SCC File No.: 40045

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(RESPONDENT)

-and-

RANDY WILLIAM DOWNES

RESPONDENT
(APPELLANT)

FACTUM OF THE APPELLANT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART 1 – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal raises a narrow but important question of statutory interpretation: does the voyeurism offence in s. 162(1)(a) of the *Criminal Code* require proof that nudity is reasonably expected at the place and at the time a surreptitious recording is made? A majority of the Court of Appeal for British Columbia held that the answer to this question was "yes". Respectfully, the majority erred in reaching this conclusion. To establish that an individual has contravened s. 162(1)(a), it is sufficient for the Crown to prove that the "place" where a surreptitious recording is made is one where nudity could be reasonably expected to occur at any time. There is, in other words, no independent temporal-use limit that forms an integral part of the *actus reus* of the voyeurism offence in s. 162(1)(a).

2. On June 14, 2019, the respondent, Randy William Downes, was convicted of two counts of voyeurism contrary to s. 162(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.[1] Briefly, the respondent is a youth hockey and baseball coach. He used his cellphone to take photographs of two young players, G.C. (aged 12) and T.R. (aged 13), in their underwear in hockey arena dressing rooms. The photographs were taken without T.R.'s or G.C.'s knowledge or consent. At trial, the Crown relied on 38 photographs seized from electronic devices owned by the respondent.[2] The respondent's primary argument at trial was that the Crown was required to prove that the subjects of the surreptitious recording (*i.e.*, the complainants themselves) were reasonably expected to be nude. The trial judge rejected the respondent's argument holding that she had to be satisfied beyond a reasonable doubt that "a person could reasonably be expected to be nude in the dressing rooms."[3]

3. In oral argument before the Court of Appeal, the respondent (for the first time) posited that the trial judge had erred by failing to consider whether nudity was reasonably expected *at the time* that the respondent took surreptitious photographs of T.R. and G.C. The Court of Appeal divided on this issue. Mr. Justice Willock, writing for the majority, held that the trial judge had erred by failing to consider whether nudity was reasonably expected "at the time the photographs were

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[1] *R. v Downes*, 2019 BCSC 992 ("BCSC RFJ"); Appellant's Appeal Record ("AR"), Volume 1 ("Vol. I"), pp. 2- 50.

[2] AR, Vol. II, pp. 102 - 139 [Photographs, Exhibit 2(A), Tabs 1 – 7].

[3] BCSC RFJ, para. 217.

taken[.]"[4] Writing in dissent, Madam Justice Dickson held that "the relevant inquiry at that stage is whether the place in which the impugned conduct occurred is a place in which a person can reasonably be expected to be nude, exposing intimate body parts or engaging in sexual activity, regardless of the expected use of that place specifically when the conduct occurred."[5]

4. The appellant submits that Dickson J.A. was correct. Parliament's purpose in enacting s. 162(1)(a) was to protect the territorial privacy interests of individuals that arise in certain "places" regardless of whether nudity is expected at the exact time of the offence. The text of s. 162(1)(a) does not contain any language qualifying the temporal scope of the offence. As with comparable language in s. 161(1)(a) of the *Code*, s. 162(1)(a) creates a prohibition that focusses on the "reasonably expected" functions of a "place", as opposed to the use made of the "place" by discrete subcategories of users at a given point in time. Furthermore, when read in the surrounding context of s. 162(1), it is apparent that the branch of the voyeurism offence covered by s. 162(1)(a) was meant to protect the right to privacy in private or quasi-private places regardless of whether a subject's sexual integrity is directly engaged. The interpretation adopted by Dickson J.A. is both consistent with the language of the *Code* and with Parliament's objective in making voyeurism both a privacy and a sexual integrity-based offence. By contrast, the majority's interpretation of the offence as being focussed on "sexual privacy" collapses the offence's twin purposes and, thereby, undermines Parliament's objective in enacting s. 162(1)(a).

5. The trial judge had to answer a straightforward question in this case: is a hockey arena dressing room a place where nudity could be reasonably expected to occur? The answer is clearly "yes". Hockey arena dressing rooms allow users of all ages to dress, undress and shower out of the public's gaze. Young boys may be too self-conscious to become fully nude in hockey arena dressing rooms. But surely their hesitancy (as compared to adults) is not a sound basis for finding that s. 162(1)(a) may have no application. Although "places" are not immutable in terms of their functions, the scope of s. 162(1)(a) should be guided by the ordinary expected functions of the place, and not by a granular dissection of their uses by discrete subcategories of users over seconds, minutes, hours or days.

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[4] BCCA RFJ, para. 55.

[5] BCCA RFJ, para. 56 [emphasis in original].

6. In this case, the trial judge concluded that "individuals who use hockey dressing rooms can reasonably be expected to be nude in them."[6] This common sense finding was amply supported by the trial record. The majority's conclusion—that a hockey arena change room may not be a place where nudity could be reasonably expected—artificially narrows the scope of s. 162(1)(a) and defeats Parliament's purpose in enacting the offence. As such, it should be rejected.

7. The appellant respectfully submits that this appeal should be allowed and the respondent's convictions on two counts of voyeurism should be restored.

B. Statement of Facts

i. Canada-U.S. Border Search

8. On March 21, 2016, the respondent was stopped at the Canada-United States Border crossing near Abbotsford, British Columbia.[7] He was returning from a brief shopping trip in Bellingham, Washington. He was questioned at the primary border inspection and referred for secondary inspection because of the short duration of his entry into the United States and for verification of any purchases.[8]

9. In secondary inspection, the respondent was questioned by two Canada Border Service Agency ("CBSA") officers. The respondent said he had been in the United States for three hours. He stated that he had applied for a visa waiver and visited 10 stores at Bellis Fair Mall but made no purchases except for a telephone calling card.[9] The CBSA officers searched the respondent's vehicle and his electronic devices to determine if they contained any evidence of purchases made in the United States. Officer Selberis found several deleted pictures of a young child "inside of a big box store…taken from the back."[10] Officer Selberis also observed several thousand photos in the respondent's other devices of children engaged in sporting activities.[11] None of the

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[6] BCSC RFJ, para. 218.
[7] BCSC RFJ, para. 11.
[8] AR, (Vol. III), Transcript (T.) 22 (4-8); BCSC RFJ, para. 11.
[9] AR (Vol. III), T. 36 (31-38).
[10] AR (Vol. III), T. 24 (18-32); BCSC RFJ, para. 15.
[11] AR (Vol. III), T. 25 (31-35).

photographs appeared to him to be child pornography. After the inspection, the respondent's devices were returned to him and he was permitted to re-enter Canada.

10. Following the March 21st border stop, the CBSA officers submitted a report to their supervisor relaying their concerns about the images they had observed on the respondent's devices.[12] On March 31, 2016, Ms. Shan-Marie Pereira of the CBSA contacted Nicole Mize, a civilian member of the RCMP Integrated Child Exploitation Unit, to report the observations made by the CBSA officers on March 21, 2016.[13] Ms. Mize then contacted RCMP Corporal Christopher Fox of the Coquitlam Sex Crimes Unit who determined that it was appropriate to initiate an investigation into the respondent.[14]

11. On April 26, 2016, after further investigational steps, RCMP investigators applied for and were granted a warrant to search the respondent's residence at 967 Judd Ct. in Coquitlam, British Columbia.[15]

ii. Search of Respondent's Home

12. On April 27, 2016, the search warrant was executed on the respondent's home.[16] At that time, the respondent coached boys' hockey and baseball teams. He was also a photographer of boys' team sports through a business called Action Sports Photography which he operated from his home.

13. During the search of the respondent's home, RCMP investigators seized approximately 90 electronic devices, including phones, USB devices, cameras, laptops, hard drives and other electronic storage devices.[17] On these devices, investigators found thousands of photographs, mainly of boys playing team sports. Some photographs depicted boys wearing board shorts. Most photographs appeared to be taken in public places such as sports fields.[18]

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[12] AR (Vol. III), T. 26 (21-33); BCSC RFJ, para. 21(a) – (b).
[13] AR (Vol II), p. 98 [Trial Exhibit 2, Admissions, para. 1].
[14] AR (Vol II), p. 98 [Trial Exhibit 2, Admissions, para. 2].
[15] AR (Vol II), p. 99 [Trial Exhibit 2, Admissions, para. 3].
[16] AR (Vol II), p. 99 [Trial Exhibit 2, Admissions, para. 4].
[17] AR (Vol II), p. 99 [Trial Exhibit 2, Admissions, para. 6].
[18] AR (Vol II), p. 99 [Trial Exhibit 2, Admissions, para. 7].

14. A smaller subset of photographs found on the respondent's devices consisted of images of young boys in locker rooms.[19] Those photos were the subject matter of the voyeurism charges at issue in these proceedings.[20]

iii. G.C.'s Testimony

15. G.C. was born on December 17, 2003.[21] He was 14 years old when he testified at trial and was about 12 years old at the time of the offence. He played on a Coquitlam baseball team called the "Selects" which was coached by the respondent.[22] He also played hockey for two seasons during which time the respondent was his coach.

16. G.C. testified about the respondent's use of his cellphone.[23] He said he would see the respondent with his iPhone in his hand at the rink. G.C. also remembered seeing the respondent using a regular camera with a lens that was about 6 to 10 inches long that he would use to take pictures.[24]

17. G.C. identified himself in a number of photographs tendered by the Crown in evidence.[25] He testified that he was not aware the photographs were being taken and that he had not consented to having any of the photographs taken.[26] G.C. believed that the rink where the photographs were taken was located in New Westminster.[27]

18. G.C.'s evidence about the location of the hockey rink in the photographs corresponded with the expert evidence of RCMP Corporal Hew, who testified that the pictures identified by G.C. were geolocated to the Burnaby/New Westminster area.[28]

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[19] AR (Vol II), p. 99 [Trial Exhibit 2, Admissions, para. 8].
[20] The 38 photographs on which the Crown relied were attached to the Admissions as Appendix A: AR, Vol. II, pp. 102 - 139 [Photographs, Exhibit 2(A), Tabs 1 – 7].
[21] BCSC RFJ, paras. 26 – 29.
[22] AR (Vol. III), T. 66 (20-27).
[23] AR (Vol. III), T. 69 (33-46).
[24] AR (Vol. III), T. 69 (14-32).
[25] AR (Vol. III), T. 70 (34-47), 76(1-47), 77(1-47), 78(1-47), 79(1-47).
[26] AR (Vol. III), T. 71 (2-4), 73(13-14), 74 (23-27), 75(36-39), 76(1-47), 78(1-47), 79(1-47).
[27] AR (Vol. III), T. 71 (5-8), 72(5-8).
[28] AR (Vol. III), T. 266 – 230.

19. G.C. also testified that although he did not shower after practice, some of his other teammates would shower.[29]

iv. K.C.'s Testimony

20. K.C. is G.C.'s mother. She testified that the respondent was G.C.'s spring hockey and baseball coach in 2015 or 2016.[30] She said that she had hired the respondent to give G.C. some private hockey training and that these private sessions would take place at an ice rink in New Westminster.[31] She estimated that G.C. had participated in about a dozen private lessons.

21. K.C. testified that G.C. would change into his hockey gear at the arena.[32] She said that she would be in the dressing room when G.C. would change into his gear, and that the respondent was in the dressing room sometimes to help G.C. put on his skates.

22. K.C. said that she did not see anyone taking photos in the dressing room and that "[y]ou're not supposed to have phones in the changeroom".[33]

23. K.C. testified that G.C. did not shower after practices.[34] She said that during the regular hockey seasons only "coaches and assistant coaches" were allowed in the changeroom.

24. K.C. identified herself in a number of photographs.[35] She testified that the photos appeared to have been taken during a private practice at a hockey arena in the New Westminster area.[36] She testified that she did not consent to, and was not aware, that photographs of her were being taken.[37]

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[29] AR (Vol. III), T. 73(40-41), 82 (1-28).
[30] AR (Vol. III), T. 113 (9 –15).
[31] AR (Vol. III), T. 113 (8 – 47) & 114 (1 – 6).
[32] AR (Vol. III), T. 114 (12–20).
[33] AR (Vol. III), T. 114 (31–33).
[34] AR (Vol. III), T. 115 (10).
[35] AR (Vol. III), T. 115 (20-47) & AR (Vol. III), T. 116 (1 – 47).
[36] AR (Vol. III), T. 115 (40-41 & AR (Vol. III), T. 116 (16 – 17).
[37] AR (Vol. III), T. 116 (18 – 21).

v. A.B.'s Testimony

25. A.B. was 21 years old when he gave evidence.[38] He testified that he played hockey on a team coached by the respondent in about 2009 and 2010 when he was in Grade 7. A.B. described an incident that took place in a hockey arena change room when he was playing on the respondent's team.[39] He said that the respondent had his phone out and that it was beside his leg. A.B. said that he could see that the iPhone camera application was open.[40] A.B. also testified that when he was playing in Grade 7, he did not shower but other players showered.[41]

vi. T.R.'s Testimony

26. T.R. was born in 2000.[42] He testified that he played hockey from the time he was about 3 years old up to the present.[43] He estimated that he was about 13 or 14 years old when he was coached by the respondent. At that time, he played on the Venom team during the spring season.[44] He played for about a quarter of the season and in a couple of tournaments.

27. T.R. testified that he played or practiced in Surrey and in Coquitlam. He described the layout of the change room and shower areas of the different facilities. He described them as being a sort of "open concept"[45] where the dressing room and shower facility were in one large area. He testified that other facilities were laid out so that the shower area was around the corner from the dressing room.

28. T.R. testified that he did not personally shower, but that other of his teammates would shower and that he would occasionally see other teammates naked.[46] He specifically identified a

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[38] AR (Vol. III), T. 121 (34).
[39] AR (Vol. III), T. 123 (21-44), 124 (28-37).
[40] AR (Vol. III), T. 123 (39-40).
[41] AR (Vol. III), T. 125 (24-32).
[42] AR (Vol. III), T. 141(30-31); BCSC RFJ, paras. 23 – 25.
[43] AR (Vol. III), T. 141(38-39).
[44] AR (Vol. III), T. 142 (13-20).
[45] AR (Vol. III), T. 148 (21-32).
[46] AR (Vol. III), T. 144 (18-40).

boy wearing a white hat in several of the photographs who he said "usually took a shower almost every time."[47]

29. T.R. testified that he observed the respondent sometimes taking photographs using a large camera that he estimated to be about 8 inches wide with a lens of about 10 to 12 inches long.[48] He also saw the respondent with a smaller blue digital camera.[49] He testified that he observed the respondent taking pictures when the team was "celebrating in the dressing room, like with our medals and stuff."[50] On those occasions, he was aware that the respondent was taking pictures.

30. T.R. identified himself as the subject of several photographs.[51] He identified the location of some photographs as being "Planet Ice",[52] a hockey facility in Coquitlam, British Columbia. He identified the ice rink in other photographs as being located in the Fleetwood area of Surrey.[53] T.R.'s evidence on this point corresponded with the geolocation evidence in the testimony and expert report of Corporal Hew.[54]

31. T.R. testified that he was unaware at the time that the respondent had taken the pictures and stated that he did not consent to the pictures being taken.[55]

vii. Police Witnesses

32. Crown called a number of police witnesses. RCMP Cpl. Christopher Fox was the lead investigator. He was present at the search of the respondent's residence and obtained a statement from the respondent that was admitted into evidence.[56]

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[47] AR (Vol. III), T. 149(13-16).
[48] AR (Vol. III), T. 145(5-42).
[49] AR (Vol. III), T. 146 (10).
[50] AR (Vol. III), T. 146 (18-23).
[51] AR (Vol. III), T. 147 (22-47), 148(1-20).
[52] AR (Vol. III), T. 147(34-45).
[53] AR (Vol. III), T. 149 (35-37).
[54] AR (Vol. III), T. 266 – 230.
[55] AR (Vol. III), T. 147 (37-41), 148 (4-5, 16-18).
[56] AR (Vol. II), pp. 1 – 96 [Statement of Randy Downes, Trial Exhibit 1].

33. Cpl. Shannon Lopetinsky, a member of the RCMP search team, testified that she participated in the search of the respondent's residence, and was involved in cataloging the devices that were seized by the police.[57]

34. RCMP Cpl. Kenny Hew was called as an expert in computer forensic analysis.[58] Cpl. Hew's testimony provided a narrated version of his expert report.[59] In his report, Cpl. Hew examined the digital paths of each of the photographs of G.C. and T.R. that were tendered by Crown. With respect to each photograph, Cpl. Hew was able to determine the device used to take the photographs which in all instances was either the respondent's iPhone 4S or iPhone 5S. Cpl. Hew was also able to geolocate where the photographs were taken. The locations where the photographs were taken were consistent with T.R.'s and G.C.'s testimony.

viii. The respondent's statement to police

35. The respondent did not testify at trial, but he did make a statement to Cpl. Fox on April 27, 2016.[60] The statement was admitted by the defence as voluntary and was tendered by the Crown to be used as evidence in the trial.[61]

ix. Defence Witnesses

36. The respondent called five witnesses at trial.

37. Catherine Greenall testified that she was a manager of the hockey team that was the subject of A.B.'s evidence.[62] Her son played on the same team with A.B. She testified that there was a female player on the team. Greenall was familiar with the respondent taking photographs. She testified that younger boys did not usually shower after a game or practice. She also referred to a two-parent, or two-adult, policy that ensured that two adults or parents would be in the dressing

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[57] AR (Vol. III), T. 224 – 238.
[58] AR (Vol. IV), T. 257 (6-15).
[59] AR (Vol. II), 153 – 297 [Trial Exhibit 5, Expert Report of Corporal Kenny Hew].
[60] AR (Vol. II), pp. 1 – 96 [Statement of Randy Downes, Trial Exhibit 1].
[61] AR (Vol II), p. 100 [Trial Exhibit 2, Admissions, para. 9].
[62] AR (Vol. IV), T. 338 – 375; BCSC RFJ, paras. 167-168, 177, 219.

room at any time to ensure that coaches would never be left alone with players. Greenall also testified that there were policies banning the taking of photographs in a dressing room.

38. Derek Doucette was called as a defence witness.[63] His testimony focused on his work with the respondent in his capacity as a baseball coach. He also testified about hockey arena dressing rooms and said that it was typical for boys to strip down to their underwear, but not to be naked.[64] He testified that he had not personally observed boys taking showers.[65] Under cross examination, Mr. Doucette testified that he was aware that there were rules about the possession and use of cell phones in dressing rooms.[66] He agreed that the purpose of the rule was to prevent pictures being taken in dressing rooms. Mr. Doucette also testified that he played adult hockey and he and other players would shower after a game or practice.[67]

39. Rob Maillat testified on behalf of the defence.[68] He said that he had been coaching from about 2012 until the time of trial. Two of his sons played hockey. He said that he knew the respondent and that his son played on the respondent's team in 2014 or 2015. He testified that some boys would strip down to their underwear but they would not shower.[69]

40. S.D. was a player who was 21 years old at the time of the trial.[70] He testified that he played on the respondent's team for about three to four years at the Burnaby Winter Club between the ages of 11 to 14 or 15 years old.[71] He was not playing on either of the teams with G.C. or T.R. He said that he did play with A.B. He testified that he never showered and that he never saw any of the other boys completely naked.[72] S.D. testified that he started having showers after games or practices when he was 16 or 17 years old.[73]

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[63] AR (Vol. IV), T. 376 – 398.
[64] AR (Vol. IV), T. 378 (28-38).
[65] AR (Vol. IV), T. 378 (43-47).
[66] AR (Vol. IV), T. 381 (16-25).
[67] AR (Vol. IV), T. 386 (17-43).
[68] AR (Vol. IV), T. 399 – 419.
[69] AR (Vol. IV), T. 401 (18-28), 405 (38-42).
[70] AR (Vol. IV), T. 420 – 427.
[71] AR (Vol. IV), T. 421 (30-47).
[72] AR (Vol. IV), T. 422 (37-47), 423 (1-7).
[73] AR (Vol. IV), T. 423 (8-25).

41. John MacDonald was the defence's last witness.[74] He testified that he met the respondent when his son was about 12 years old.[75] His son played on the respondent's team. MacDonald had been an assistant coach at the Burnaby Winter Club for about eight years when he met the respondent. He testified that he assisted the respondent in coaching.[76] He could not recall kids between the ages of 12 and 14 being naked in the dressing room or showering but kids who were 15 years old would usually shower.[77] Under cross-examination, he confirmed there was a no cellphone policy that began in 2011 or 2012 and that the coaches were made aware of the rule.[78]

C. Lower Court Decisions

i. The Trial Court

42. On June 14, 2019, the trial judge convicted the respondent of two counts of voyeurism under s. 162(1)(a). After summarizing the evidence, the trial judge discussed a number of the legal principles applicable to the offence of voyeurism.[79] The trial judge cited Wagner C.J.'s comments in *R. v. Jarvis* that Parliament's objective in creating the voyeurism offence was "to protect individuals' privacy and sexual integrity, particularly from new threats posed by the abuse of evolving technologies."[80] In defining the objective of s. 162(1)(a), the trial judge observed that the protection of an individual's sexual integrity is the primary focus of ss. 162(1)(b) and (c) whereas the primary focus of s. 162(1)(a) is a person's reasonable expectation of privacy in a place.[81] The trial judge observed that the "focus on the place in which an observation or recording is made was intended to recognize that there are private or semi-private spaces in which a person should be protected from being observed or recorded."[82]

43. The trial judge went on to set out the following four elements that the Crown had to prove beyond a reasonable doubt: (1) the respondent intentionally took the photographs at issue; (2) the

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[74] AR (Vol. IV), T. 428 – 453.
[75] AR (Vol. IV), T. 428 (41-44).
[76] AR (Vol. IV), T. 429 (24-45).
[77] AR (Vol. IV), T. 430 (36-47), 431 (1-7).
[78] AR (Vol. IV), T. 442 (41-43).
[79] BCSC RFJ, paras. 48-57.
[80] *R. v. Jarvis*, 2019 SCC 10, para. 48
[81] BCSC RFJ, para. 123.
[82] BCSC RFJ, para. 213.

photographs were taken surreptitiously; (3) when photographed, T.R. and G.C. were in circumstances that gave rise to a reasonable expectation of privacy; and (4) when photographed, T.R. and G.C. were in a place in which a person can reasonably be expected to be nude. In addressing the fourth element, the trial judge repeated that s. 162(1)(a) is concerned with prohibiting surreptitious observations or recordings in certain places, as opposed to recordings of certain activities, captured under (b), or recordings for certain purposes, captured under (c).[83]

44. The trial judge rejected the respondent's counsel's submission that s. 162(1)(a) required the Crown to prove that T.R. and G.C. were in a place where ***they*** could reasonably be expected to be nude.[84] Rather, she found that the "place must be a place in which "a person" (not "the person") can reasonably be expected to be nude [.]"[85] The trial judge found that the focus of s. 162(1)(a) is on the nature of the place, and not the activity of the subject of the recording, and therefore it is not a requirement that the person who is the subject of the recording actually was, or ever had been, nude.[86] In reaching this conclusion, the trial judge considered the language of s. 162(1)(a) ("the person" vs. "a person") and contrasted the language of s. 162(1)(a) with s. 162(1)(b), noting that the latter section required that "the person is nude".[87]

ii. The Court of Appeal

45. The respondent appealed his conviction to the Court of Appeal for British Columbia where he raised five non-constitutional grounds of appeal.[88] The four grounds of appeal which were the subject of the respondent's factum were unanimously dismissed in the court below. However, the court disagreed on the respondent's fifth ground of appeal which was raised for the first time by the respondent in oral argument before the Court of Appeal. Specifically, he argued that the trial judge had erred by failing to consider whether nudity was reasonably expected at the time that the respondent took surreptitious photographs of T.R. and G.C.

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[83] BCSC RFJ, para. 201.
[84] BCSC RFJ, para. 204.
[85] BCSC RFJ, para. 205; see also 215-216.
[86] BCSC RFJ, para. 206.
[87] BCSC RFJ, para. 204.
[88] BCCA RFJ, paras. 19 and 22.

46. A majority of the Court of Appeal (per Willcock J.A.) allowed the appellant's appeal from conviction, finding that the trial judge had failed to consider whether nudity was reasonably expected "at the time" the offence was alleged to have occurred.[89] Writing in dissent, Madam Justice Dickson held that the relevant "place" under s. 162(1)(a) "is a place in which a person can reasonably be expected to be nude, exposing intimate body parts or engaging in sexual activity, regardless of the expected use of that place specifically when the conduct occurred."[90]

PART II – STATEMENTS OF QUESTION IN ISSUE

47. This appeal as of right raises the following question of law:

> Did the trial judge err by failing to consider whether nudity was reasonably expected at the place and at the time where the offence was alleged to have occurred?

48. The answer is "no". The trial judge did not err in her interpretation of s. 162(1)(a). The offence does not require proof that a discrete category of persons (*i.e.*, 11- and 12-year hockey players) were reasonably expected to be nude in hockey arena dressing rooms at the exact time of the offence.

PART III – STATEMENT OF ARGUMENT

A. Overview of the appellant's position

49. The appellant's overall submission is that this appeal should be allowed substantially for the reasons given by Dickson J.A. in her dissenting opinion. Dickson J.A. carefully considered the text, context and purpose of the voyeurism offence in s. 162(1)(a) in conformity with the modern approach of statutory interpretation. After applying this accepted methodology, Dickson J.A. reached several key interpretive conclusions that were critical to supporting her overarching view that s. 162(1)(a) did not contain a temporal-use limit. Specifically, Dickson J.A. observed that:

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[89] BCCA RFJ, paras. 40 and 55.

[90] BCCA RFJ, paras. 56 [emphasis in original].

a. the text of s. 162(1)(a) focusses on what can be "objectively" expected in a place and the offence does not contain any language that suggests Parliament meant it to be "limited or qualified by any temporal-use language";[91]

b. the structure and context of s. 162(1) indicates that s. 162(1)(a) fulfills a different purpose from the offences in ss. 162(1)(b) and (c), suggesting that the gravamen of voyeurism under s. 162(1)(a) is a "location-based", not activity-based offence;[92] and

c. the purpose of s. 162(1)(a) was to protect territorial privacy interests in the context of traditionally private or quasi-private places regardless of whether such "multi-purpose places" may be used in ways that do not involve nudity, exposure of body parts or sexual activity at the time of the offence.[93]

50. In the following submissions, the appellant does not propose to reinvent the wheel by recapitulating Dickson J.A.'s careful analysis. Instead, the appellant will highlight additional interpretative considerations that demonstrate that the majority's analysis was fundamentally flawed. On the whole, the appellant submits that the reasons given by Dickson J.A. are sufficient to resolve this appeal in favour of the appellant.

B. The majority did not apply the "modern principle" of statutory interpretation

51. Prior to this case, no appellate court had directly undertaken a detailed analysis of s. 162(1)(a) with a view to defining its key elements. Nevertheless, the principles governing this interpretive exercise are uncontroversial. To decide if s. 162(1)(a) contains an implicit temporal limit, "the words of [the] Act" should be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[94] This modern "principle" or "approach" to statutory interpretation has been

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[91] BCCA RFJ, para. 75, 77, 88.

[92] BCCA RFJ, para. 78.

[93] BCCA RFJ, para. 83.

[94] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21 citing Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) at 87.

employed by this Court in countless cases, including in many involving the interpretation of the contested elements of criminal offences.[95]

52. In its reasons, the majority did not undertake a conventional examination of the text, context and purpose of s. 162(1)(a). Rather, the majority's analysis begins by noting that "places" are not immutable and can be used for a myriad of activities that "depend upon how the place is being used when the observation is made."[96] The majority appears to have harboured some doubt about whether s. 162(1)(a) was meant to capture "a fully clothed person in a dressing room when no one else is present or expected to be present."[97] Its overall conclusion—that s. 162(1)(a) is temporally limited—was premised on its view that the voyeurism "provisions are fundamentally concerned with bodily and sexual privacy" and "are not intended to establish offences founded upon an invasion of privacy alone".[98]

53. In contrast, Dickson J.A. employed a well-established statutory interpretation methodology and considered in detail the text, context, and purpose of s. 162(1)(a).[99] Justice Dickson's interpretive analysis culminated in the following overarching conclusion:[100]

> In my view, interpreted textually, contextually and purposively, s. 162(1)(a) prohibits the surreptitious observation or recording of a subject who is in circumstances that give rise to a reasonable expectation of privacy whenever the subject is in a place in which a person can reasonably be expected to be nude, exposing intimate body parts or engaged in sexual activity.

54. The appellant acknowledges that a reviewing court's failure to quote Dreidger's modern principle "word for word as some magic incantation"[101] is not itself a freestanding error. But here the shortcoming in the majority's analysis lies in its analytical substance, not its form. The majority ignored the text and context of s. 162(1)(a) and proceeded on the erroneous assumption that s.

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[95] *R. v. Clark*, [2005] 1 S.C.R. 6, para. 43; *R. v. A.D.H.*, [2013] 2 S.C.R. 269 para. 19; *R. v. D.L.W.*, [2016] 1 S.C.R. 402, paras. 13 – 15; *R. v. Alex*, [2017] 1 S.C.R. 967, para. 24.

[96] BCCA RFJ, para. 37.

[97] BCCA RFJ, para. 39.

[98] BCCA RFJ, para. 54; see also para. 41.

[99] BCCA RFJ, paras. 70 – 71.

[100] BCCA RFJ, paras. 90.

[101] See *eg*, *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 533.

162(1) was uniquely concerned with "sexual privacy".[102] In contrast, Dickson J.A.'s more structured analysis confirmed that there is no superadded temporal limit in s. 162(1)(a).

C. The text of s. 162(1)(a) does not support the inclusion of a temporal limit

55. The proper analytical starting point, as recognized by Dickson J.A.,[103] is the plain or ordinary meaning of s. 162(1)(a). The ordinary meaning of a text refers to "the understanding that spontaneously emerges when words are read in their immediate context"[104] and to the "natural meaning which appears when the provision is simply read through."[105] While this Court has held that "plain meaning alone is not determinative,"[106] the ordinary meaning is often the most reliable indicator of Parliament's view as to intended scope of a legislative measure.

56. The language of the section 162(1)(a) provides as follows:

Voyeurism	Voyeurisme
162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if	**162 (1)** Commet une infraction quiconque, subrepticement, observe, notamment par des moyens mécaniques ou électroniques, une personne — ou produit un enregistrement visuel d'une personne — se trouvant dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée, dans l'un des cas suivants :
(a) <u>the person</u> is in a place in which **<u>a person</u>** can **<u>reasonably be expected</u>** to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;	**a) <u>la personne</u>** est dans **<u>un lieu</u>** où il est raisonnable de s'attendre à ce qu'**<u>une personne</u>** soit nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite;

[102] BCCA RFJ, paras. 41, 51, 54.

[103] BCCA RFJ, paras. 70 – 71.

[104] R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002) at 21 cit'd at *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, para. 59.

[105] *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724 at 735.

[106] *Alex*, para. 31.

57. Dickson J.A. was correct that s. 162(1)(a) uses objective language suggesting that any expectation of nudity would not depend on the "accused's [subjective] expectation of the state of any person in the place of observation or recording."[107]

58. Two main textual elements of s. 162(1)(a) confirm that "place" was meant to be understood based on the objectively determined functions of the location, as opposed to its variable uses by subcategories of users. First, s. 162(1)(a) uses the definite article "the person" (« *la personne* ») when referring to the subject of the recording but then employs an indefinite article "a person" (« *une personne* ») when referring to the reasonably expected uses of the place. As this Court has observed previously,[108] the use of an indefinite article may be a "telling" indicator of Parliament's intended meaning. Second, and relatedly, the provision uses the term "reasonable" which signals an objective, rather than subjective, examination of the circumstances, as seen through the eyes of a reasonable person.[109]

59. Perhaps more importantly, s. 162(1)(a) is not, as observed by Dickson J.A., "limited or qualified by any temporal-use language."[110] Had Parliament wished to incorporate a temporal limitation in s. 162(1)(a), one would have expected this to appear in the express language of the offence. There is no shortage of examples of provisions in the *Criminal Code* that contain express language setting out temporal-limits.[111] The fact Parliament did not incorporate any temporal-use

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[107] BCCA RFJ, para. 75 [emphasis in original].

[108] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, paras. 34. 39-41; *Glykis v. Hydro-Québec*, [2004] 3 S.C.R. 285, para. 13.

[109] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, para. 36; *R. v. Gosset*, [1993] 3 S.C.R. 76, para. 25. For an entirely subjective inquiry see s. 17 (*R. v. Ruzic*, 2001 SCC 24, para. 71) and for a subjective/objective inquiry see s. 34(1)(a) (*R. v. Khill*, 2021 SCC 37, paras. 52-54).

[110] BCCA RFJ, para. 77.

[111] See *eg*, *Criminal Code*, ss. 162.1(2)(b) ["at the time of the recording"], ss. 162.1(2)(c) ["at the time the offence is committed"], 175(1)(d) ["at the time of such conduct"], 233 ["if at the time of the act or omission"], 242 ["immediately before, during or in a short time after"], 264(4) ["at the time the offence was committed"], 269.01 ["at the time of the commission of the offence"], 293 ["at the same time"], 304(1) ["at the time of the sale"], 311 ["at the time when it was published"], 320.15(2) ["at the time of the failure or refusal"] , 320.16(1) ["at the time of operating the conveyance"], 320.16(2) ["at the time of committing the offence"], 320. 16(3) ["at the time of committing the offence"], 320.22(e) ["at the time of committing the offence"], 322(1)(d) ["at the time it was taken or converted"], 343(b) ["at the time he steals or immediately before or

language, coupled with the surrounding context, is a strong indication that Parliament was focussed on the regular functions of the "place", rather than its use by certain categories of users at any given point in time.

60. The overall structure and language of s. 162(1) similarly supports Dickson J.A.'s opinion that the offence under s. 162(1)(a) is "location-based, not purpose-based".[112] Section 162(1) creates offences that can arise in "three different situations":[113] one offence [s. 162(1)(a)] prohibits surreptitious recordings or observations based on a location; a second offence [s. 162(1)(b)] prohibits the surreptitious observation and recording of actual nudity or sexual activity regardless of the place; and a third offence [s. 162(1)(c)] prohibits surreptitious observations or recording for a sexual purpose at any location. Therefore, the offence in subsection 162(1)(a), in contrast with ss. 162(1)(b) and (c), does not require proof that the accused acted with a sexual purpose of any kind. The fact that s. 162(1)(a) can be committed without any sexual purpose strongly indicates that it was meant to cover interests not already encompassed by the prohibitions in s. 162(1)(b) or (c): namely, the protection of "territorial privacy, as it is concerned with protecting privacy in particular places."[114]

61. A further textual element worthy of note are the words "can reasonably be expected to be nude" (*«raisonnable de s'attendre à ce qu'une personne»*). In addition to signalling an objective standard (as noted above), this phrasing is meant to incorporate a risk-based legal standard. Where a statute employs the concept of a "reasonable expectation" of a given harm, the legislature should be taken to have established a threshold standard directed at the risk of an apprehended harm materializing.[115] A reasonable expectation of risk is proven where the risk of the identified harm is established "well beyond the merely possible or speculative" but not to the extent of requiring

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immediately thereafter"], 348.1 ["dwelling-house was occupied at the time of the commission of the offence"], 460(2) ["at the time when the offence is alleged"].

[112] BCCA RFJ, para. 76.

[113] *R. v. Trinchi*, 2019 ONCA 356, paras. 7-10; *Jarvis*, at paras. 1, 44, 70.

[114] *Jarvis*, para. 67; see also para. 45.

[115] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, paras. 196-198, 201-203, 206; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, paras. 52, 54, 56-57.

proof "on the balance of probabilities."[116] In this way, s. 162(1)(a) attempts to "mark out a middle ground between that which is probable and that which is merely possible."[117]

62. In sum, on its plain language, s. 162(1)(a) requires proof of an objective risk that a person will be reasonably expected to be nude, will expose intimate body parts or will be engaged in explicit sexual activity at the "place", but not that the risk will materialize only at the precise time when a surreptitious recording is made.

D. The French language text supports the dissenting opinion

63. The French language text of s. 162(1)(a) also supports Dickson J.A.'s conclusion that s. 162(1)(a) does not contain any temporal-use limitation. Neither the majority nor the dissenting opinions referred to the French language text. Nevertheless, it is well established that, as a bilingual statute, "both the English and French versions of the [*Criminal Code*] are equally authoritative."[118] To the extent there remains any question about the meaning of the text of s. 162(1)(a), the French language version settles that debate. Here, the French text conveys the same plain meaning as the English text, including in that: (1) there is no express reference to a temporal limit; (2) the text juxtaposes a definite article (*«la personne»*) with an indefinite article (*«une personne»*); (3) the French text uses objective language (*«raisonnable»*); and (4) the French text establishes a legal standard based on an apprehended risk (*«raisonnable de s'attendre à ce qu'une personne»*). The French language text, therefore, confirms that Dickson J.A. was correct that s. 162(1)(a) does not expressly or implicitly contain a temporal-use limit.

E. The comparable language in s. 161(1)(a) provides important context

64. In advancing their competing interpretations of s. 162(1)(a), both the majority and the dissent appear to have overlooked the fact that prohibition orders in s. 161(1)(a) of the *Code* contain similar language. Section 161(1)(a) of the *Code* provides:

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[116] *Ibid*.

[117] *Ontario (Community Safety and Correctional Services)*, para 54.

[118] *R. v. Mac*, [2002] 1 SCR 856, para. 5.

Order of prohibition	Ordonnance d'interdiction
161 (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from	161 (1) Dans le cas où un contrevenant est déclaré coupable, ou absous en vertu de l'article 730 aux conditions prévues dans une ordonnance de probation, d'une infraction mentionnée au paragraphe (1.1) à l'égard d'une personne âgée de moins de seize ans, le tribunal qui lui inflige une peine ou ordonne son absolution, en plus de toute autre peine ou de toute autre condition de l'ordonnance d'absolution applicables en l'espèce, sous réserve des conditions ou exemptions qu'il indique, peut interdire au contrevenant :
(a) attending a public park or public swimming area **where persons under the age of 16 years are present or can reasonably be expected to be present**, or a daycare centre, schoolground, playground or community centre;	a) de se trouver dans un parc public ou une zone publique où l'on peut se baigner **s'il y a des personnes âgées de moins de seize ans ou s'il est raisonnable de s'attendre à ce qu'il y en ait**, une garderie, un terrain d'école, un terrain de jeu ou un centre communautaire;

65. This Court has held that the *Criminal Code* should be interpreted consistently "so as to avoid conflict between its internal provisions."[119] To the appellant's knowledge, s. 161(1)(a) has never been interpreted by courts as containing a temporal limit that would permit offenders to attend at prohibited locations in the absence of proof that children under the age 16 are reasonably expected to be present *at the precise time* an offender attends a public park, school, playground or community centre—as the case may be.

66. On the contrary, the jurisprudence suggests the proper focus of a court is on the objectively discernable characterises of the place:

[119] *R. v. Wust*, [2000] 1 SCR 455, para. 34; *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378 at 1387.

a. In *R. v. D'Angelo*,[120] the Ontario Court of Appeal held that an accused had breached a s. 161(1)(a) order prohibiting his attendance at swimming pools because he went to a private recreation and pool facility located in his apartment complex.

b. In *R. v. Lachapelle*,[121] the BC Court of Appeal held that the prohibition against attending a public park was not offended by an offender who worked for a travelling carnival that was a "magnet for children" because the carnival was being hosted on a vacant piece of private land in a large field.

c. In *R. v. Perron*,[122] the Ontario Court of Appeal held that a public park used to host a fair on the public fairground was a "public park" within the meaning of s. 161(1)(a) because the prohibition defined a "discrete location that is accessible to the public for recreational use that involves or is reasonably likely to involve children under the specified age."[123]

d. In *R v Allaby*,[124] the Saskatchewan Court of Appeal held that an offender had breached a section 161(1)(a) order by attending a public library which was found to fall within the definition of "community centre". This was so because "the definition of community centre would include places where children are present or can be reasonably expected to be present to participate in social, recreational or educational activities or any one of them."[125]

67. *D'Angelo*, *Perron*, *Lachapelle* and *Allaby* are instructive because of the courts' emphasis on the functions and generalizable characteristics of the "place" (be it a public park, swimming pool, community centre, school or daycare). While none of these cases directly address the question of whether s. 161(1)(a) contains a temporal-use element, the decisive thrust of the courts' reasoning was that offenders are at all times prohibited from attending public parks, swimming pools, daycares, community centres because they are the kinds of "places" where children

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[120] *R. v. D'Angelo*, 2002 CanLII 12379 (ON CA).

[121] *R. v. Lachapelle*, 2009 BCCA 406.

[122] *R. v. Perron*, 2009 CanLII 92140 (ON CA) cited with approval in *R. v. K.R.J.*, [2016] 1 SCR 906, para. 36.

[123] *Perron*, para. 20.

[124] *R v Allaby*, 2017 SKCA 25; see contra: *R. c. Boissonneault*, 2019 QCCA 1074.

[125] *Allaby*, para. 37.

participate in social, recreational or educational activities. While there is still room for disagreement as to whether a pool falls under the prohibition,[126] or a green space is a park,[127] or a library is a "community centre",[128] the focus in each case is on the functions of the location.

68. An offender who is subject to a s. 161(1)(a) order would not, for instance, be permitted to lurk in a playground at night, attend a midnight swim, or take an evening class at a local community centre because children are unlikely to be present at those exact times. Depending on the time of day, children may not be present at schools, playgrounds or the other locations identified in s. 161(1)(a), but the prohibition order would still apply. By the same token, the voyeurism offence under s. 162(1)(a) is applicable to a "place" where people of varying ages are reasonably expected to be nude regardless of whether nudity is reasonably expected at a specific time for a discrete subcategory of user.

F. The purpose of s. 162(1)(a) is not limited to "sexual privacy"

69. The majority's interpretation of s. 162(1)(a) appears to be tied to its view that s. 162(1) is only concerned with breaches of "sexual privacy".[129] Specifically, the majority held that the voyeurism offences "are fundamentally concerned with bodily and sexual privacy" and "not intended to establish offences founded upon an invasion of privacy alone."[130] The majority appears to have incorrectly interpreted this Court's judgment in *Jarvis* as holding that s. 162(1) was enacted with two conjoined objectives: the protection of privacy and of sexual integrity, which the majority integrated into the singular objective of protecting "sexual privacy".[131]

70. Respectfully, the majority erred in its interpretation of this Court's judgment in *Jarvis*. Contrary to the majority's analysis, the twin objectives identified by this Court in *Jarvis*, while interrelated, may operate independently. In *Jarvis*, Wagner C.J., for the majority, defined the objective of s. 162(1) as follows:[132]

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[126] *D'Angelo*.
[127] Compare *Lachapelle* with *Perron*.
[128] Compare *Allaby* with *Boissonneault.*
[129] BCCA RFJ, paras. 41, 54.
[130] BCCA RFJ, para. 54.
[131] BCCA RFJ, paras. 41, 54.
[132] *Jarvis*, para. 48 [emphasis added].

> This understanding of when a reasonable expectation of privacy arises in this context also best accords with Parliament's object in enacting the offence in s. 162(1): to protect individuals' privacy **and** sexual integrity, particularly from new threats posed by the abuse of evolving technologies.

71. In his concurring opinion in *Jarvis*, Rowe J. endorsed the majority's characterization of the objective of the offence, writing:[133]

> "I agree with the Chief Justice as to the purpose and object of s. 162(1)"[134]

72. The legislative history—which was canvassed in detail by this Court in *Jarvis*[135]—confirms that the twin objectives underlying the voyeurism offence should be read disjunctively. Section 162 came into force November 1, 2005.[136] In *Jarvis*, Wagner C.J. reviewed the legislative history noting that the "development of the voyeurism offence addressed limitations in the criminal law"[137] which had previously addressed voyeuristic-type behaviour through offences of trespassing at night[138] and mischief.[139] Changes in technology was one of the primary drivers behind the enactment of the voyeurism offence. The offence was, moreover, part of a comprehensive set of amendments intended to provide increased protection for children, particularly as regards the commission of sexual offences, as recently discussed by this Court in *R. v. Friesen*.[140]

73. Prior to the enactment of s. 162(1), there was a live debate about whether voyeurism should be conceptualized as a privacy or sexual integrity offence. The significance of this distinction was developed in a 2002 "consultation paper" prepared by the federal Department of Justice entitled,

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[133] *Jarvis*, para. 113.

[134] *Jarvis*, para. 48.

[135] *Jarvis*, paras. 49 – 53, 110-116

[136] *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32.

[137] *Jarvis*, para. 114.

[138] *Code*, s. 177.

[139] *Code*, s. 430.

[140] *R. v. Friesen*, 2020 SCC 9, paras. 98, 101.

"Voyeurism as a Criminal Offence."[141] The consultation paper, which was discussed at length in *Jarvis*,[142] explained:

> Justifying the creation of a voyeurism scheme in the Criminal Code involves a consideration of the harm that such a scheme is intended to address. The harm can be assessed as the breach of a right to privacy that citizens enjoy in a free and democratic society; alternatively, voyeurism can be conceptualized as a sexual offence.

74. Bill C-2 ultimately represented Parliament's best effort to enact a voyeurism offence that embraced both the privacy and sexual integrity concerns identified in the consultation paper. In *Jarvis*, Wagner C.J. tendered the following observation:[143]

> According to a summary of the responses the government received to the consultation paper, the majority of respondents were in favour of conceptualizing voyeurism as *both* a sexual and a privacy-based offence: Department of Justice, *Voyeurism As A Criminal Offence: Summary of the Submissions*, October 28, 2002 (online). Indeed, the circumstances surrounding its enactment confirm that the voyeurism offence eventually incorporated into the *Criminal Code* was meant to deal with both of these related harms. …

75. The majority's conclusion, in the present case, that s. 162(1)(a) is focussed only on "sexual privacy",[144] arguably has the effect of rekindling the debate that divided the majority and concurring opinions in *Jarvis*.

76. The majority in *Jarvis* held that the "reasonable expectation of privacy" element of the voyeurism offence should be guided by the s. 8 jurisprudence, and the majority's discussion on this point is consistent with its view that the offence is both "a sexual and a privacy-based offence."[145] In contrast, Rowe J. held that the more expansive conception of privacy protection in the s. 8 jurisprudence was ill-suited to defining the elements of a criminal offence because this body of jurisprudence covered "a range of circumstances broader than for the same words in s.

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[141] Canada, Department of Justice, *Voyeurism as a Criminal Offence: A Consultation Paper*. Ottawa, 2002.

[142] *Jarvis*, paras. 49 – 53, 117, 133.

[143] *Jarvis*, para. 51 [italics in original, underline added].

[144] BCCA RFJ, paras. 41, 54.

[145] *Jarvis*, paras. 54-70.

162(1).”[146] Rowe J. proposed a competing two-part framework focussed on (1) whether a surreptitious observation or recording diminished a subject’s ability to maintain control over their image; and (2) whether the type of observation/recording infringed upon sexual integrity.[147] Ultimately, the majority’s interpretation of s. 162(1)(a) prevailed and must dictate the proper interpretation of s. 162(1)(a) going forward.

77. The majority of the Court of Appeal in the case at bar expressed skepticism about the relevance of Parliamentary debates in “defining the scope of the offence”[148], describing the remarks of certain Parliamentarians as being an inaccurate “description of the offence created by s. 162(1)(a).”[149] Caution is justifiably warranted when relying on statements made in the legislative record because they may sometimes “be rhetorical and imprecise.”[150] Nevertheless, “courts rightly look to [extrinsic evidence] in determining the purpose”[151] of a provision. Here, the relevance of the Parliamentary debates lay not in defining the elements of the offence, but in confirming that Parliament enacted the voyeurism offence based on two interrelated, but ultimately independent, objectives: protecting privacy and sexual integrity.

78. Parliament originally introduced the voyeurism offence in s. 162, as part of Bill C-20, Bill C-12 and finally, in the form of Bill C-2. Bills C-20 and Bill C-12 died on the order paper when Parliament was prorogued in 2003 and 2004. Yet, the content and wording of the proposed s. 162 amendment remained the same between all three Bills. When the voyeurism offence was initially introduced as part of Bill C-20, then Minister of Justice and Attorney General of Canada, Martin Cauchon stated:[152]

> […] As well, Bill C-20 also creates offences of voyeurism aimed at remedying a shortcoming in criminal law. While voyeurism is not a new phenomenon, the means by which it can be perpetrated are.
> …

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[146] *Jarvis*, para. 102.

[147] *Jarvis*, para. 133.

[148] BCCA RFJ, para. 49.

[149] BCCA RFJ, para. 50.

[150] *R. v. Safarzadeh-Markhali*, [2016] 1 S.C.R. 180 para. 36; *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, para. 57.

[151] *Safarzadeh-Markhali*, para. 36.

[152] Canada, Parliament, House of Commons Debates, 37th Parl, 2nd Sess, Vol. 138, No. 46 (27 January 2003) at 1130 [emphasis added].

> What we are proposing is to make it an offence to surreptitiously observe and record a person in circumstances that give rise to a reasonable expectation of privacy, **not only when that observation and recording is for the purpose of sexual exploitation but also when it constitutes a serious violation of the right to privacy.** …… Canadians value their privacy. **This was confirmed again in the response we received from the public consultation on voyeurism**. **An overwhelming majority of respondents indicated that this offence should criminalize not only voyeurism conducted for a sexual purpose but also when it constitutes a serious breach of privacy**. These new offences would reinforce the protection of the right to privacy valued by Canadians.

79. Later, when Bill C-2 was considered in the House of Commons at Second Reading, the Honourable Larry Bagnell (Parliamentary Secretary to the Minister of Natural Resources) offered the following comments about the offence:[153]

> The first [prong of the offence] is a case when the person observed or recorded is **in a place** where one can reasonably expect a person to be in a state of nudity or engaged in sexual activity. **I would think a bathroom, bedroom or fitting room would qualify as such a place.** The second case is when a person is in a state of nudity or engaged in sexual activity and the purpose of the observation or recording is to observe or record a person in that state. The third case is when the observation or recording is done for a sexual purpose.

80. Similar statements were made by the Honourable Landon Pearson when Bill C-2 was proposed for Second Reading in the Senate:[154]

> [The voyeurism offence] would prohibit secret observation or recording of a person in circumstances giving rise to reasonable expectation of privacy when the person observed or recorded is in **a place** where a person is expected to be in a state of nudity or engaged in a sexual activity, such as in a bedroom, a **bathroom or changing room.** It would prohibit secret observation or recording of a person in circumstances giving reasonable expectation of privacy when the person is in a state of nudity or engaged in sexual activity and the purpose is to observe or record the person in such a state or activity. …

81. Returning to the question of legislative purpose, this Court's decision in *Jarvis* confirms that Parliament's objective in enacting s. 162(1)(a) encompassed a concern for both invasions of privacy *simpliciter* and interferences with sexual integrity. The gravamen of the s. 162(1)(a) branch of the offence is "territorial privacy, as it is concerned with protecting privacy in particular

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[153] Canada, Parliament, House of Commons Debates, 38th Parl, 1st Sess, Vol. 140, No. 7 (13 October 2004) at 332-333 [emphasis added].

[154] Canada, Parliament, Debates of the Senate, 38th Parl, 1st Sess, Vol. 142, No. 73 (20 June 2005) at 1530 [emphasis added].

places."[155] This is consistent with Parliament's intention that the voyeurism offence would apply "not only when [a surreptitious] observation and recording is [made] for the purpose of sexual exploitation but also when it constitutes a serious violation of the right to privacy."[156] If the two objectives animating s. 162(1) are not viewed as being separate and distinct, then the offence becomes one based exclusively on sexual integrity, which is inconsistent with this Court's holding in *Jarvis* and with the legislative purpose, as reflected in its legislative history.

G. A temporal-use limit is not necessary to limit the scope of s. 162(1)(a)

82. The majority's interpretation of s. 162(1)(a) appears to have been informed by concerns about the potential scope of the offence. For instance, Willcock J.A. asked the (apparently) rhetorical question: "does one who surreptitiously takes a still photograph (by, for example, using a cellphone) of a fully clothed person in a dressing room when no one else is present or expected to be present commit the offence described by s. 162(1)(a)?" In the majority's view, the addition of a temporal limit averted any risk of the offence "captur[ing] conduct that does not bear any of the hallmarks of voyeurism as a breach of sexual privacy."[157]

83. The Crown agrees that s. 162(1)(a) prohibits a person from surreptitiously making a "visual recording" in any "place" even if the subject of a recording is fully clothed, is not exposing intimate body parts or is not engaged in explicit sexual activity.[158] Thus, to answer the rhetorical question posed by the majority, if nudity, exposure of body parts or sexual activity is reasonably expected in a place, the offence in s. 162(1)(a) would indeed apply to a "person who installed a hidden camera in a fitting room of a department store…if the only recording he captured was of a fully clothed customer trying on different hats."[159] But it does not follow that this represents an unintended effect of s. 162(1)(a); rather, it is consistent with Parliament's objective in protecting territorial privacy in certain places. Once again, the majority's concern about the scope of the

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[155] *Jarvis*, para. 67.

[156] Canada, Parliament, House of Commons Debates, 37th Parl, 2nd Sess, Vol. 138, No. 46 (27 January 2003) at 1130 (Martin Cauchon) [emphasis added].

[157] BCCA RFJ, para. 41 [emphasis in original].

[158] *Trinchi*, para. 8.

[159] *Ibid*, para. 8.

provision appears to be tied to its erroneous premise that s. 162(1) is concerned with "sexual privacy"[160] alone, rather than privacy or sexual integrity.

84. More to the point, the majority's interpretation arguably ignores important features of the offence that already limit its potential scope. One important limit, identified by Dickson J.A., is that temporal nuances can be considered in determining "whether the subject was in circumstances that gave rise to a reasonable expectation of privacy when the impugned conduct occurred and, if so, the nature and extent of that reasonable expectation."[161] In this sense, the appellant (like Dickson J.A.) agrees that "a proper analysis of the offence is more nuanced than a simple characterization of the place where the impugned conduct occurred without regard to the specific use being made of that place at the time."[162] However, as found by Dickson J.A., this balancing occurs as a result of the introductory paragraph in s. 162(1) and not by incorporating a temporal element to s. 162(1)(a).

85. Another important limit in s. 162(1) is the overall requirement that a recording must be made "surreptitiously". As noted by the trial judge in this case, "surreptitiousness is one of two overarching elements that must be proven by the Crown, beyond a reasonable doubt, in all voyeurism cases."[163] The term "surreptitious" is not defined in s. 162(1) but should be taken to mean "covert" or "clandestine", which in turn, refers to acts that are "not openly acknowledged or displayed" or "done secretly or kept secret".[164] By incorporating the term "surreptitiously, Parliament also introduced a stringent requirement for proof of *mens rea*; namely, that the accused must observe or record "with the intention that the subject not be aware that he is doing so, is attempting to avoid notice or attention."[165] Because s. 162(1)(a) requires proof of surreptitiousness, it ensures that accidental or reckless acts of observation or recording are not captured by the offence.

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[160] BCCA RFJ, paras. 41, 54.
[161] BCCA RFJ, para. 90.
[162] BCCA RFJ, para. 90.
[163] BCSC RFJ, para. 72.
[164] *Concise Oxford English Dictionary* (12th edition, Oxford University Press).
[165] *Trinchi*, para. 46.

86. Yet a further limit in s. 162(1)(a)—touched on above—is the requirement that nudity, exposure of inmate body parts, or explicit sexual activity must "reasonably be expected" at the place in question. As discussed, this aspect of the offence requires more than proof of a mere risk of nudity, bodily exposure or sexual activity occurring at a "place".[166] Thus, under the express terms of the offence, there is no irrebuttable presumption that a bathroom, bedroom or changeroom would meet the definition of a "place" for the purposes of the offence. The appellant, in this regard, agrees with the majority's view in the court below that the "analysis must be more nuanced than a simple characterization of the place where the observation occurs".[167] Trial courts are required to determine on a case-by-case basis whether "the place" is one where nudity could be reasonably expected based on its ordinary day-to-day function. The mere possibility that nudity could occasionally occur would not necessarily be sufficient.

87. The jurisprudence of trial courts illustrates this point. In *R. v. Hamilton*, for instance, a trial judge determined that a dry storage room which was occasionally used as a change room was not, in the circumstances of that case, a place where nudity, exposure of intimate body parts, or explicit sexual activity was reasonably expected. Significantly, this conclusion was based on looking at the matter contextually, without incorporating a strict temporal-use element.[168] A similar contextual approach was employed in *R. v. F.G.*, where a family room in the basement of a matrimonial home was found to be a place where it could reasonably be expected that a person would be engaged in explicit sexual activity. Again, this conclusion was reached without adopting a strict temporal-use element.[169]

88. A final consideration—which was not addressed by the court below—is the statutory public good defence in s. 162(6). This Court has held that in determining the potential scope of an offence, the presence of a "liberally construed" public good defence will go some distance in preventing potentially troubling applications of the law.[170] In *Jarvis*, this Court observed:[171]

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[166] *Merck Frosst Canada Ltd.*, paras. 196-198, 201-203, 206; *Ontario (Community Safety and Correctional Services)*, paras. 52, 54, 56-57.

[167] BCCA RFJ, para. 47.

[168] *R. v. Hamilton*, 2009 BCPC 381, paras. 33-34.

[169] *R. v. F.G.*, 2018 ONCJ 31, paras. 492-494.

[170] *R. v. Sharpe*, [2001] 1 S.C.R. 45, paras. 61 – 67, 71.

[171] *Jarvis*, para. 70 [emphasis added].

> **Parliament has already weighed society's interests in allowing individuals to observe and record others and in protecting individuals from surreptitious observation and recording.** In the result, Parliament has enacted s. 162(1), which prohibits surreptitious observation and recording that breaches reasonable expectations of privacy in the three situations described in paras. (a) through (c) of that provision. **It is inherent in the public good defence in s. 162(6) that the value of observation or recording to society might, in a particular case, outweigh the value of individual privacy interests, even where the observation or recording would otherwise ground a conviction under s. 162(1) of the *Criminal Code*.**

89. To summarize, the majority's concern about the potentially broad scope of s. 162(1)(a) was misguided. Properly interpreted, s. 162(1)(a) gives effect to Parliament's objective in enacting the offence, while adequately limiting the scope of the offence. When the "place" element of s. 162(1)(a) is considered against the backdrop of the remaining elements of the offence (including the statutory public good defence), there is no reason to suppose the offence would criminalize conduct that is disconnected from its purpose.

H. The majority's interpretation results in absurd and impractical consequences

90. The appellant's final point relates to the practical implications of the majority's interpretation. Despite finding that s. 162(1)(a) required the trial judge to decide if nudity was expected "at the time of the use in question,"[172] the majority did not explain what this would entail. More precisely, if a trial judge is required to consider the reasonably expected use of a place at the time of the offence, does this refer to the expectations of an ordinary member of the public, or of a hockey coach, hockey parent or junior hockey player? Furthermore, are the reasonable person's expectations evaluated based on how most members of the public use the place or on the use of the place made by subcategories of users (*e.g.* 11- or 12-year-old boys)?

91. By introducing a temporal limit, the majority created a standard that is at once excessively precise and yet almost impossible to ascertain. Time can, of course, be measured based on increments of seconds, minutes, hours, days, weeks or years. At any given time, a place may be used for more than one purpose by more than one person. For example, the evidence at trial established that hockey players in their late-teens and adults would shower and become nude.[173] Fully clothed janitorial staff may enter a change room used by adults (who are reasonably expected

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[172] BCCA RFJ, para. 40.

[173] BCSC RFJ, paras. 218, 221-223, 226-227.

to be nude). Does this mean that s. 162(1)(a) would simultaneously apply to adult hockey players but not to janitorial staff who are present at the same time? The majority was undeniably correct that the "characteristics of places are not immutable,"[174] but the uses of any place are not constant, even when evaluated in discrete temporal segments based on categories of users.

92. On a related point, the majority's interpretation tends to skew s. 162(1)(a) toward a subjective inquiry. The court below was unanimous in finding that "reasonable expectations" were not to be determined by reference to the subjective expectations of the subjects of a surreptitious observation or recording.[175] At trial, there was no dispute that players could be expected to be nude when they reached a certain age. Yet, the majority's reasons must be understood as holding, albeit implicitly, that the Crown had to prove the reasonably expected uses of a hockey arena dressing room by 11- and 12-year-old boys at the exact time of offence. If that was the majority's intention, then it is difficult to see how s. 162(1)(a) can be distinguished from a subjective test. As McLachlin J. (as she was then) held for the majority of this Court in *R. v. Creighton* (albeit in a different context), there is a point where an objective standard becomes so imbued with personalized attributes that it "devolves into a subjective test, thus eroding" the standard that Parliament laid down in the statute.[176]

93. A further consequence of the majority's interpretation is that it arguably results in an ill-defined zone of risk from the perspective of potential perpetrators. Although a temporal-use limit reduces the scope of liability, it also blurs the boundaries between "lawful" and unlawful forms of surreptitious recording. Section 162(1)(a) was meant to define "places" where surreptitious observations and recordings were prohibited on pain of criminal sanction. Parliament identified zones of potential liability based on whether: a) the subject of a recording had a reasonable expectation of privacy; and b) the usual activities were reasonably expected to involve nudity, the exposure of intimate body parts, or explicit sexual activity. Outside of these "places", the making of surreptitious recordings locations may be immoral or invasive of privacy, but it is not a criminal offence (at least under s. 162(1)(a)). But, under the majority's interpretation, the zone of risk created by s. 162(1)(a) becomes imprecise. What is "lawful" or criminal is determined by the habits

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[174] BCCA RFJ, para. 49.

[175] BCCA RFJ, para. 44 (per Willcock J.A.), para. 75 (per Dickson J.A.).

[176] *R. v. Creighton*, [1993] 3 SCR 3 at 58.

of discrete subcategories of users. In the result, the potential for criminal liability becomes fluid because it is not a surreptitious recording in a place that is prohibited, but the surreptitious recording of certain activities in that place.

94. A final observation concerns the arguably arbitrary and absurd consequences of the majority's interpretation, including as revealed by the facts of this case. The trial judge found,[177] and the majority in the court below accepted,[178] that nudity could be reasonably expected in hockey arena dressing rooms. The disagreement at trial was about whether 11- or 12-year-old boys could be reasonably expected to be nude. As a practical matter, this means that if the respondent had photographed a fully clothed 17-year-old, he would have contravened s. 162(1)(a) on the majority's' interpretation. On the other hand, because he photographed 11- or 12-year-old boys in their underwear, there was no contravention of s. 162(1)(a) because young boys are too self-conscious to become nude. Courts generally presume that "the legislature does not intend to produce absurd consequences."[179] Surely there is an element of absurdity or arbitrariness in an interpretation of s. 162(1)(a) that uses a child's self-consciousness, timidity and vulnerability as a basis for limiting the scope of the offence.

I. The trial judge was correct to find that nudity was reasonably expected

95. Turning to the facts of the case at bar, the appellant submits that there was ample evidence to support the trial judge's conclusion that "the hockey dressing rooms, in which Mr. Downes took the photographs of T.R. and G.C., are places in which a person can reasonably be expected to be nude."[180]

96. In concluding that the "place" element of s. 162(1)(a) had been proven, the trial judge did not, as implied by the majority,[181] ignore the conflicts in the evidence concerning whether nudity could be reasonably expected at the time of the offence. The trial judge, instead, carefully considered the conflicts in the evidence, as revealed in the following passages of her reasons:[182]

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[177] BCSC RFJ, para. 228.
[178] BCCA RFJ, para. 55.
[179] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 27.
[180] BCSC RFJ, para. 228.
[181] BCCA RFJ, para. 55.
[182] BCSC RFJ, paras. 218-228 [emphasis added].

[218] **The evidence of G.C., T.R., A.B., Mr. Doucette, Mr. Macdonald and S.D. established that individuals who use hockey dressing rooms, can reasonably be expected to be nude in them.** At various ages, they change their underwear and shower after games and practices.

[219] Ms. Greenall testified that boys of the age of T.R. and G.C. do not usually shower after a game or practice.

[220] Mr. Maillet testified that boys around the age of puberty are self-conscious about their bodies. They quickly strip down to spandex, or their underpants, but then put their pants back on.

[221] Implicit in both Ms. Greenall's and Mr. Maillet's evidence is that, at some age, boys do shower and change.

[222] Mr. Macdonald testified that he could not recall boys between the ages of 12-14 being naked in a dressing room. **He said that they usually did so at about 15 years of age.**

[223] **G.C. testified that**, in August 2015, when Mr. Downes took the photographs of him, **he never showered after games**, **but some of his team members did so.** G.C., who was 14 when he testified, and still playing hockey, said that he now showers after hockey.

[224] **T.R. testified that**, when he played for Mr. Downes, **he did not take showers after hockey games or practices but that other boys did so**. **He saw some boys going to shower after games.** The other boys would take their clothes off, wrap themselves in their towels, go to the shower, dry themselves off, and walk back to their hockey bag at the bench. **When this happened, he would see the other boys naked when they put their towel down to put on their underpants**. T.R. pointed out one boy in the photographs in the Appendix whom he said showered after almost every practice. His ability to observe that boy was challenged in cross-examination and he was less certain than he was in direct.

[225] **A.B. also testified that, although he did not shower**, **some other players would shower "once in a while", but not as often as when he became older**. A.B. testified that, while being coached by Mr. Downes, **he was 100% sure that he changed his underpants in the dressing room after a game and, as a result, was momentarily naked**. His evidence in that regard was not shaken in cross-examination.

[226] **Mr. Doucette, himself a hockey player, testified that as an adult, he and other players would typically shower after a game or practice**. In some moments, they would be nude in the dressing room.

> [227] S.D. testified that, when he played for Mr. Downes, he never got completely naked in the dressing room and did not see other players doing so. He did not shower and said that he had never seen other players do so. **S.D. testified that he began showering after a practice or game at about 16 or 17 because his parents disliked the "stink" and it became uncomfortable getting into clothes**.
>
> [228] **Although the evidence varied as to the age** at which players start to change or shower, based on the totality of the evidence, **I find that the hockey dressing rooms, in which Mr. Downes took the photographs of T.R. and G.C., are places in which a person can reasonably be expected to be nude.** The Crown has proven this element of the offence beyond a reasonable doubt.

97. The trial judge did not reflexively conclude that nudity was reasonably expected in hockey arena dressing rooms because they are dressing rooms. She did not, in other words, fail to adhere to the majority's admonition that the "place" element of s. 162(1)(a) involves more than "a simple characterization of the place where the observation occurs."[183] The appellant, therefore, submits that an offence under s. 162(1)(a) was made out on the facts of this case.

PART IV – SUBMISSION CONCERNING COSTS

98. The appellant does not seek its costs and asks that no award of costs be made against it.

PART V – ORDER SOUGHT

99. The appellant respectfully requests that the appeal be allowed, and that respondent's convictions be restored.

PART VI – SUBMISSIONS ON EFFECT OF PUBLICATION BAN AND RESTRICTION ON PUBLIC ACCESS

100. There is a publication ban imposed under ss. 486.4(1) and 486.4(2.1) of the *Criminal Code* prohibiting the publication, broadcasting or transmission in any way of information that could identity the complainants and certain witnesses.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of April, 2022.

for:

Rome Carot
Counsel for the Appellant

for:

Micah B. Rankin
Counsel for the Appellant

[183] BCCA RFJ, para. 47.

PART VII – TABLE OF AUTHORITIES & LEGISLATION

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