S.C.C. File No.: 37833

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

-and-

RYAN JARVIS

RESPONDENT
(Respondent)

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I. OVERVIEW AND STATEMENT OF FACTS

1. In common parlance and law alike, voyeurism is the non-consensual viewing of a person in circumstances of privacy.

2. When it enacted s. 162 of the *Criminal Code*, Parliament did not purport to criminalize the observation or recording of people in *public*, even where the observation or recording is done for a sexual purpose. Rather, Parliament recognized that evolving technology had made it easier for 'peeping Toms' to gain remote visual access to private spaces such as homes, bathrooms, and changing rooms, intruding on private spaces and acts in previously unanticipated ways. That was the principal mischief targeted by the new voyeurism offence.[1]

3. The Appellant Crown now argues that the Court should interpret the offence in a manner that would criminalize observation and photography in *public* space, and in so doing, asks this Court to expand the scope of a criminal offence beyond that which was intended by Parliament. The Criminal Lawyers' Association of Ontario ("CLA") submits that the Court should decline to rewrite the offence in this manner. If observing or photographing fully clothed people in public doing non-private things is to be a crime, Parliament would need to say so clearly. The interpretation proposed by the dissent in the court below and by the Appellant in this Court is broad in scope and uncertain in its application. People are entitled to have reasonable notice about the scope of criminal prohibitions – even where the relevant line is not between blameless and insidious conduct but rather between the socially distasteful and the truly criminal. Recording unwitting subjects for sexual purposes in public is undoubtedly the former; but on a proper reading of s. 162, it is not the latter.

4. The CLA makes no submissions on the facts of these appeals.

II. POSITION ON QUESTIONS IN ISSUE

5. It is the position of the CLA that:

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[1] Michael Plaxton, "Privacy, Voyeurism, and Statutory Interpretation," Criminal Law Quarterly (Forthcoming 2018-19), revised on March 13, 2018, accessed online on March 18, 2018

i. "Reasonable expectation of privacy" in s. 162(1) means an expectation that one will not be seen or recorded. The observer's sexual purpose forms no part of this analysis.

ii. It is inappropriate to broaden the scope of a criminal offence with reference to *Charter* values, international instruments, or other similar sources. Rights-protecting instruments are not tools to justify subjecting people to conviction and imprisonment where Parliament has not clearly expressed an intention to do so.

III. STATEMENT OF ARGUMENT

A. Parliament meant the requirement of "privacy" to be taken literally

6. "Reasonable expectation of privacy" is a protean concept that takes on meaning from the context in which it is used.[2] In s. 8 *Charter* jurisprudence, the term marks out that zone of privacy Canadians can reasonably expect to enjoy free from state intrusion.[3] The presence or absence of a reasonable expectation of privacy in a given situation often requires nuanced judicial analysis to determine. Experienced jurists, including members of this Court, often disagree in the result. That uncertainty is an acceptable price to pay for the proper protection of constitutional rights in evolving social and technological circumstances.[4]

7. In s. 162, by contrast, finding a "reasonable expectation of privacy" means that the accused can be sent to jail for violating it. An open-ended, evolving standard is inappropriate here, and in any event is not what Parliament intended. Rather, a "reasonable expectation of privacy" in this context refers to the complainant's reasonable expectation that he or she is not

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[2] *R. v. Tessling*, [2004] 3 SCR 432, 2004 SCC 67, at para. 25, *per* Binnie J.

[3] *R. v. Marakah*, [2017] 2 SCR 608, 2017 SCC 59, at para. 37. As the Court in *Marakah* recognized, in a free and democratic society, citizens may in fact face risks to privacy from their fellow citizens that they do not reasonably expect from the state.

[4] Sometimes the uncertainty of the result in a given case is offered as a reason to find police "good faith" which weighs in favour of admitting evidence under *R. v. Grant*, [2009] 2 SCR 353, 2009 SCC 32. Although we don't send police officers to jail for s. 8 violations, the "good faith" analysis demonstrates the courts' reluctance to condemn police conduct for a reasonable mistake of law on what constitutes a reasonable expectation of privacy. One would think that the prospect of sending someone to jail for making a similar mistake under s. 162 would militate in favour of an interpretation that does not require complex analysis in the first place.

being watched or observed. For a number of reasons, developed below, it should not be more complicated than that.

8. First, as the majority of the Court of Appeal concluded, "[i]f the fact that [an individual is] being surreptitiously recorded without their consent for a sexual purpose were enough to give rise to a reasonable expectation of privacy, that would make the privacy requirement redundant."[5] After all, almost no one wants to be the subject of lascivious observation in public; so if this alone created a "reasonable expectation of privacy" within the meaning of s. 162, then the observer's sexual purpose would *alone* be sufficient to result in the commission of the offence under s. 162. This cannot be right. As a matter of logic, the *complainant's* subjective expectations cannot depend on what is in the mind of the accused, since this is not known to the complainant. And as a matter of criminal law policy, transforming otherwise fairly innocuous (if distasteful) conduct into a criminal act based solely on what is in the mind of the accused is a step not to be taken lightly given its potential for creating "thought-crimes".[6]

9. Contrary to the assertion of Huscroft J.A., there is nothing "ironic"[7] about the fact that a condition precedent to criminal culpability inherently limits the scope of conduct captured by an offence. Clearly, Parliament did not intend to criminalize *all* incursions on sexual integrity through the enactment of this offence.[8] A requirement that the individual reasonably expects to be free from public observation or recording is consistent with the scheme of the offence and its legislative history. For example, in discussing the scope of the criminal offence and its potential interaction with journalistic freedom, the Hon. Sue Barnes (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada at the time the voyeurism offence was debated in Bill C-12 in 2004), described that "persons observed would have to be in circumstances giving rise to a reasonable expectation of privacy, ***which means they must have***

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[5] Reasons of Feldman J.A., at para. 108

[6] The law of criminal attempt is all about navigating this difficult balance. The law's abhorrence of criminalizing bad thoughts is no doubt why s. 24(2) of the *Criminal Code* requires that an act go "beyond mere preparation" to commit the predicate offence in order to ground criminal liability as an attempt.

[7] Reasons of Huscroft J.A., at para. 134

[8] Department of Justice, "Voyeurism as a Criminal Offence: A Consultation Paper", 2002, at p. 8.

reasons to believe that they are in a place where nobody can watch them."[9] The lengthy legislative evolution of the voyeurism offence has been helpfully analyzed by Prof. Michael Plaxton. He concludes that the legislative history does "not indicate any collective intention to mold or guide the use of surveillance technology in broadly public locations." Prof. Plaxton describes how even when it was suggested that the voyeurism offence could or should protect privacy interests in public locations, the idea was rejected in debates.[10]

10. The dissent recasts the issue by inquiring into whether similarly situated individuals should "expect that their personal and sexual integrity will be protected while they are at school."[11] No one would reasonably dispute that they should, but this says nothing about whether such protection can be achieved through the application of this particular criminal law, which was enacted to target a very different mischief. The proper approach to interpreting a criminal law is not to ask whether particular interests deserve "protection"; it is to determine whether the impugned conduct falls within the scope of the law as written.

11. The dissent disavows the task of following through the implications of its analysis, finding that students have *at least* a reasonable expectation that their privacy will be prioritized "over the interests of anyone who would seek to compromise their personal and sexual integrity while they are at school," and that this was sufficient to dispose of the case.[12] But to the extent that this Court is urged by the Appellant to adopt a version of Huscroft J.A.'s analysis, its implications need to be assessed in order to see if the framework is tenable.

12. The CLA submits that it is not, for two principal reasons: (1) it yields no predictable method of determining what is and is not criminalized by s. 162, violating the fair notice principle; and (2) it yields absurd results, demonstrating that Parliament could not actually have intended to extend the reach of s. 162 in this manner.

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[9] Canada, House of Commons, *House of Commons Debates*, Vol. 40, 3rd Sess., 37th Parl., April 23, 2004, p. 1020 [emphasis added]

[10] Michael Plaxton, "Privacy, Voyeurism, and Statutory Interpretation," Criminal Law Quarterly (Forthcoming 2018-19), revised on March 13, 2018, at pp. 12-20

[11] Reasons of Huscroft J.A., at para. 131

[12] Reasons of Huscroft J.A., at para. 111

13. According to the "fair notice" principle, people subject to a criminal law have the right to know with reasonable certainty what is and is not captured by it. This was described by McLachlin C.J. as the "principle that crimes should be defined in a way that affords citizens, police and the courts a clear idea of what acts are prohibited."[13] It is not only the morally blameless who are entitled to its benefit. Rather, fair notice is also due to people engaging in conduct that would generally be considered disreputable – like observing or photographing people in public for sexual purposes – but whose criminal status has not been clearly established.

14. The CLA submits that the interpretation proposed by the Appellant and the dissenting justice below would violate this principle by yielding nothing but uncertainty as to the reach of s. 162. To test this hypothesis, we need to consider the implications of the Appellant's proposed interpretation of s. 162 to other fact scenarios that might reasonably be expected to arise.

15. Consider a scenario identical to *Jarvis* in all respects except that the person doing the surreptitious recording was a fellow student instead of a teacher. The Appellant places great weight on the "trust relationship between students and their teachers" and argues that this relationship informs the reasonable expectation of privacy.[14] But unlike some other offences – for instance, sexual exploitation under s. 153 – the voyeurism offence contains no indication that Parliament intended to carve out relationships of trust, authority or dependence for special treatment. Reading such a concept into the terms of s. 162 would transform "privacy" from a straightforward concept readily understandable to a layperson – i.e. "a place where you expect not to be watched or recorded" – into a multilayered judicial inquiry with uncertain results. If a student-teacher relationship would suffice to create a reasonable expectation of privacy, what other kinds of relationships would do so? This kind of abstruse inquiry, divorced from the actual wording of s. 162, is the antithesis of what the fair notice principle demands.

16. Or consider a scenario identical to the case at bar except that the recordings did not focus on any part of the subjects' bodies. Assuming that the "sexual purpose" could otherwise be proved, there seems to be little reason why a subject's reasonable expectation of *privacy* would be different depending on whether their whole body or a particular (clothed) part of it were

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[13] *R. v. Labaye*, [2005] 3 SCR 728, 2005 SCC 80, at para. 2.
[14] Appellant's Factum, at para. 9

recorded. Would the analysis change if the accused subsequently used technological means to zoom in and crop the image to focus on the subject's breast or genital area? It is difficult to see how the voyeurism offence could actually be completed in the editing room rather than at the time of recording or observation.

17. Relatedly, consider the example given by the Appellant of an accused with a "foot fetish" who goes about surreptitiously recording, in public and for a sexual purpose, the feet of passersby. Presumably, the passersby would entertain a reasonable expectation against being sexually objectified in this manner. Yet it would be a major leap to propose that such an expectation should transform this kind of conduct into a jailable offence.

18. Recognizing this problem, the Appellant offers that the offence would not be made out in such circumstances because the harms of associated with this kind of sexual objectification are "minimal" and the impact on the target's dignity and autonomy is insufficient to constitute an offence. No authority or argument is offered in support of this conclusion. It is by no means clear why an unwitting passerby would have a "reasonable expectation of privacy" in respect of his or her clothed midsection but not his or her feet. In any event, given the premium placed on notice and clarity where conviction and imprisonment are at stake, that very lack of obviousness is a serious problem for the Appellant's interpretation of s. 162. After all, if the foot fetishist is not to be convicted, neither should a range of other potential accused swept in to the ambit of s. 162 by the Appellant's unwieldy interpretation.

19. Naturally, any number of other scenarios can be envisioned. Some have already been canvassed in the lower courts.[15] Taken together, they strongly suggest that the Appellant's proposed approach yields no reasonably predictable results, since it transforms the privacy element from a straightforward binary determination into an open-ended, multi-factored inquiry. Even if the Appellant's approach could be forced to produce predictable results by insisting on its most aggressive version – i.e. a complainant's reasonable expectation of not being sexually observed or recorded *would always* generate a reasonable expectation of privacy – this would yield absurd results. All manner of covert observation or recording of people *in public doing*

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[15] *R. v. Lebenfish*, 2014 ONCJ 130 (accused photographing bathers at nude beach, acquitted); *R. v. Rudiger*, 2011 BCSC 1397 (accused covertly videotaping children playing in public park, convicted)

non-private things would be subject to prosecution under s. 162. That prospect is simply untenable.[16]

B. Reliance on *Charter* values, the Quebec *Charter*, or the common law cannot expand Parliament's intended scope of a criminal offence

20. Simply put, it is not for the courts to expand the reach of criminal laws to address interests they deem worthy of "protection," even where provisions of constitutional documents and international instruments can be marshalled in support of the worthiness of such concerns. This conclusion flows straightforwardly from the necessity of restraint in interpreting penal legislation, and the fair notice principle described above. But it also flows from the reality that the criminal law is not the only – and in many circumstances not the best – way in which to "protect" such interests. As Justice Doherty once observed, the criminal law is "a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment."[17] Accordingly, it does not follow from the identification of an interest worthy of protection that Parliament would choose *criminal law* as the means to protect it.[18] This is another reason why we should not jump too quickly from disapprobation of particular conduct to a finding that Parliament would inevitably choose a criminal law response.

21. The well-grounded judicial reluctance to interpretively expand criminal offences in response to perceived under-inclusion was illustrated powerfully by the Court's recent decision interpreting the bestiality offence. In *R. v. D.L.W.*, this Court held that non-penetrative sexual

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[16] Notably, courts in non-criminal contexts have generally disavowed a reasonable expectation of privacy from unpublished photographs and videos taken of an individual in a public place: see, e.g., *Milner v. Manufacturers Life Insurance Co.*, 2005 BCSC 1661, at paras. 69-94. See also, *Aubry v Éditions Vice-Versa*, [1998] 1 SCR 591, where the majority upheld the Court of Appeal's conclusion that "***the fault lay not in the taking of the photograph but in its publication***" (at para. 44 [emphasis added]).

[17] *R. v. Greenwood* (1991), 8 CR (4th) 235 (Ont. C.A.), at pp. 246-247.

[18] Using this case purely for illustrative purposes, it would appear that both employment and tort law would offer protection for the students' interests. A teacher conducting himself in this manner would presumably face dismissal, and may well be subject to a civil action in tort.

contact with an animal is not within the scope of s. 160 of the *Code*, despite the valid policy arguments that it ought to be. Because "judges are not to change the elements of crimes in ways that seem to them to better suit the circumstances of a particular case,"[19] the Court held that such an argument should be directed to Parliament. Further, and unlike the less restrictive approach taken to defences, excuses, and justifications,[20] the Court also confirmed the fundamental principle in respect of the interpretation of a penal statute that "the courts must not expand the scope of criminal liability beyond that established by Parliament."[21]

22. The Appellant's invocation of "*Charter* values" to support the broadening of criminal liability should therefore be rejected. This Court has warned that to interpret all legislation to conform with *Charter* values would "wrongly upset the dialogic balance."[22] *Charter* values are only a legitimate interpretive aid in cases of genuine ambiguity.[23] It is all the more important to heed this caution where criminal offence-creating provisions are being interpreted, since people subject to prosecution and imprisonment under such laws cannot be expected to have such legal subtleties within their ken. As this Court recognized, when interpreting criminal offences the "companion of restraint is *certainty*."[24]

23. While Charter *values* have sometimes been considered in the interpretation of *Criminal Code* provisions, rarely if ever have they been invoked by a court in order to justify expanding the previously understood scope of an offence.[25] After all, the fair notice principle can itself be described as a *Charter* value – indeed, a *Charter* right.[26] *Charter* values are therefore much more

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[19] *R. v. D.L.W.*, [2016] 1 SCR 402, 2016 SCC 22, at para. 3
[20] *Ibid*, at para. 64
[21] *Ibid*, at para. 18. See also: s. 9 of the *Criminal Code*; *Frey v. Fedoruk*, [1950] SCR 517; *R v. McDonnell*, [1997] 1 SCR 948
[22] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, 2002 SCC 42, at para. 66
[23] *Ibid*.
[24] *R. v. Hutchinson*, [2014] 1 SCR 346, 2014 SCC 19, at para. 18 [emphasis in original]
[25] See *R. v. Zundel*, [1992] 2 SCR 731 at 771 per McLachlin J. (as she then was), where the majority disagreed with the minority's interpretation of the "false news" offence to incorporate the *Charter* values of equality and multiculturalism. As the majority held in *Hutchinson* (*supra* at para. 42), "[o]ur jurisprudence has consistently confirmed that in interpreting criminal law provisions, the twin watchwords of restraint and clarity must inform the inquiry."

[26] As explained in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, fair notice

likely to be relevant to the common law development of defences, as this generally does not raise the same fair notice concerns.[27]

24. Finally, it should be recognized that the regulation of observation and photography *in public* would be a complex endeavour engaging *Charter* rights and values on all sides. In many circumstances, photography will amount to an expressive, artistic act attracting protection under s. 2(b) of the *Charter*. This Court has recognized that "all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream are deserving of *Charter* protection."[28] Even a form of expression as odious as child pornography attracts *Charter* protection, subject to reasonable limits under s. 1.[29]

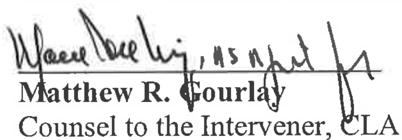
25. Accordingly, if Parliament were to criminalize photography in public spaces, it would need to establish that the limits on expressive freedom thereby imposed were demonstrably justified in a free and democratic society. All of this suggests that even if *Charter* values were to be considered in the *interpretive* exercise – which the CLA contests – they would not necessarily militate in favour of the broad interpretation advanced by the Crown. That reality underscores the wisdom of interpreting the offence according to what Parliament actually wrote and, on the available evidence, actually intended.

IV – V SUBMISSIONS ON COSTS AND ORDER REQUESTED

26. The CLA makes no submissions regarding costs.

27. The CLA makes no submission on the ultimate order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 5th day of April, 2018.



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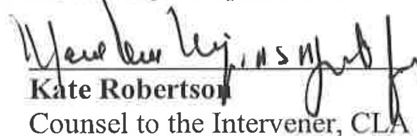

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underpins the doctrine of vagueness, which is a principle of fundamental justice under s. 7.

[27] See, e.g., *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4, and *R. v. Tran*, [2010] 3 SCR 350, 2010 SCC 58.
[28] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at p. 968
[29] *R. v. Sharpe*, [2001] 1 SCR 45, 2001 SCC 2

TABLE OF AUTHORITIES

Authority		Reference in Argument
	Cases	**Para**
1	*Aubry v. Éditions Vice-Versa*, [1998] 1 SCR 591	19
2	*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42	22
3	*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4	23
4	*Frey v. Fedoruk*, [1950] SCR 517	21
5	*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927	24
6	*Milner v. Manufacturers Life Insurance Co (c.o.b. Manulife Financial)*, 2005 BCSC 1661	19
7	*R v. Clarke*, [2014] 1 SCR 612, 2014 SCC 28	23
8	*R v. D.L.W.*, 2016] 1 SCR 402, 2016 SCC 22	21-22
9	*R v. Grant*, [2009] 2 SCR 353, 2009 SCC 32	6
10	*R v. Greenwood* (1991), 8 CR (4th) 235 (Ont. C.A.)	20
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12	*R v. Labaye*, [2005] 3 SCR 728, 2005 SCC 80	13
13	*R v. Lebenfish*, 2014 ONCJ 130	19
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16	*R v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606	23
17	*R v. Rodgers*, [2006] 1 SCR 554, 2006 SCC 15	23
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