasonable expectation of privacy in the distributed material by making it accessible to the general public.
(4) The distributed material constitutes a matter of public concern.
(5) The distributed material was photographed, filmed, videotaped, recorded, or otherwise reproduced in a public place and under circumstances in which the person depicted had no reasonable expectation of privacy."

North Carolina "Reasonable expectation of privacy. - When a depicted person has consented to the disclosure of an image within the context of a personal relationship and the depicted person reasonably believes that the disclosure will not go beyond that relationship."

Washington: "Factors that may be used to determine whether a reasonable person would know or understand that the image was to remain private include:
(a) The nature of the relationship between the parties;
(b) The circumstances under which the intimate image was taken;
(c) The circumstances under which the intimate image was distributed; and
(d) Any other relevant factors.
(4) It shall be an affirmative defense to a violation of this section that the defendant is a family member of a minor and did not intend any harm or harassment in disclosing the images of the minor to other family or friends of the defendant. This affirmative defense shall not apply to matters defined under RCW **9.68A.011**."

Wisconsin: "A "legitimate expectation of privacy" for purposes of a search or seizure under the 4th amendment is not consistent with the context and purpose of this section. The 4th amendment embodies a balance between society's interest in law enforcement and the privacy interest asserted by the individual that is not relevant to this section."

Action: None

Defenses/Exemptions - 3(b)(2)

Issues: Whose burden to prove defenses for (b) 2A? Replace with "legitimate medical, scientific or educational activities" from Oregon statute?

Response: I believe the defendant should have this burden, but our draft doesn't make that clear. It is my sense that we should leave the wording of the exemptions as they are.

Action: None

Public interest – Sec. 3(2)(A)

Issues: Multiple First Amendment issues

Response: The Supreme Court has made repeated reference to "matters of public concern" which it maintains are "at the heart of the First Amendment's protection," contrasting it with "speech on matters of purely private concern is of less First Amendment concern." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-60 (1985).). In Snyder v Phelps, the Court suggested that a matter is "purely private" if it does not contribute to "the free and robust debate of public issues" or the "meaningful dialogue of ideas." Snyder v. Phelps, 131 S.Ct. 1207, 1215 (2011The Court has recognized that distribution of homemade sexually explicit material "does not qualify as a matter of public concern under any view." *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004).

The Ninth Circuit recently held, in upholding a conviction for harassing and intimidating conduct, that unauthorized "sexually explicit publications concerning a private individual" are not "afforded First Amendment protection." *United States v. Osinger*, 753 F.3d 939, 948.

Furthermore, the Restatement (Second) of Torts § 652D (1977) provides considerable guidance on the determination of what constitutes a matter of public concern or interest.

Most existing civil statutes do not define the term (sometimes called public concern, sometimes newsworthiness). Colorado's statute is one exception: "For purposes of this section, unless the context otherwise requires: (a) "Newsworthy event" means a matter of public interest, of public concern, or related to a public figure who is intimately involved in the resolution of important public questions or, by reason of his or her fame, shapes events in areas of concern to society."

Action: Addressed in comment.

Effective Date

Issue: Clarification?

Response: Is there a standard ULC way to address?

Action: None

Section 4 – Civil Action

Parties – Sec. 4(a)

Issues: Can a family member or intimate partner bring claim? Can a minor's parents be sued? Should "prevailing plaintiff" be specified?

Response: Unsure. North Dakota "An action may be brought by a natural person or a guardian of the natural person, if the person is incompetent."

Action: None

Statutory Damages - Sec. 4(b)

Issues: Should it be made clear that act authorizes recovery any ongoing profits? Damages for

emotional distress? If punitive, according to other state law? Clarify can get damages even if actual damages are nominal? Provide minimum statutory damages? Some states may require listing of "special damages"? Add costs of removal of images from internet? Look to defamation act for remedy to incentivize defendant to take material down? Are damages without harm unconstitutional?

Response: Unsure. Suggestion of providing incentives for defendants to remove is compelling, but often removal will be out of defendants' control. I personally like the suggestion of paying for removal costs, and would add payment for reputation management services.

Here is an example of how one state addresses damages (Minnesota):

"**Damages.** The court may award the following damages to a prevailing plaintiff from a person found liable under subdivision 1 or 2:
(1) general and special damages, including all finance losses due to the dissemination of the image and damages for mental anguish;
(2) an amount equal to any profit made from the dissemination of the image by the person who intentionally disclosed the image;
(3) a civil penalty awarded to the plaintiff of an amount up to $10,000; and
(4) court costs, fees, and reasonable attorney fees."

Action: None

Injunctive Relief – Sec. 4(b)(5)

Issues: Fine as is or needs to be stated as separate remedy?

Response: Unsure. Here is Minnesota's provision for comparison:
"**Injunction; temporary relief.**
(a) A court may issue a temporary or permanent injunction or restraining order to prevent further harm to the plaintiff.
(b) The court may issue a civil fine for the violation of a court order in an amount up to $1,000 per day for failure to comply with an order granted under this section."

Action: None

Confidentiality – Sec. 4(d)

Issues: Section is very detailed – leave to court rule? Make new section?

Response: Unsure. Compare to Washington: "Make it known to the plaintiff as early as possible in the proceedings of the action that the plaintiff may use a confidential identity in relation to the action" and California's extensive provisions. Wondering if we could also consider adding provision encouraging/allowing that the visual images themselves not be entered into the record.

Action: None.

Jurisdiction and Venue – Sec.4 (?)

Issues: Should jurisdiction be added?

Response: Unsure what ULC standards are for this. Here are some of the state civil statutes' jurisdiction provisions for reference:

Minnesota: A court has jurisdiction over a cause of action filed pursuant to this section if the plaintiff or defendant resides in this state.

Florida: A violation of this section is committed within this state if any conduct that is an element of the offense, or any harm to the depicted person resulting from the offense, occurs within this state.

Texas: A court has personal jurisdiction over a defendant in a suit brought under this chapter if:
(1) the defendant resides in this state;
(2) the claimant who is depicted in the intimate visual material resides in this state;
(3) the intimate visual material is stored on a server that is located in this state; or
(4) the intimate visual material is available for view in this state.

Action: None

Issues: Should venue be added?

Response: I don't know what the ULC standards are for this. Here is one state venue provision:

Minnesota: A cause of action arising under this section may be filed in either:
(1) the county of residence of the defendant or plaintiff or in the jurisdiction of the plaintiff's designated address if the plaintiff participates in the address confidentiality program established by chapter 5B; or (2) the county where any image is produced, reproduced, or stored in violation of this section.

Action: None

Section 5 – Statute of Limitations

Issues: Why four years? What about discovery rule? Should it be different for minors? Suggested 2 years with discovery rule.

Response: My sense is that this should be changed to include reference to discovery and we should reconsider what the number of years should be.

For reference, Minnesota's statute states: "In a civil action brought under subdivision 1, the statute of limitations is tolled until the plaintiff discovers the image has been disseminated." North Carolina's statute states "The civil cause of action may be brought no more than one year after the initial discovery of the disclosure, but in no event may the action be commenced more than seven years from the most recent disclosure of the private image."

Action: None.

Section 6 - Limitations

Issues: Should text of CDA 230 be inserted here; provide larger/more robust protection than federal law; provide backstop in case federal law changes?

Response: The act should do no more than make clear that its provisions are limited by current federal law to avoid preemption.

Some state statutes do not make any reference to CDA 230 at all, e.g. Pennsylvania's. Of those that do, some include the language requested by the tech industry, but others vary. For example:

California: "Nothing in this section shall be construed to alter or negate any rights, obligations, or immunities of an interactive service provider under Section 230 of Title 47 of the United States Code. Nothing in this section shall be construed to limit or preclude a plaintiff from securing or recovering any other available remedy."

Texas: "This chapter does not apply to a claim brought against an interactive computer service, as defined by 47 U.S.C. Section 230, for a disclosure or promotion consisting of intimate visual material provided by another person."

Vermont: "Interactive computer services, as defined in 47 U.S.C. § 230(f)(2), or information services or telecommunications services, as defined in 47 U.S.C. § 153, for content solely provided by another person. This subdivision shall not preclude other remedies available at law."

Action: I have borrowed language from the Uniform Unsworn Declarations Act in inserting a brief comment.

Section 7 – Severability

Issues: Add required legislative note.

Action: Added per Rule 604.

Other Issues

Do we need to use Rule 601 Section on uniformity?