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 IN REPLY
(Pursuant to Rules 29(4) and 35(3) of the *Rules of the Supreme Court of Canada*)

MINISTRY OF ATTORNEY GENERAL
B.C. PROSECUTION SERVICE
Criminal Appeals and Special Prosecutions
Ministry of Attorney General
3rd Floor, 940 Blanshard Street
Victoria, BC V8W 3E6

MICAH RANKIN
ROME CAROT
Email: micah.rankin@gov.bc.aa

Counsel for the Appellant

DONALD J. SOROCHAN, QC
GLEN ORRIS, QC
FAISAL ALAMY
Suite 500 – 815 Hornby Street
Vancouver, BC V6Z 2E6
Tel: (604) 488-4731
Email:

Counsel for the Respondent

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

MATTHEW ESTABROOKS
Tel: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the Respondent

MICHAEL J. SOBKIN
331 Somerset Street
Ottawa, ON,
K2P 0J8
Tel: (613) 282-1712
Email: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Respondent

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The appellant files this factum pursuant to Rule 29(4) in response to the constitutional challenge to s. 162(1)(a) raised by the respondent in his factum. In the court below, the respondent raised the constitutionality of s. 162(1)(a) for the first time on appeal. However, the Court of Appeal did not address the constitutionality of s. 162(1)(a), and instead resolved the appellant's conviction appeal based on principles of statutory interpretation.[1] There is no good reason for this Court to entertain the respondent's *Charter* argument in the context of this Crown appeal as of right.

A. OVERVIEW OF APPELLANT'S RESPONDING ARGUMENT

2. This Court should decline to consider the constitutionality of s. 162(1)(a) for the following reasons:

a. The respondent has not identified any rare or exceptional circumstances that would justify allowing him to advance a new constitutional argument in this Court. There is no record or reasons from the courts below. The respondent's *Charter* argument is, moreover, contingent on a hypothetical interpretation of s. 162(1)(a) that may or may not be reached by this Court.

b. The respondent's section 7 argument has no merit. Parliament did not, as asserted by the respondent, enact the voyeurism offence to prevent sexually exploitative conduct. As this Court concluded (unanimously) in *R. v. Jarvis*,[2] Parliament's purpose in enacting s. 162(1) was to protect privacy and sexual integrity from threats posed by evolving technologies.

c. Any violation of s. 7 occasioned by s. 162(1)(a) is justifiable under s. 1. Voyeurism creates unique challenges in an age of unrelenting technological change. The offence is proportional in terms of its objective and its overall impact on *Charter* rights.

3. This appeal raises a narrow issue of statutory interpretation. It should be resolved on that basis.

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[1] *R. v Downes*, 2022 BCCA 8 ("BCCA RFJ"); Appellant's Appeal Record ("AR"), Volume 1 ("Vol. I"), pp. 54-91; BCCA RFJ, para. 55.

[2] *R. v. Jarvis*, 2019 SCC 10, para. 48.

B. STATEMENT OF FACTS

4. On February 11, 2022, the appellant filed its Notice of Appeal as of right pursuant to s. 693(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

5. The Crown's appeal involves a narrow question of statutory interpretation that divided the court below: 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?

6. On March 10, 2022, the respondent served a Notice of Constitutional Question indicating his intention to raise the following constitutional questions in this appeal:

1) Does s. 162(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 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*?

7. The respondent did not challenge the constitutional validity of s. 162(1)(a) at trial.[3] This was so despite this Court having rendered its decision in *Jarvis* before the parties made closing arguments at trial.

8. On appeal from conviction, the respondent (for the first time) argued that s. 162(1)(a) was constitutionally invalid. He submitted that s. 162(1)(a) should be read down in conformity with the concurring opinion in *Jarvis*. The Crown, for its part, argued that the respondent should not be permitted to raise a new constitutional argument and, in any case, that the *Charter* argument had no merit.

9. The appellant understands that it is common ground that neither the trial judge nor the Court of Appeal considered the constitutional validity of the voyeurism offence in s. 162(1)(a) of the *Code*. As such, there is no dispute that the respondent's *Charter* argument is a "new issue".

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[3] *R. v Downes*, 2019 BCSC 992

PART II – QUESTIONS IN ISSUE

10. The respondent's factum gives rise the following issues that were not addressed in the court below:

a. Should this Court entertain the question of whether s. 162(1)(a) violates s. 7 of the *Charter*?

b. Is s. 162(1)(a) unconstitutionally overbroad within the meaning of s. 7?

c. Can s. 162(1)(a) be saved under s. 1?

d. What, if any, constitutional remedy should be granted?

PART III – STATEMENT OF ARGUMENT

A. The constitutional question should not be considered

11. As a general rule, "a respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial."[4] This Court will only permit a new constitutional issue to be raised "exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties."[5] In deciding whether to permit a responding party to advance a new *Charter* argument, the Court must consider the "state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice."[6]

12. The respondent has not demonstrated that this is one of the "rare cases"[7] that warrants this Court's consideration of new constitutional arguments on appeal. There is no record from the courts below related to the constitutional questions raised by the respondent. The parties did not tender any evidence which might, for example, bear on a justification under s. 1. This is not a case that involves constitutional issues that are evasive of review;[8] or one where this Court has "the

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[4] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, para. 58.

[5] *Guindon v. Canada,* 2015 SCC 41, para. 23.

[6] *Guindon*, para. 20; *R. v. Bird,* 2019 SCC 7, para 146.

[7] *Bird*, para. 146.

[8] *R. v. C.P.*, 2021 SCC 19, para 50.

benefit of fully developed reasons for judgment on the constitutional point in both of the courts below."[9]

13. The interests of justice likewise do not favour the respondent. The respondent's constitutional argument is ultimately a fallback or failsafe position that only arises "if the construction of section 162(1)(a)…in the majority judgment…is found to be incorrect".[10] The respondent, in effect, concedes that this appeal *does not* directly put the constitutionality of s. 162(1)(a) in issue. Without knowing the basis of this Court's eventual judgment, any constitutional argument based on its future decision is, by definition, purely speculative. This Court may affirm the majority judgment, endorse the dissenting opinion, or propose an entirely new interpretation of s. 162(1)(a). The respondent has not addressed these possibilities, and it is unfair to require the appellant to respond to constitutional arguments premised on hypothetical interpretations of s. 162(1)(a) that have not yet been reached by this Court.

B. Does s. 162(1)(a) of the *Criminal Code* violate s. 7 of the *Charter*?

14. If this Court decides to entertain the respondent's *Charter* challenge, then it should be dismissed on the merits. To advance a claim under s. 7, the analysis proceeds in two stages: (1) the claimant must show that the impugned law results in a deprivation of life, liberty and/or security of the person; and (2) the claimant must show that the deprivation does not accord with the principles of fundamental justice.[11] The appellant acknowledges that the respondent's section 7 liberty interest is engaged by s. 162(1)(a) but disagrees that the offence is inconsistent with the principles of fundamental justice.

i. Is s. 162(1)(a) unconstitutionally overbroad?

15. The respondent argues that s. 162(1)(a) is overbroad. He maintains that the trial judge's extension of s. 162(1)(a) to the protection of privacy in "a non-sexual context is not a permissible construction of the law."[12] The respondent further contends that the "objective of s.162(1) is to

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[9] *Guindon*, para 35.

[10] The respondent's Notice of Constitutional Question was filed on March 11, 2022; see also respondent's factum, paras. 50, 62.

[11] *R. v. D.B.,* 2008 SCC 25, para. 37.

[12] Respondent's factum, para. 61.

target exploitative sexual conduct."[13] The respondent submits that the offence in s. 162(1)(a) will breach s. 7 unless "the construction of that provision by the majority of the British Columbia Court of Appeal is accepted."[14] The appellant disagrees with these assertions.

16. A law is said to be overbroad when it "includes *some* conduct that bears no relation to its purpose."[15] As explained in *Bedford*, an overbroad law is one that is "arbitrary *in part*."[16] This occurs where there is "no rational connection between the purposes of the law and some, but not all, of its impacts."[17] The overbreadth analysis generally proceeds in three analytical steps: (1) determining the purpose of the impugned law; (2) considering the scope of the impugned law; and (3) comparing the purpose with the scope of the impugned law to determine whether or not they are in alignment. Applying these steps, the respondent's overbreadth argument has no merit and should be rejected.

17. To begin, the respondent's overbreadth analysis is premised on an inaccurate characterization of the legislative purpose underlying s. 162(1)(a). The purpose of a law is determined by examining statements of purpose in the legislation; the text, context, and scheme of the legislation; and extrinsic evidence such as legislative history and evolution.[18] The respondent's argument does none of these things, and the respondent is wrong that the purpose of s. 162(1)(a) is to prevent exploitive sexual conduct.[19] In *Jarvis*, Wagner C.J.C. canvassed the legislative history underlying s. 162(1) and held that Parliament's purpose in enacting the offence was: "to protect individuals' privacy and sexual integrity, particularly from new threats posed by the abuse of evolving technologies."[20] In his concurring opinion, Rowe J. wrote that he "agree[d] with the Chief Justice as to the purpose and object of s. 162(1)"[21] and went on to state that the voyeurism offence

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[13] Respondent's factum, para. 68.

[14] Respondent's factum, para. 70.

[15] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 112 [emphasis in original].

[16] *Ibid*.

[17] *Ibid*.

[18] *R. v. Safarzadeh-Markhali*, [2016] 1 S.C.R. 180, para. 31.

[19] Respondent's factum, paras. 68.

[20] *Jarvis*, para. 48.

[21] *Jarvis*, para. 113.

was meant "to protect well-established interests of privacy, autonomy and sexual integrity of all individuals, in light of threats posed by new technologies to encroach upon them."[22] The legislative purpose of s. 162(1) was definitively settled by this Court in *Jarvis*, and the respondent has shown no basis for revisiting that holding in this case.

18. In addition, the respondent's submission misunderstands the scope of s. 162(1)(a). To correctly apply the overbreadth analysis, it is essential to accurately define the "true scope"[23] of s. 162(1)(a). The respondent is, in this regard, wrong that the appellant's interpretation amounts to defining "a place simply by its name".[24] As set out in the appellant's factum,[25] s. 162(1)(a) involves more than a labelling exercise. Trial courts must determine on a case-by-case basis whether "the place" is one where nudity could be reasonably expected based on its ordinary function. On the whole, the respondent's interpretation of s. 162(1)(a) appears to conflate the introductory wording of s. 162(1) ("reasonable expectation of privacy") with the independent requirement to prove that the "place" is one where nudity (*etc.*) could be "reasonably be expected" to occur.[26] These two aspects of the *actus reus* of the offence must be treated as being separate or else the "place" element of s. 162(1)(a) becomes "mere surplusage".[27] As to the true scope of s. 162(1)(a), this must necessarily be informed by considering the various elements of the offence, including that: (1) the observation or recording must be done "surreptitiously"; (2) in "circumstances that give rise to a reasonable expectation of privacy"; (3) that nudity, intimate bodily exposure or explicit sexual activity must "reasonably be expected"; and that the statutory public good defence in s. 162(6) have no application.

19. In the same vein, the respondent has not explained how s. 162(1)(a) overshoots the legislative mark identified by this Court in *Jarvis*. As the appellant sets out in its factum, s. 162(1)(a) was intended to apply to "places" even if the subject of a recording was fully clothed.[28]

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[22] *Ibid*.

[23] *R. v. Khawaja*, 2012 SCC 69, paras. 43 and 50.

[24] Respondent's factum, paras. 32 and 36.

[25] Appellant's factum, paras. 86-87.

[26] Respondent's factum, paras. 31-32.

[27] *Jarvis*, paras. 44-47.

[28] See also: *R. v. Trinchi,* 2019 ONCA 356, para. 8

Indeed, the incorporation the language "reasonably be expected to be nude" makes it plain that Parliament did not intend that actual nudity would be required. The major distinction between the offences in s. 162(1)(a) and (b) is that the latter, unlike the former, requires proof of actual nudity, genital/anal exposure or sexual activity. As explained by this Court in *Jarvis*, "[s]ection 162(1)(a) implicates territorial privacy, as it is concerned with protecting privacy in particular places."[29] By prohibiting surreptitious recordings of even fully clothed individuals in certain places, the effects of s. 162(1)(a) align with Parliament's objective of protecting privacy, as well as sexual integrity.

20. Finally, and relatedly, s. 162(1)(a) is not subject to the same shortcomings that have led this Court to invalidate criminal offences in other cases. Section 162(1)(a) does not unintentionally sweep conduct into its ambit that is unrelated to Parliament's purpose in enacting it. This Court's jurisprudence illustrates this point:

a. in *Bedford*,[30] this Court held that the prohibition on living off the avails of prostitution was overbroad because it targeted parasitic relationships but had the unintended effect of criminalizing non-exploitative relationship;

b. in *Carter*,[31] this Court found the prohibition on assisted suicide was overbroad because it "[swept] conduct into its ambit that [was] unrelated to the law's objective" of protecting vulnerable people from being induced to commit suicide;

c. in *Appulonappa*,[32] this Court held that the human smuggling offence was overbroad because it "appears to criminalize some conduct that bears no relation to its objective" such as humanitarian workers assisting asylum seekers; and

d. in *Safarzadeh-Markhali*,[33] this Court held that limits on credit for pre-sentence custody "capture[d] people it was not intended to capture: offenders who do not pose a threat to public safety or security."

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[29] *Jarvis*, para. 67.

[30] *Bedford*, para. 142.

[31] *Carter v. Canada (Attorney General),* 2015 SCC 5, para. 86.

[32] *R. v. Appulonappa*, 2015 SCC 59, para. 73.

[33] *Safarzadeh-Markhali*, para. 53.

21. In each of these examples, the impugned laws were overbroad because of their *unintended* consequences. In contrast, the legislative record with respect to s. 162(1) makes it plain that Parliament *intended* to criminalize the surreptitious recording of images in certain places regardless of whether actual nudity or sexual activity was taking place at the time of a recording or observation. As such, the respondent's section 7 claim fails and should be dismissed.

ii. *Can s. 162(1)(a) be saved under s. 1 of the Charter?*

22. The respondent's Notice of Constitutional Question asks this Court to decide if s. 162(1)(a) can be justified under s. 1 of the *Charter*. But the respondent's factum makes no submissions on the application of s. 1. In reply, the appellant submits that if s. 162(1)(a) infringes s. 7, then it is a reasonable limit that can be demonstrably justified in a free and democratic society. The test under s. 1 is well-established. The factors set out in *R. v. Oakes* remain the governing test.[34]

Pressing and Substantial Objective

23. A law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society. The objectives of s. 162(1) are pressing and substantial. Clearly, protecting the privacy and sexual integrity of persons against being surreptitiously observed or recorded is a pressing and substantial objective. The legislative history underlying s. 162(1) canvassed by this Court in *Jarvis* reveals why this is so.

Rational Connection

24. To make out a rational connection, the Crown need only demonstrate a connection between the infringement and the benefit sought "on the basis of reason or logic".[35] There is a rational connection between the restrictions set out in s. 162(1) and Parliament's objective of protecting privacy and sexual integrity. Prohibiting surreptitious observations or recordings from being made in places where nudity, bodily exposure or sexual activity may occur protects against invasions of privacy and interferences with sexual integrity.

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[34] *R. v. Oakes,* [1986] 1 S.C.R. 103

[35] *Carter*, para. 99.

Minimal Impairment

25. The second stage of the proportionality branch of the *Oakes* test requires the Court to determine whether a law is minimally impairing. In deciding whether a law is minimally impairing, "a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem."[36] The voyeurism offence was enacted to address well-known limitations in the existing criminal law, as well as the inherent challenges involved in targeting surreptitious activities in an age of technological change.

26. In enacting s. 162(1)(a), Parliament carefully tailored the offence so that it applies to a small category of places where surreptitious recordings are prohibited. Parliament's incorporation of a stringent standard of *mens rea*,[37] as well as a statutory "public good" defence, [38] are both features of the offence that ensure that the offence does not overreach its legitimate objects.

Overall Proportionality

27. At the final stage of the proportionality analysis, a reviewing court must weigh the overall impact of the law on protected rights against the beneficial effect the law has in terms of the greater public good.[39] The salutary effects of s. 162(1)(a) in terms of protecting privacy and sexual integrity clearly outweigh any deleterious consequences. The public as a whole benefits from the protections offered by s. 162(1)(a). Conversely, any impact on the competing "freedom" to secretly observe or photograph persons in change rooms is limited and should be accorded little, if any, weight in the analysis. Indeed, given that violations of privacy are tortious acts,[40] there appears to be no reason to accord the "right" to secretly record any weight under s. 1.

iii. *What, if any, constitutional remedy should be granted?*

28. The respondent makes no submissions on the question of constitutional remedy. This Court, the appellant and the interveners are, therefore, left in the unenviable position of having to

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[36] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, para. 43.

[37] *R. v. Keegstra,* [1990] 3 S.C.R. 697 at 775; *Khawaja*, paras. 45-48.

[38] *R. v. Sharpe*, 2001 SCC 2, paras. 34, 60, 73-74.

[39] *Carter*, para. 122.

[40] *Jones v. Tsige*, 2012 ONCA 32; *Privacy Act*, RSBC 1996, c. 373, s. 1.

guess what the respondent's position is regarding the appropriate remedy. This is yet another reason why this Court should not consider the respondent's constitutional challenge to s. 162(1)(a).

29. In his factum before the Court of Appeal, the respondent argued that a s. 7 breach could be remedied by "reading down" the offence in accordance with the Rowe J.'s concurring opinion in *Jarvis*.[41] In the court below, the appellant agreed that a tailored remedy would be preferable to striking down the offence in its entirety.[42]

30. If this Court finds that s. 162(1)(a) is overbroad, the appellant submits the offence is "substantially constitutional and peripherally problematic."[43] In these circumstances, a tailored remedy should be employed to "ensure the public retains the benefit of legislation enacted in accordance with our democratic system."[44]

PART IV – SUBMISSION CONCERNING COSTS

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

PART V – ORDER SOUGHT

32. The appellant asks that its appeal be allowed, and the respondent's convictions be restored.

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

33. 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,

for: *for:*

Rome Carot
Counsel for the Appellant

Micah B. Rankin
Counsel for the Appellant

Dated this 16th day of June 2022 at Victoria, British Columbia.

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[41] AR, Vol. I, p. 203.

[42] AR, Vol. I, p. 245.

[43] *Sharpe*, paras. 111 and 114.

[44] *Ontario (Attorney General) v. G*, 2020 SCC 38, paras. 112 and 116.

PART VII – TABLE OF AUTHORITIES & LEGISLATION

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