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)

AND

ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF ONTARIO and
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

INTERVENERS

FACTUM OF THE RESPONDENT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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INDEX

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. From 1991 to 2016, the Respondent, Randy Downes, was a highly successful coach of amateur hockey and baseball teams. He made a modest living from coaching, and owned a business called Action Sports Photograph, which provided video and photo portfolios to teams and the parents of children participating in various sports. As part of that business, Mr. Downes maintained files of thousands of pictures.[1]

2. A routine shopping trip changed, and ruined, the Respondent's life. On March 21, 2016, when he was returning to Canada from a trip to Washington State, the Respondent was subjected to a secondary search by the Canadian Border Services Agency ("CBSA").

3. Searches were made of the Respondent's laptop, iPad, flash drives, memory cards, and his US and Canadian cellphones. Several thousands of photographs of children involved in sporting activities were found on the computer and on the memory cards. Several dozen photographs were of children in locker rooms.[2]

4. Although no child pornography had been found on the Respondent's electronic devices, the CBSA contacted the BC Integrated Child Exploitation ("ICE") unit and advised them of what occurred. ICE contacted the RCMP Sex Crimes Unit of the Coquitlam RCMP. The RCMP determined that an investigation should be initiated.

5. In October 2016, Mr. Downes was arrested and charged with four counts of voyeurism contrary to s.162(1)(a) of the *Criminal Code,* one count of possessing child pornography contrary to s.163.1(4) of the *Code,* and four counts of making or publishing child pornography contrary to s.163.1(2) of the *Code*. The RCMP held a press release, which was broadcasted on both national and provincial news outlets. The specific charges were detailed, with the result that Mr. Downes' was branded a sex offender and his successful career was over.

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[1] Appellant's Record Vol. I, Tab 1B, Reasons for Judgment of the British Columbia Supreme Court ("RFJ BCSC"), at paras. 2, 3, 18; Reasons for Sentence, at para. 95, *R. v Downes*, 2020 BCSC 177

[2] Appellant's Record Vol. III, Selberis TS pages 29-31

6. Two years later, in April 2018, Judge Janzen of the Provincial Court of British Columbia refused to commit the Respondent on the child pornography charges at a preliminary inquiry. Not a single photo was found to support the child pornography charges. There was only a committal for trial on the voyeurism charges.[3]

7. On June 14, 2019, Madam Justice McNaughton of the Supreme Court of British Columbia found Mr. Downes guilty of the voyeurism offences. She held that:

a. Mr. Downes took the photographs intentionally;
b. The photographs were taken surreptitiously;
c. There was a reasonable expectation of privacy; and
d. A dressing room is a place where a person could reasonably be expected to be nude.

8. It is the fourth element that is central to this appeal.

9. The Respondent agrees that this appeal raises an important question of statutory interpretation of the voyeurism offence in s.162(1)(a) of the *Criminal Code*. In the context of the facts of this case that issue has been narrowly defined by both the Court of Appeal for British Columbia and the Appellant to this question: does the voyeurism offence in s.162(1)(a) of the *Criminal Code* require proof that nudity is to be reasonably expected at the place and at the time a surreptitious recording is made?

10. A majority of the Court of Appeal for British Columbia held that the answer to this question is "yes", holding that the characteristics of a place are not immutable,[4] and the relevant inquiry is whether the place can accurately be characterized, at the time of the use in question, as a place in which a person can reasonably be expected to be nude.[5] To hold otherwise would capture conduct that does not fall within the ambit of voyeurism under s.162(1)(a) as a breach of sexual privacy.

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[3] Respondent's Record, Tab 1, Oral Reasons for Judgment of the Honourable Judge P. Janzen on Preliminary Inquiry, April 9, 2018
[4] Appellant's Record Vol. I, Tab 1C, Reasons for Judgment of the British Columbia Court of Appeal ("RFJ BCCA"), para. 37
[5] *Ibid*. at para. 40

11. The majority found that the trial judge erred in failing to address conflicting evidence with respect to whether the subjects of the photographs were in a place in which a person could reasonably be expected to be nude.[6]

12. Madam Justice Dickson, in dissent, 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."[7]

13. The Respondent submits that the majority decision of the Court of Appeal is correct. A hockey arena change room may or may not be a place where nudity could be reasonably expected.

14. The Respondent's further position is that constitutional issues are raised by the application of s.162(1)(a) to situations where there was not, in fact or reasonable expectation, nudity, the exposing of intimate body parts or the engaging in sexual activity.

B. Statement of Facts

Judicial Findings that Crown Failed to Prove Sexual Conduct by Respondent

Dismissing the child pornography charges

15. At trial, the Crown called evidence from two CBSA officers, John Selberis and Nicolas Colford, who conducted an inspection of the Respondent's vehicle and electronic devices.[8] Officer Selberis estimated that he saw about 6,000 photographs during the searches of Mr. Downes' devices. None of the photographs appeared to him to be child pornography.[9]

16. At trial, the statements Mr. Downes made to the CBSA officers were admitted into evidence for all purposes. Mr. Downes explained to Officer Selberis that they were from his sports photography business and that parents had him take pictures of their children during their sports activities. Mr. Downes told the officers that no sexually suggestive images existed.[10]

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[6] *Ibid*. at para. 55
[7] *Ibid*. at para. 56
[8] Appellant's Record Vol. III, Selberis TS pages 20-35; Colford TS page 35-39
[9] Appellant's Record Vol. III, Selberis TS pages 30, 34
[10] Appellant's Record Vol. III, Selberis TS pages 22-23, 31-32

17. On April 26, 2016, RCMP Cst. Cavanagh applied for, and was granted, a warrant to search Mr. Downes' residence. The search warrant was executed at the residence on April 27, 2016 resulting in the seizure of approximately 90 electronic devices, including cellphones, USB devices, cameras, laptops, hard drives, and other electronic storage devices. Thousands of photographs were found in Mr. Downes' possession. A large number of photographs were taken of boys playing team sports.[11]

18. All the seized photos, not just those relevant to the voyeurism charges, were examined in detail by the Honourable Judge P. Janzen of the Provincial Court of British Columbia at the Preliminary Inquiry.[12]

19. Having done so, Judge P. Janzen refused to commit the Respondent to trial on the child pornography charges, ruling that:

> [9] As for the other photos on which the Crown relies to establish the charges of child pornography, not a single photo is of a nude boy. Not a single photo is of a boy wearing wet clothing that is clinging to the boy's genitals or buttocks. Not a single shot is zoomed in on the crotch or buttocks. Not a single shot is cropped to remove the upper torso and head and/or the legs to focus on the crotch or buttocks. While some photos are from the rear of boys in athletic poses that involve the fabric of the board shorts or more often the baseball uniform to pull tight across the boys' buttocks, these photos are few and far between and the poses are natural, athletic poses. The vast majority of the poses involve boys playing sports in uniforms, or playing in parks or on beaches in board shorts.
>
> . . .
>
> [30] I have concluded that there is evidence to support that Mr. Downes made and possessed a large number of images of boys. However, there was no evidence to support that these images were child pornography. The Crown has failed to establish that there is any evidence on which a reasonable trier of fact, properly instructed, could convict Mr. Downes for possession or making of child pornography.[13]

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[11] Appellant's Record Vol. II, Tab 14, Ex. 2, Appendix A, page 106
[12] Respondent's Record, Tab 1, Oral Reasons for Judgment of the Honourable Judge P. Janzen on Preliminary Inquiry, April 9, 2018, at paras. 6-14
[13] *Ibid*.

20. The Crown neither sought judicial review of the committal decision nor included the pornography charges in a direct indictment against the accused.

Findings by the Trial Court that the Respondent's Conduct was not Sexual

21. In her Reasons for Sentence, the learned trial judge made specific findings that the Respondent was convicted of acts that were primarily about the invasion of privacy rather than committed for a sexual purpose, holding:

> [16] I have only considered those portions of the pre-sentence reports to which Mr. Downes did not object, as I agree with his counsel's submissions that they are unreliable because they are based on incorrect assumptions about what has been proven with respect to the nature of the offences—in particular, that they were committed for a sexual purpose.
>
> . . .
>
> [73] Over his many years of coaching, Mr. Downes' voyeuristic behaviour only occurred with respect to two boys. Although this is not a mitigating factor, it suggests he was interested in surreptitiously photographing these two boys in particular, as opposed to taking such photographs generally. I have no explanation for his behaviour. Mr. Downes was not charged with taking the photographs for a sexual purpose, nor has the Crown sought to prove that the photos were taken for a sexual purpose in this sentencing hearing. I have no evidence as to why he took them and, in the circumstances, I am not prepared to draw an inference that the photos were taken for a sexual purpose. There is nothing in the portions of the Corrections and Psychological reports that I have considered indicating that there was an event in Mr. Downes' life, which triggered his behaviour.
>
> . . .
>
> [81] I accept that the laying of the pornography charges, and the subsequent media coverage of them, are consequences that flow from the commission of Mr. Downes' offences, namely, the fact that he took the photos. He was ultimately charged and convicted of offences that were primarily about the invasion of privacy, which is not how the story appeared in the media. The effect of this public shaming and embarrassment to Mr. Downes, and to his mother, should be considered when crafting a fit sentence for him.[14]

[14] *R. v Downes*, 2020 BCSC 177

22. The Respondent was sentenced in accordance with these findings. The Crown did not appeal the sentence.

Evidence of the Respondent about the Photographs Possessed by Him

23. Statements of the Respondent to police and CBSA officers were admitted into evidence at trial. In those statements, the Respondent provided explanations for the two categories of photographs: photographs were possessed by him of boys playing team sports and photographs were of boys wearing board shorts. At trial, the statements were acknowledged by the Crown and the accused as admissible for all purposes.[15]

The Crown Case

24. The Respondent takes no issue with the findings at trial that on the dates on which the photographs were taken, T.R. and C.G. were playing on teams coached by the Respondent and the Respondent intentionally took the photographs.[16]

25. The Respondent challenged at trial and his appeal the findings of the learned trial judge that the Respondent took the photographs surreptitiously and that the places where the photographs were taken are places in which a person relevant to the charge can reasonably be expected to be nude, or to expose his or her genital organs or anal region or her breasts.

26. In support of the allegation that the Respondent surreptitiously took the photographs in the Appendix, the Crown called a witness, A.B., and adduced evidence from the witness about cellphone use by the Respondent at a time and place other than the events charged in the Indictment. This testimony was the only direct testimony of supposedly surreptitious conduct of the Respondent in the use of his mobile phone. While the learned trial judge ruled that she could not "draw an inference from A.B.'s evidence that Mr. Downes took the photographs in the

[15] Appellant's Record Vol. III, Selberis, TS page 20-34; see also: Appellant's Record Vol. III, Fox, TS page 43-62; Appellant's Record Vol. II, Exhibit 1: TS Randy Downes, dated April 27, 2016; Appellant's Record Vol. III, Entered at TS page 54

[16] Appellant's Record Vol. I, Tab 1B, RFJ BCSC, at paras. 69, 71

Appendix surreptitiously," she did not rule the evidence of A.B. to be inadmissible as irrelevant and prejudicial.[17]

PART II - QUESTIONS IN ISSUE

27. Is the majority judgment of the British Columbia Court of Appeal in error in holding that, in the circumstances of this case, the trial judge erred by failing to consider whether nudity was reasonably expected at the place and at the time where the offence was alleged to have occurred?

28. If this Court concludes that the statute cannot be interpreted as the majority did, does the construction of the statute render the statute non-compliant with s. 7 of the *Charter*?

PART III - ARGUMENT

A. Construction of s. 162(1)(a)

29. The section of the *Criminal Code* at issue is s.162(1)(a):

> 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
>
> > (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;

30. The indictment charging the Respondent alleged the following counts:

> Count 1
>
> .. from the 1st day of June, 2013 to the 9th day of June, 2013, inclusive, at or near Coquitlam and Surrey, in the Province of British Columbia, did unlawfully observe or record children under the age of 16 where the children were in a place in which they could reasonably have been expected to be nude, contrary to Section 162(1)(a) of the *Criminal Code.*

[17] Appellant's Record Vol. I, Tab 1B, RFJ BCSC, at paras. 98-102

Count 2

> . . . from the 2nd day of August, 2015 to the 17th day of August, 2015, inclusive, at or near Coquitlam, New Westminster, and Surrey, in the Province of British Columbia, did unlawfully observe or record children under the age of 16 where the children were in a place in which they could reasonably have been expected to be nude, contrary to Section 162(1)(a) of the *Criminal Code*.

31. The definition of this phrase, "a place in which a person can reasonably be expected to be nude," must be consistent with the definition of when a person being recorded is in circumstances that give rise to a reasonable expectation of privacy. The definition of that phrase must be consistent with paragraphs 42 and 43 of *R. v. Jarvis*, [2019] 1 S.C.R. 488:

> [42] The fact that a variety of factors may influence whether a person would expect not to be observed or recorded is also consistent with Parliament's choice to express the element of the offence in s. 162(1) with which we are concerned by reference to the "circumstances" that give rise to a reasonable expectation of privacy. The word "circumstances", in the sense in which it is used in s. 162(1), connotes a range of factors or considerations — which are not limited to a person's location or physical surroundings.
>
> [43] I recognize that expressing this element by reference to the circumstances in which a person is observed or recorded is also a way to make it clear that this element relates to privacy expectations that would reasonably arise from the context in which observation or recording takes place, not to the subjective, and potentially idiosyncratic, privacy expectations of the particular person who is observed or recorded. Nonetheless, had Parliament intended to limit the types of circumstances that can be considered in determining whether such an expectation may reasonably arise, it could have done so expressly in s. 162(1), for example by defining "circumstances that give rise to a reasonable expectation of privacy" as including only certain types of circumstances or by providing a list of circumstances or factors to be taken into account in determining whether such an expectation could reasonably arise. Indeed, if Parliament's intention in using the phrase "circumstances that give rise to a reasonable expectation of privacy" was to limit the scope of the conduct prohibited by s. 162(1) to observing or recording a person who does not believe she can be observed, Parliament could have made this explicit, for example by prohibiting surreptitious recording or observation of "a person who does not believe he or she can be observed" where the elements in paras. (a), (b) or (c) of s. 162(1) are present. But Parliament did not do this; instead, it used the word "circumstances", without limitation.

32. The Crown, the learned trial judge and the dissenting justice of the Court of Appeal all

define a place simply by its name (i.e., a dressing room) as a place "in which a person can reasonably be expected to be nude". Doing so disregards and is in conflict with the ruling in *Jarvis* that there is a variety of factors and circumstances that give rise to a reasonable expectation of privacy. Not all hockey rink dressing rooms are alike. Some have shower facilities, most for younger players do not. The expectation of nudity is zero in some and possible in others.[18]

33. The judgment of Mr. Justice Willcock in the BC Court of Appeal is completely in accord with the principles set out in *Jarvis* to determine when a person is in circumstances that give rise to a reasonable expectation of privacy:[19]

> [37] The characteristics of a place are not immutable. A room may be used for multiple purposes, and what one expects to observe at the place will depend upon how the place is being used when the observation is made.
>
> . . .
>
> [40] In order to characterize the place at which the impugned conduct occurs, it is necessary to consider the manner in which the place is expected to be used. If a place is one where nudity may normally be expected (in a shower or toilet, for example) the characterization is easy. If, as in the case at bar, there is inconsistent use and the observation is not continuous and protracted, the expected use at the time of observation or recording must be addressed. The relevant inquiry, in my opinion, is whether the place can accurately be characterized, at the time of the use in question, as a place in which a person can reasonably be expected to be nude. If so, then the section applies even if there is no nudity, as discussed by Juriansz J.A. in *Trinchi*. But if there was no nudity, and nudity could not reasonably be expected during the course of the relevant use, then it is a different matter.
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> . . .
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> [54] The provisions are fundamentally concerned with bodily and sexual privacy, and, as appellant's counsel contends, are not intended to establish offences founded upon an invasion of privacy alone. If careful attention is not paid to the characteristics of the place in which the observation or recording is made, given its use at the time of the observation or recording, there is a risk that s. 162(1)(a) will be read in a manner that criminalizes conduct that was neither engaged in for the purpose of, nor resulted in, the observing or recording of nudity or sexual activity. While the appellant's conduct was undoubtedly a breach of trust and invasive of privacy, that does not necessarily make it

[18] Appellant's Record Vol. IV, Greenall, TS pages 354-355
[19] Appellant's Record Vol. I, Tab 1C, RFJ BCCA, at paras. 37, 40, 54

conduct that this section criminalizes as a sexual offence.

34. None of the photographs of the subjects in evidence or any other photographs found on the accused's electronic devices depicted nudity or were otherwise pornographic.[20]

35. Had nudity been depicted in any of the photographs it would have been evidence that the accused had the intent to take a picture where the subject of the photograph was in circumstances that gave rise to a reasonable expectation of privacy. With the exception of "streakers" or exhibitionists, when a nude person is photographed, the person would normally be in a place where a person could reasonably expect to be nude. The evidence might also show a sexual purpose for the photograph justifying a conviction under s.162(1)(b). Here the evidence is clear that nobody was nude when the pictures were taken nor was there any reasonable expectation that at the time anyone would be nude. In such circumstances there is no evidence to support even the inference of the accused's intention to take a nude or otherwise prohibited voyeuristic photograph.

36. To hold that a place described as a "dressing room" is, because it is so described, a place where some person can reasonably be expected to be nude at some time, and is therefore sufficient to establish a criminal offence under s.162(1)(a), casts the criminal sanction too broadly. Such a holding would violate the *Canadian Charter of Rights and Freedoms* by being overbroad and too vague.

37. To interpret s.162(1)(a) as suggested by the Crown would render the effect of the section overbroad and bring into conflict with s. 7 of the *Charter*.[21]

38. Consistent with the legal maxim *nullum crimen sine lege, nulla poena sine lege*, that everything which is not forbidden by law is allowed and that there must be no crime or punishment except in accordance with fixed, predetermined law, observing or recording are legal activities. Section 162 renders them illegal only under certain circumstances.[22]

39. For these activities to be illegal, the observation or recording must be of a person who is in

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[20] Appellant's Record Vol. I, Tab 1C, RFJ BCCA, at para. 3
[21] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at paras. 105-117
[22] McLachlin J. (as she then was) in *R. v. Kelly*, [1992] 2 S.C.R. 170 at 203; Fish J. in *R. v. Levkovic*, [2013] 2 S.C.R. 204 at paras. 1-3; McLachlin C.J.C. in *R. v. Mabior*, 2012 SCC 47; Karakatsanis J. in *R. v. K.R.J.*, [2016] 1 S.C.R. 906 at para. 25

circumstances that give rise to a reasonable expectation of privacy. This in itself does not render the activity illegal. It is rendered illegal if the person being observed or recorded is in a place in which a person can reasonably be expected to be nude.

40. Parliament has carefully crafted this section so that it is very specific as to what would turn inherently legal activity into illegal activity. The circumstances that give rise to a reasonable expectation of privacy must be determined within the context of the observation or recording. Similarly, "… a place in which a person can reasonably be expected to be nude," must also be determined within the context of the observation or recording.[23]

41. To hold that a place simply described as a "change room" or "changing room" is, at all times and for all purposes, a place in which a person can reasonably be expected to be nude is to give an effect to this law that is clearly overbroad. In order to keep the section within the parameters of its purpose and in compliance with the *Charter*, it is submitted that such a "place" cannot simply be determined by its name.

42. In *Jarvis* the analysis of section 162(1)(a) by Wagner C.J.C. considers the "circumstances that give rise to a reasonable expectation of privacy" on the basis that it is in a place where **that person** "can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity."[24]

43. The majority in *Jarvis* also stressed the sacrosanct nature of "privacy with respect to intimate parts of our bodies and information about our sexual selves" and that the "law also recognizes that intrusion, interference or unwanted attention that has a sexual aspect is particularly pernicious". It is submitted that, consistent with the offence being in the Part V Sexual Offences part of the *Criminal Code*, the majority decision in *Jarvis* does not support the application of s. 162(1)(a) other than in the context of a sexual offence.[25] The trial judge found that the Crown had failed to establish that the Respondent committed a sexual offence.

44. This requirement is more specifically discussed in the decision of Rowe J. for the

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[23] See *R. v. Jarvis*, *supra*
[24] *Jarvis*, at para. 46
[25] *Jarvis*, at para. 82

concurring minority in *Jarvis*, which held:

> [118] The offences created by ss. 162(1) and 162.1(1) are the first in the *Criminal Code* to include a complainant's reasonable expectation of privacy as an element of the offence. As such, the phrase must be interpreted with due consideration given to its function within the offence itself and within the scheme of offences in which it is located. Voyeurism is a sexual offence and should be interpreted in light of the harms contemplated in related provisions under the same heading in Part V of the *Criminal Code* ("Sexual Offences"). As will be discussed below, this calls for an interpretation of "privacy" that has regard to personal autonomy and sexual integrity.
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> . . .
>
> [122] In this case, one should look to the scheme for sexual offences as a whole so as to inform the interpretation of s. 162(1). Sexual offences are designed to protect the personal autonomy and sexual integrity of the individual.

45. This Court's decision in *Skoke-Graham v. The Queen* supports the Respondent's submission that the conduct of the Respondent did not violate s.162(1) when that subsection is properly interpreted using the titles and headings of the statute, which was the approach of the minority decision in *Jarvis*. Section 162(1) should be interpreted in light of the harms contemplated in related provisions in the scheme for sexual offences in Part V of the *Criminal Code*. In the context of the voyeurism offence, "privacy" should be interpreted such that s. 162(1) can only be infringed if a person is recorded or observed in a way that causes them both to lose control over their image and infringes their sexual integrity.[26]

46. The offence is not the taking of any surreptitious photo but rather is focused on intrusions that infringe another person's sexual integrity. It is submitted that the offence requires an actual infringement of another person's sexual integrity, not the mere possibility of an infringement.

47. To ensure that the purpose of the section is properly carried out and in compliance with the *Charter*, the character of the place referred to in subsection (a) must be determined within the context of the observation or recording. In other words, it must be determined at the time of the

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[26] *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106 at para. 42; see also *R. v. Jarvis*, *supra* at paras. 93-128

observation or recording and in the circumstances surrounding such observation or recording.

B. Constitutional Issues

48. The Respondent raised the following constitutional issues in the Court of Appeal and in his Notice of Constitutional Question in this Court filed on March 11, 2022 which gave notice, pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada*, that:

> the appeal raises the following constitutional questions if the construction of section 162(1)(a) of the *Criminal Code* in the majority judgment of the British Columbia Court of Appeal, which construction avoids constitutional infirmity, is found to be incorrect:
>
> 1. Does s. 162(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringes. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

49. In response to the Notice of Constitutional Question, Notices of Intervention were filed with the Court by the Attorney General of Ontario and the Attorney General of Alberta. No Notice of Intervention was filed by the Attorney General of Canada.

50. Although raised in the Amended Notice of Appeal in the Court of Appeal and the subject of the Notice of Constitutional Question in this Court, this ground need not be considered if, as the Respondent submits in this appeal, the proper construction of s. 162(1) of the *Criminal Code* determines the issue. It is a well-established principle that a court is not bound to answer a constitutional question when it may dispose of the case before it without doing so.[27]

51. Before addressing the merits of the constitutional issues, the Respondent notes that the Appellant filed a Motion to Quash the Respondent's Notice of Constitutional Question. On April 25, 2022, the Court dismissed the motion.

52. In its Motion to Quash the Appellant argued that a successful constitutional challenge would require the Court to set aside the new trial order made by the Court of Appeal. To do that, the Appellant argued, the Court would first have to grant leave to cross-appeal. The Respondent

[27] *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106, at para. 45

disagreed with this position in its response to the Motion to Quash and submitted that he can pursue his constitutional arguments without seeking to vary the order of the Court of Appeal. The Respondent's position is that the majority's construction of the statute renders the statute compliant with s. 7 of the *Charter*. If that view is accepted, then the appeal will be dismissed. The Crown will then have to decide whether to hold a new trial.

53. In the recent case of *R. v. Sullivan*[28] Kasirer J. discussed the situation where the Respondent Mr. Chan had no right of appeal when a new trial had been ordered and concluded that it remains an open question whether "it would be in the public interest to proceed with Mr. Chan's prosecution again"[29] and for the trial judge on any new trial to determine the appropriate remedy for any prejudice.[30]

54. If this Court dismisses the Appellant's appeal, the Crown in accordance with the British Columbia *Crown Counsel Act*[31] will then consider whether to proceed with the ordered new trial. To proceed with the new trial Crown counsel must independently, objectively, and fairly measure all the available evidence, information and documents against a two-part test set out in the British Columbia Prosecution Service Charge Assessment Policy Guidelines[32] which charge approval standards continue to apply throughout the prosecution: whether there is a substantial likelihood of conviction; and, if so, whether the public interest requires a prosecution.

55. The public interest test would include consideration of the fact that the Respondent had served his sentence before the Court of Appeal decision was rendered, a factor that the trial judge may also be asked to consider should the matter proceed to trial.[33]

56. If, however, this Court concludes that the statute cannot be interpreted as the majority did but can only be interpreted in a way that renders the provision unconstitutional due to overbreadth, then the Court will issue reasons for judgment that say that. Having the jurisdiction to hear the Crown's appeal, by statutory authority, the Court may "make any order that the court of appeal

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[28] *R. v. Sullivan*, 2022 SCC 19
[29] *Ibid*. at para. 97
[30] *Ibid*. at para. 96
[31] *Crown Counsel Act*, R.S.B.C. 1996, c. 87, ss. 2 and 4(3)
[32] Charge Assessment Guidelines, Policy CHA 1
[33] *R. v. Sullivan*, 2022 SCC 19, at paras. 92, 96 and 97

might have made and may make any rule or order that is necessary to give effect to its judgment".[34]

57. Of course, if the Court concludes in its reasons that the legislation is unconstitutional there will be no new trial because the Crown will respect the Court's decision.

58. The Respondent now turns to merits of the constitutional questions.

59. No issue is taken with the observations of the learned trial judge and the dissenting judge in the Court of Appeal that personal autonomy and dignity and their appropriate protection are evolving themes in the law of privacy in many aspects of civil, regulatory and private law.

60. The constitutional issues raised by the Respondent relate to potential breaches of his *Charter* rights. Whether it is *intra vires* Parliament to legislate general privacy protections is best left to another case. Currently, Canada's federal privacy laws are narrowly framed as data protection statutes. The federal *Personal Information Protection and Electronic Documents Act*, (PIPEDA), S.C. 2000, c. 5., and the federal *Privacy Act*, R.S.C., 1985, c. P-21 codify a set of rules for how organizations and federal government institutions are required to handle an individual's personal information. There is similar legislation in most provinces, including British Columbia.

61. It is respectfully submitted that the extension by the learned trial judge of the reach of s. 162(1) of the *Criminal Code* "to protect individuals' privacy" in a non-sexual context is not a permissible construction of the law. If law reform is needed in this area, it should be accomplished by legislation of Parliament or the Provincial Legislature or by the Supreme Court of Canada clarifying the common law tort of invasion of privacy.

62. If this Court should accept the interpretation of the learned trial judge as to the reach of s. 162(1) of the *Criminal Code* to extend to the types of privacy breaches she has identified, it is submitted that this interpretation of the section will result in an infringement of section 7 of the *Charter* protection for the life, liberty or security of the person as it is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

63. The Court of Appeal was empowered and had the duty to assess the content of legislation

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[34] *Criminal Code*, s. 695(1)

for compliance with the *Charter*. As a threshold matter, the *Criminal Code* provisions engage the Respondent's section 7 interest in life, liberty and security of the person as there is the possibility of imprisonment. Further there is considerable social stigma flowing from the conviction which the Respondent submits should require a high moral blameworthiness of the offender.[35]

64. In this Court's decision in *R. v. Heywood*, the constitutional validity of the then vagrancy sections of the *Criminal Code* was considered. Cory, J, for the majority, discussed the process of an overbreadth analysis:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.
>
> There is another aspect in which the section offends the principles of fundamental justice. As Hutcheon J.A. observed, there is no provision for notice to be given to a person convicted of a predicate offence of his potential liability for breaching s. 179(1)(b). . . The lack of a notice requirement for s. 179(1)(b) is unfair and unnecessarily so. It demonstrates that the section by the absence of a requirement of notice violates s. 7.[36]

65. With respect to whether the *Charter* breach could be justified under section 1 of the *Charter*, Cory, J. held:

> This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: *Re B.C. Motor Vehicle Act*, *supra*, at p. 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be

[35] *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 S.C.R. 1123; *B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Creighton*, (1993) 3 S.C.R. 3

[36] *R. v. Heywood*, [1994] 3 S.C.R. 761

> justified. Overbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.

66. The substantive principle enunciated in *R. v. Heywood* is that under section 7 there are three overlapping requirements, namely, that criminal laws must not be arbitrary, overbroad or grossly disproportionate. These principles were examined in the 2013 case of *Canada (Attorney General) v. Bedford*,[37] in which this Court restated the law on arbitrariness, overbreadth and gross disproportionality, and applied the latter two principles to strike down Canada's prostitution laws.

67. In addressing the principles of fundamental justice in *Bedford*, McLachlin C.J.C. stated that section 7 is directed at "inherently bad laws … that take away life, liberty or security of the person in a way that runs afoul of our basic values".[38] Chief Justice McLachlin stated that a law is overbroad when "there is no rational connection between the purposes of the law and *some*, but not all, of its impacts".[39] In assessing overbreadth, the Court emphasized that the relevant comparison in each case is between the infringement of rights caused by the law on the one hand and the objective of the law on the other.[40]

68. The Respondent submits that objective of s.162(1) is to target exploitative sexual conduct. The interpretation of the section advanced by the Crown and applied by the learned trial judge and the dissenting justice of the British Columbia Court of Appeal, is overbroad since it extends the offence to cover conduct bearing no connection to its underlying purpose of preventing sexual exploitation.[41]

69. In *Bedford*, McLachlin C.J.C. stated that none of the impugned provisions could be saved under section 1 and were, therefore struck down.[42]

70. *Bedford* is a key decision in the jurisprudence on section 7 which clarified the tests for arbitrariness, overbreadth and gross disproportionality. The test for a law being overbroad laid out

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[37] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101
[38] *Ibid*. at para. 96
[39] *Ibid*. at para. 112
[40] *Ibid*. at para. 123
[41] *Ibid*. at para. 142
[42] *Ibid*. at para. 169

in *Bedford* is that a law is *overbroad* when some, but not all, of the limits it places on section 7 rights bear no connection to its objective. The Respondent submits that the application of s. 162(1)(a) would breach his section 7 rights if the construction of that provision by the majority of the British Columbia Court of Appeal were not accepted and could not be saved under section 1 of the *Charter*.

71. The Respondent submits that, as occurred in the Court of Appeal, the proper interpretation of s. 162(1) should make it unnecessary to decide these *Charter* issues. If, however, that construction is not accepted, this Court may address the constitutional issues. The Court may also make any order with respect to constitutional breaches that the Court of Appeal might have made and make any ruling or order that is necessary to give effect to the judgment of this Court. If the dissenting judgment of the Court of Appeal had prevailed, the Court of Appeal would have been required to decide the constitutional issues raised by the Respondent. This Court will be in the same position as the Court of Appeal if the majority judgment of the British Columbia Court of Appeal is not accepted.

PART IV - SUBMISSIONS ON COSTS

72. The Respondent does not seek his costs and asks that no award of costs be made against him.

PART V - ORDER SOUGHT

73. The Respondent seeks an order dismissing the appeal.

74. Should the majority judgment of the British Columbia Court of Appeal not be accepted, the Respondent requests the Court to consider the Respondent's submissions with respect to the *Charter* issues raised and make any order that the Court of Appeal might have made and make any ruling or order that is necessary to give effect to the judgment of this Court.[43]

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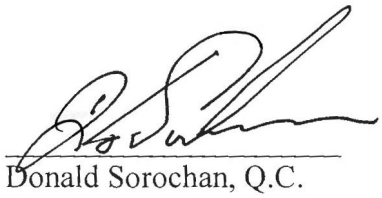
[43] Under the authority granted to the Court by section 695(1) of the *Criminal Code*.

PART VI - SUBMISSIONS ON CASE SENSITIVITY

75. The Respondent agrees that 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.

Dated at the City of Vancouver, Province of British Columbia, this 2nd day of June, 2022.



Donald Sorochan, Q.C.
Glen Orris, Q.C.
Faisal Alamy
Counsel for the Respondent

PART VII - LIST OF AUTHORITIES

Authorities	**Para # in factum**
Canada (Attorney General) v. Bedford, [2013] 3 S.C.R. 1101	37, 66-70
R. v. Creighton, [1993] 3 S.C.R. 3	63
R. v. Heywood, 1994 CanLII 34 (S.C.C.), [1994] 3 S.C.R. 761	64-66
R. v. Jarvis, [2019] 1 S.C.R. 488	31-33, 40, 42-45
R. v. K.R.J., [2016] 1 S.C.R. 906	38
R. v. Kelly, [1992] 2 S.C.R. 170	38
R. v. Levkovic, [2013] 2 S.C.R. 204	38
R. v. Mabior, 2012 SCC 47	38
R. v. Sullivan, 2022 SCC 19	53, 55
Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), 1990 CanLII 105 (S.C.C.), [1990] 1 S.C.R. 1123	63
Skoke-Graham v. The Queen, [1985] 1 S.C.R. 106	45, 50
Statutory Provisions	
Criminal Code, R.S.C. 1985, c. C-46, ss. 162(1)(a), 695(1) *Code criminel*, L.R.C. 1985, ch. C-46, art. 162(1)(a), 695(1)	5, 9, 29, 43, 45, 50, 56, 61-62, 64, 74
Crown Counsel Act, R.S.B.C. 1996, c. 87, ss. 2, 4(3)	54
Rules of the Supreme Court of Canada, SOR/2002-156, 33(2) *Règles de la Cour suprême du Canada*, DORS/2002-156, 33(2)	48
The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 7 *Loi constitutionnelle de 1982* (R-U), constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c. 11, art. 7	28, 36-37, 41, 47, 52, 60, 62-63, 70