File no. 40045

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

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant
(Respondent)

and

RANDY WILLIAM DOWNES

Respondent
(Appellant)

and

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

FACTUM OF THE INTERVENER
ATTORNEY GENERAL OF ONTARIO

Rules 33(4) and 42 of the *Rules of the Supreme Court of Canada*

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PART I: OVERVIEW AND FACTS

1. The Attorney General of Ontario ("Ontario") intervenes as of right on the constitutional questions raised by the respondent, submitting that the offence in section 162(1)(a) of the *Criminal Code* is not overbroad contrary to section 7 of the *Charter* and, alternatively, that any overbreadth is justified under section 1 of the *Charter*.

2. Section 162(1)(a) should be interpreted as it was by this Court in *Jarvis*, by the Ontario Court of Appeal in *Trinchi*, and by the dissenting judge in the court below. Thus interpreted, the section is not overbroad of its purpose. The legislative purpose of section 162(1)(a) is to protect privacy in the class of places where it can reasonably be expected that people will do some of the most private physical acts: become nude; expose their genitals, anal region, or breasts; or engage in explicit sexual activity. That someone can reasonably be expected to do one or more of those acts in a place is a clear objective measure that the place is a private one. Through section 162(1)(a), Parliament has declared that those are places in which anyone should be free from being surreptitiously observed or visually recorded without their consent or knowledge — regardless of whether they are in fact nude, exposed, or engaged in sexual activity at the time.

3. When section 162(1)(a) is correctly understood as protecting everyone's privacy from secret observation or visual recording in the described class of private places, the offence is not overbroad. To the contrary, the offence criminalizes exactly what it is meant to: a specific subset of invasions of privacy.

4. Ontario relies on the facts stated by the parties and by the court below, including the legislative history of the enactment.

PART II: QUESTION IN ISSUE

5. Ontario intervenes on the respondent's two constitutional questions:

   a. Does section 162(1)(a) of the *Criminal Code* infringe section 7 of the *Charter* by reason of overbreadth?

   b. If so, is the infringement justified under section 1 of the *Charter*?

6. Ontario submits that:

   a. Subsection 162(1)(a) is not overbroad of its legislative purpose.

   b. Alternatively, if overbroad, the provision is justified under section 1.

PART III: STATEMENT OF ARGUMENT

A. THE PROVISION IS NOT OVERBROAD

i. There is no temporal component in "a place in which a person can reasonably be expected to be nude…"

7. In order to assess the overbreadth claim, the Court must start by interpreting the provision.[1] Ontario agrees with the appellant, and with the dissenting judge in the court below, that "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", as enacted in section 162(1)(a), does not include a temporal component.

8. This Court recently confirmed in another context that when Parliament wants a legal test applied, it says so explicitly.[2] It is plain that Parliament did not include an explicit temporal component in the "place" element of section 162(1)(a).

9. That is not to say the elements of the offence lack any temporal component. As the dissenting judge pointed out in the court below (B.C.C.A. para. 58), the prosecution must

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[1] *R. v. J.J.*, 2022 SCC 28 at para. 17

[2] *R. v. J.D.*, 2022 SCC 15 at para. 27

prove that the victim was "a person who [was] in circumstances that give rise to a reasonable expectation of privacy." It is known from both the section 8 *Charter* jurisprudence,[3] and from this Court's decision in *Jarvis*,[4] that assessing reasonableness of an expectation of privacy requires considering the entire context — the "totality of the circumstances". Unavoidably, that task includes having regard for the time when the observation or recording was made, plus the characteristics of the place where it occurred, the presence of others in the place, the state of knowledge of the person being observed, and innumerable other factors.

ii. Parliament's purpose for s. 162(1)(a) includes protecting privacy

10. The respondent's submission construes too narrowly the legislative purpose of section 162(1)(a). The purpose is not, as the respondent submits, solely to combat sexually exploitive conduct (R.F. para. 68). It is broader. The purpose of section 162(1)(a) is to protect everyone against surreptitious observation or visual recording in private places, regardless of whether the intent or the result is sexually exploitive.

11. Section 7 of the *Charter* requires that any law which affects life, liberty, or personal security must only have effects that are rationally connected to its legislative purpose. When overbreadth is claimed, identifying the law's purpose is critical to a proper analysis.[5] As this Court stated in *Moriarity*: "In general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality[,] and capture the main thrust of the law in precise and succinct terms."[6] Articulation of a challenged law's purpose should be "firmly anchored in the legislative text, considered in its full context", and should "avoid statements of purpose that effectively predetermine the outcome of the overbreadth analysis without actually engaging in it".[7]

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[3] *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 31

[4] *R. v. Jarvis*, 2019 SCC 10 at paras. 29-30

[5] *R. v. J.J.*, 2022 SCC 28 at para. 137

[6] *R. v. Moriarity*, 2015 SCC 55 at para. 26

[7] *R. v. Moriarity*, 2015 SCC 55 at para. 32

12. The respondent's statement of the law's purpose, as "target[ing] exploitive sexual conduct" (R.F. para. 68), fails to capture the main thrust of section 162(1)(a). The law is not solely about preventing sexual exploitation. It is about protecting personal privacy. Section 162(1)(a) seeks to protect personal privacy against surreptitious observation or visual recording by articulating an identifiable class of places — places in which it is objectively foreseeable a person will be nude, expose their genitals or anal region or breasts, or be engaged in explicit sexual activity — and criminalizing surreptitious observation or visual recording in those places, if the subject has a reasonable expectation of privacy against being observed or recorded in that place and at that time.

13. Looking at the text of the provision, it is clear that Parliament chose to *not* limit liability under section 162(1)(a) to only observations or recordings that catch people in sexual or sexualizable situations. The text does not reflect such a limit. Instead, section 162(1)(a) protects privacy whether or not someone is actually naked or exposed or engaged in sexual activity. To accept the respondent's submission that the provision is *only* about sexual exploitation would require ignoring the very text of the impugned provision.

14. The legislative history similarly refutes the respondent's characterization of Parliament's purpose. As the Chief Justice explained on behalf of the majority in *Jarvis*, the purpose of section 162(1) is to "protect individuals' privacy and sexual integrity, particularly from new threats posed by the abuse of evolving technologies".[8] And further, "The express terms of s. 162(1), as well as its legislative history, demonstrate that this provision is concerned with protecting individuals' privacy interests in specific contexts."[9] Protecting privacy can stand apart from protecting sexual integrity. They are complementary and overlapping goals, but they are not coextensive.

15. This Court in *Jarvis* explained that after a Department of Justice consultation paper proposed that a new offence of voyeurism could be theorized around *either* invasion of

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[8] *R. v. Jarvis*, 2019 SCC 10 at para. 48 (emphasis added)

[9] *R. v. Jarvis*, 2019 SCC 10 at para. 59 (emphasis added)

privacy *or* around exploitation of sexual integrity,[10] the vast majority of the parties consulted were in favour of legislating based on *both* rationales.[11] Thereafter, Parliament chose to legislate against both threats to sexual integrity and threats to privacy.[12]

16. In the post-*Jarvis* case of *Trinchi*, the Ontario Court of Appeal wrote about the scope of section 162(1)(a), and accepted that the focus of that subsection is on *privacy* in the defined class of places, without necessarily involving sexual exposure or exploitation:

> … Paragraph (a) criminalizes making peepholes or the installation of cameras to observe people in such places. A person who installed a hidden camera in a fitting room of a department store would likely be caught by this provision if the only recording he captured was of a fully clothed customer trying on different hats. Paragraph (a) does not require the accused to act for a sexual purpose. It would apply to an accused who hoped to profit by posting recordings on the Internet. [13]

Ontario supports this interpretation. A person secretly observed or recorded while trying on clothing — or even hats — in a private changing room has suffered a violation of their privacy, regardless of the presence or absence of a sexually exploitive context.

17. The Alberta Court of Appeal has similarly held that section 162 is an example of an offence that aims to protect privacy, noting in the case of *A.E.* that "surreptitiously recording private activity may amount to a significant violation of privacy", even absent sexual activity — although capturing sexual activity makes the privacy violation more serious.[14]

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[10] Department of Justice, *Voyeurism as a Criminal Offence: A Consultation Paper* (2002) (online: www.justice.gc.ca/eng/cons/voy/voy.pdf)

[11] Department of Justice, *Voyeurism As A Criminal Offence: Summary of the Submissions*, October 28, 2002 (online: www.justice.gc.ca/eng/cons/voy/final.html)

[12] *R. v. Jarvis*, 2019 SCC 10 at paras. 50-51

[13] *R. v. Trinchi*, 2019 ONCA 356 at para. 8 (emphasis added)

[14] *R. v. A.E.*, 2021 ABCA 172 at para. 72; see also *R. v. Jarvis*, 2019 SCC 10 at para. 82

iii. The normative function of "a place in which a person can reasonably be expected to be nude…"

18. Parliament could have chosen to enumerate a specific list of places to be protected against surreptitious observation and recording.[15] But the drafters of section 162 chose a different approach. Rather than enumerating places by name or by function, the places that are protected under section 162(1)(a) are defined in a principled and normative way: If it is reasonable to expect that people in a certain place will be naked, or expose their genitals or anal region or breasts, or be engaged in explicit sexual activity, then that is a place where everyone is entitled to be free from surreptitious observation and visual recording — whether naked or not, exposed or not, explicit sexual activity or not.

19. It is well-understood in the section 8 *Charter* context that establishing reasonable expectations of privacy is not solely an empirical task; rather, it includes a strong normative element.[16] Given the close link between "reasonable expectation of privacy" under section 8 of the *Charter* and the same words in section 162 of the Code,[17] the interpretation of section 162(1)(a) should also follow a normative approach.[18] The prohibition in section 162(1)(a) refers to nudity, exposure, and sexual activity *not* because only nudity, exposure, and sexual activity are protected from voyeurs. Rather, the subsection defines protected places in terms of reasonable expectations of nudity, exposure, or sexual activity because identifying places where people sometimes do those most private of physical acts[19] is an accurate measure of where people should, as a normative matter, be able to expect privacy against being non-consensually observed or visually recorded.

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[15] Contrast *Cr. Code* s. 161(1)(a)

[16] *R. v. Tessling*, 2004 SCC 67 at para. 42

[17] *R. v. Jarvis*, 2019 SCC 10 at paras. 54-59

[18] *R. v. J.J.*, 2022 SCC 28 at para. 57, applying a normative approach in s. 278.1

[19] *R. v. Jarvis*, 2019 SCC 10 at para. 82 ("privacy with respect to intimate parts of our bodies and information about our sexual selves is particularly sacrosanct")

iv. Criminalizing invasions of privacy is not novel or unique

20. Criminalizing invasions of privacy is not, contrary to the respondent's suggestion, a novel step (R.F. paras. 60-61). Parliament has done so explicitly for nearly fifty years.

21. Part VI of the *Criminal Code*, entitled "Invasion of Privacy", was first enacted in 1974. According to Robert W. Hubbard in *Wiretapping and Other Electronic Surveillance: Law and Procedure*, Part VI "was designed to protect individual privacy. Consequently, the single most important feature of Part VI is that it creates a series of offences to punish unauthorized electronic intrusions into privacy."[20]

22. Part VI of the *Criminal Code* creates several crimes:

a. Section 184 makes it an offence to knowingly intercept private communications by means of electro-mechanical, acoustic, mechanical or other device absent consent, or authorization under the *Code*, or certain technical exceptions for telecommunication companies. Section 184.5 creates a similar offence for radio-based telephone communications.

b. Section 191 creates an offence of possessing, selling, or purchasing devices designed primarily for intercepting private communications, absent one of the identified exemptions.

c. Section 193 creates an offence of disclosing the content or existence of intercepted private communications, absent an identified exemption. Section 193.1 creates a similar offence for radio-based telephone communications.

23. Outside of Part VI, there are still more offences in the *Criminal Code* that protect particular privacy interests in various ways.

24. Territorial privacy interests are also protected by the offences of trespassing at night (section 177), breaking and entering (section 348), being unlawfully in a dwelling

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[20] Robert W. Hubbard, Mabel Lai & Daniel Sheppard, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (Toronto: Thomson Reuters), at §1:2 and §2:2

(section 349), and mischief through interfering with enjoyment of property (section 430(1)). Indeed these are the offences that historically would have been relied upon to prosecute voyeuristic conduct that is now more directly addressed by section 162.

25. Bodily privacy interests are addressed by the various assault-based offences, from simple to aggravated assault, plus various forms of sexual assault and related offences like sexual interference. Non-consensual distribution of intimate images (section 162.1) can also be thought of as protecting bodily, as well as informational, privacy.

26. Informational privacy is protected in some contexts by the offences of unauthorised use of computer systems (section 342.1), possession etc. of devices to obtain unauthorised use of computer systems (section 342.2), and mischief in relation to computer data (section 430(1.1)). As noted, non-consensual distribution of intimate images (section 162.1) has an informational aspect, in addition to addressing bodily privacy. And section 487.0194 protects privacy-holders against unlawful retention of private information after the expiration of a preservation demand or preservation order.

27. The most compelling analog to the offence of voyeurism is section 184, interception of private communications. What section 184 does for communications, section 162 does for visual observations and recordings. Both offences criminalize invasions of privacy.

28. Similarly, what section 193 does for disclosure of intercepted communications, section 162.1 does for distribution of intimate images. The offences criminalize dissemination of recordings or images representing private communications or private intimate conduct.

29. It is misdirection to suggest that Parliament has not yet turned it mind to whether invasion of privacy should be a crime. Criminalizing invasions of privacy is well established.

iv. The exemption for *some* video surveillance by warrant

30. The legislative purposes of subsections 162(1)(b) and (c) should not be confused with the purpose of the provision in issue in this case, subsection 162(1)(a). There is good reason to think their purposes are each somewhat different.

31. In section 162(2), Parliament exempted peace officers from liability for voyeurism when they are acting pursuant to a general warrant authorizing covert observation or recording of a place protected by subsection (1)(a), or of activities protected by subsection (1)(b). However even with a warrant, police are *not* exempted from the application of subsection (1)(c), which protects against observation or recording made for a sexual purpose.

32. The distinction between exempting judicially authorized video surveillance from (1)(a) and (1)(b), but not exempting it from (1)(c), underscores that Parliament considered the three sub-sections to have *different* purposes.

v. Violating sexual integrity does not require nudity etc.

33. In the alternative, even if protecting sexual integrity were the sole legislative purpose of section 162(1)(a), it is wrong to assume that because someone is clothed, their sexual integrity cannot be violated. To the contrary, if someone is in a place where nudity, exposure, or sexual activity can reasonably be expected, and the person enjoys a reasonable expectation of privacy in that circumstance, and they are observed or visually recorded without their knowledge, then that person *can* still experience a violation of their sexual integrity even if they never remove their underwear.

34. In *Jarvis,* the culpable visual recordings were of the chest area of *clothed* female students. Both the majority's judgment and the concurring reasons held that the recordings violated the sexual integrity of those clothed subjects.[21]

35. The majority reasons in *Jarvis* also referred to the criminal prohibitions around child pornography as a manifestation "of our societal consensus that there is a sphere of privacy regarding information about our sexual selves that is particularly worthy of respect."[22] That sphere of privacy about our sexual selves can be violated even in the absence of nudity or the exposure of sexualized body parts. The jurisprudence interpreting the child pornography

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[21] *R. v. Jarvis*, 2019 SCC 10 at para. 85 (majority) and para. 147 (concurrence)

[22] *R. v. Jarvis*, 2019 SCC 10 at para. 82

provisions makes it clear, "There can certainly no longer be any question as to whether nudity is required to conclude to a depiction meeting the definition of child pornography."[23] Nudity is an important part of determining whether there is a sexual context, but is not determinative.[24] Recordings of children can be "clearly sexually exploitative of them, even though they are wearing underwear or bathing suits,"[25] or even diapers.[26]

vi. The offence is tailored to its purpose

36. As this Court said succinctly in *Moriarity*, "A law is overbroad when there is no rational connection between the purpose of the law and some of its effects."[27] Ontario submits the offence in section 162(1)(a) is not overbroad, because all of the conduct it criminalizes is rationally connected to Parliament's purpose: protecting people against surreptitious observation or visual recording in private places.

37. To assess the breadth of the offence, it is necessary to examine not only the "place" element, but *all* the elements of the offence, plus the defence provided in section 162(6).

a. The other elements of the s. 162(1)(a) offence

38. The appellant's main factum and reply factum both correctly point out an accused is not liable under section 162(1)(a) unless all the elements of the offence are proven (A.F. paras. 84-86; A.F.R. para. 18). The observation or visual recording must be carried out in a place where there is a reasonable expectation of someone being nude, having their genitals or anal region or breasts exposed, or being engaged in explicit sexual activity. And, the

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[23] *R. v. Jones*, 2019 ONCJ 805 at para. 23 (quoted); see also *R. v. Rudiger*, 2011 BCSC 1397 at para. 128-134, *R. v. Schacter*, 2018 ONCJ 371 at paras. 15-21, *R. v. M.B.*, 2019 ONCA 237 at paras. 5-11

[24] *R. v. Rudiger*, 2011 BCSC 1397 at para. 129, *R. v. Schacter*, 2018 ONCJ 371 at para. 19

[25] *R. v. Schacter*, 2018 ONCJ 371 at para. 37

[26] *R. v. M.B.*, 2019 ONCA 237 at paras. 5-11

[27] *R. v. Moriarity*, 2015 SCC 55 at para. 2

person actually observed or recorded must have a reasonable expectation of privacy against that manner of observation or recording at the time of the observation or recording. And, the observation must be done surreptitiously; if a person *knows* they are being observed or recorded, and *chooses* to be nude, to expose themselves, or to engage in sex under those circumstances, there is no offence. Denial of the victim's ability to choose is at the core of the offence. Finally, mental fault is required: the accused person's conduct must be intentional or reckless.

b. The public good defence in s. 162(6)

39. The public good defence is an integral part of the legislative scheme. It must be considered in the overbreadth analysis. Parliament explicitly intended that this statutory defence would prevent overbreadth.

40. In sections 162(6) and (7), Parliament provided a defence to a charge of voyeurism where the acts in question served the public good and did not exceed what served the public good. As noted in *Jarvis*, the public good defence recognizes that "the value of observation or recording to society might, in a particular case, outweigh the value of individual privacy interests" even where the conduct otherwise makes out the offence.[28]

41. This Court has defined "public good" as meaning "necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest,"[29] and held that the term should be interpreted purposively.[30] While those comments related to the public good defence under the previous child pornography provisions, lower courts have since followed that definition of public good in the voyeurism context as well.[31]

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[28] *R. v. Jarvis*, 2019 SCC 10 at para. 70

[29] *R. v. Katigbak,* 2011 SCC 48 at para. 43, quoting *R. v. Sharpe*, 2001 SCC 2 at para. 70

[30] *R. v. Sharpe*, 2001 SCC 2 at para. 70

[31] *R. v. F.G.*, 2018 ONCJ 31 at paras. 465-70; *R. v. S.T.*, 2019 ONSC 1082 at paras. 26-27; *R. v. Farmer*, 2021 NSCA 7 at paras. 100-16

42. The statutory public good defence entered Canadian law from Stephen's *Digest of the Criminal Law* (1877), as a proposed defence to obscenity.[32] Stephen's *Digest* informed the 1879 UK Draft Code, which influenced Canada's original *Criminal Code* of 1892.[33]

43. As originally enacted, the first issue under the public good defence was "whether the occasion of the sale… is such *as might be for* the public good".[34] Canadian courts interpreted this literally: the legal question turned not on whether the public good was actually served, but whether the impugned act could have served the public good in any hypothetical circumstances.[35] The 1954 re-enactment of the *Code* changed the wording to, "whether such acts *served* the public good".[36] Since then, the actual conduct in issue must serve the public good in order to satisfy the threshold legal question.

44. Parliamentary proceedings show that the reason for including public good as a defence to voyeurism was specifically to address overbreadth concerns, in order to comply with the *Charter*.[37] Government statements in justice committee proceedings indicate that the public good defence was expected to protect ethical journalism that does not unnecessarily exploit people's private sexual lives.[38] Generally, the intent of the defence was to

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[32] James Fitzjames Stephen, *A Digest of the Criminal Law* (1st ed. 1877) at 105

[33] Desmond Haldane Brown, *The Genesis of the Criminal Code of 1892* (Osgoode Society, 1989) at 121-132

[34] *Criminal Code*, S.C. 1892, c. 29, s. 179

[35] *R. v. Palmer* (1937), 68 C.C.C. 20 (Ont. C.A.), [1937] O.J. No. 82 (QL) at paras. 8-11

[36] *Criminal Code*, R.S.C. 1953-54, c. 51, s. 150(4)

[37] Canada, Parliament, House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 38th Parl., 1st sess., No. 22 at 0945 (Hon. Irwin Cotler, Minister of Justice, and Ms. Lisette Lafontaine, Department of Justice)

[38] Canada, Parliament, House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 38th Parl., 1st sess., No. 42 at 1030 (Hon. Paul Harold Macklin, Parliamentary Secretary to the Minister of Justice and A.G.)

protect the legitimate gathering of information.[39]

45. The contemporary starting point for applying the public good defence is the two-step framework given by this Court in *Katigbak*.[40] The legal test is objective: the question is whether the impugned acts served the public good, without going beyond what was necessary to serve the public good — *not* whether the accused's *purpose* in taking the impugned actions was to serve the public good.[41]In the voyeurism context, lower courts have employed the framework as follows:[42]

1. Did the impugned actions serve the public good?
    a. Is there objective evidence that the impugned actions served the public good? This can be construed as an "air of reality" test.[43] This is a question of law.
    b. If such objective evidence exists, can the Crown show beyond a reasonable doubt that despite that evidence, the impugned actions did not serve the public good? This is a question of law.
2. If the impugned actions served the public good, did they extend beyond what was necessary to serve the public good?
    a. Is there evidence that the impugned actions extended beyond what was necessary to serve the public good? This is a question of law that ensures the

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[39] Canada, Parliament, House of Commons Debates, 38th Parl., 1st sess., No. 7 at 1630 (Hon. Larry Bagnell, Parliamentary Secretary to the Minister of Natural Resources)

[40] *R. v. Katigbak,* 2011 SCC 48 at para. 41

[41] *R. v. Katigbak,* 2011 SCC 48 at paras. 42, 46

[42] *R. v. F.G.*, 2018 ONCJ 31 at para. 465-67; *R. v. S.T.*, 2019 ONSC 1082 at paras. 26-27; see also *R. v. Farmer*, 2021 NSCA 7 at paras. 100-16

[43] *R. v. Farmer*, 2021 NSCA 7 at paras. 107-15

public good defence will only be available if all the actions that are alleged to constitute the offence are connected to the advancement of the public good.[44]

b. If there is such evidence, does the trier of fact find beyond a reasonable doubt that the impugned actions extended beyond what was necessary to serve the public good?

46. It is irrelevant whether the public good was served through outcomes tangential to the impugned actions; the impugned actions must themselves serve the public good.[45] Recent caselaw has held that the public good was *not* served by:

- Providing police with intimate images of someone applying to be a police officer;[46]
- A police officer, operating without legal justification and without notifying the police dispatcher, spying on occupied motel rooms at night with the claimed intent of preventing underage prostitution, assault, and detecting illegal activity;[47]
- Parents' surreptitious surveillance of their 10-year-old children in their bedrooms or bathrooms;[48] or
- Continuous surreptitious surveillance in order to "create a system of accountability" where no wrongdoing was observed.[49]

47. The structure of the defence has allowed courts to protect free expression from the vagaries of public opinion. In the 1974 case of *Sutherland*, a sex shop owner was charged with possession of obscene material for distribution. The "obscene material" consisted of vibrators, lubricants, and other artificial sex aids. The trial judge directed an acquittal,

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[44] *R. v. Katigbak,* 2011 SCC 48 at para. 46

[45] *R. v. Farmer*, 2021 NSCA 7 at paras. 107-16

[46] *Roque v. Peters*, 2022 MBQB 34 at paras. 59, 63-69

[47] *R. v. Farmer*, 2021 NSCA 7 at paras. 97, 107-16

[48] *R. v. S.T.*, 2019 ONSC 1082 at paras. 50-58

[49] *R. v. F.G.*, 2018 ONCJ 31 at paras. 464-77

holding that provision of such aids helped people to enjoy sex and thus served the public good without excess.[50]

48. The public good defence is well understood by courts and is adaptable to each case's unique facts. It guards well against overbreadth of the voyeurism offences.

vii. The law on overbreadth applied to s. 162(1)(a)

49. A law violates section 7 of the *Charter* for being overbroad when at least some of its effects lack a rational connection to its purpose.[51] When the purpose of section 162(1)(a) is correctly understood as focusing on protecting privacy, not just sexual integrity, then it is evident that the offence is not overbroad. Everyone who contravenes section 162(1)(a) violates the privacy of the victim who is secretly observed or recorded.

50. Indeed, the offence is under-inclusive of legitimate privacy interests that Canadian society deems worth of protection. Section 8 of the *Charter* undoubtedly is broader, in respect of protecting against state action. Protecting only the class of places where someone can reasonably be expected to be nude, exposed, or engaged in sex represents a choice by Parliament to not protect other classes of places — even places where, as a matter of societal norms and *Charter* values, people should expect to be free from secret surveillance even if nobody ever takes off their clothes. A private office. A private dining room. A psychotherapist's couch. A religious confession booth. Behind a voting screen on election day.

51. Under-breadth of a criminal offence is no cause for constitutional complaint, but it illustrates that Parliament steered well way from overbreadth.

52. Furthermore, even someone who through intentional conduct violates a victim's privacy by surreptitious observation or recording contrary to section 162(1)(a) may still be

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[50] *R. v. Sutherland, Amitay, Bowie* (1974), 18 C.C.C. (2d) 117 (Ont. Co. Ct.), [1974] O.J. No. 2283 (QL) at paras. 21, 27-30, 38-39

[51] *Canada (A.G.). v. Bedford*, 2013 SCC 72 at paras. 112-19; *R. v. Moriarity*, 2015 SCC 55 at para. 24

exempted from liability, by the warrant exception in section 162(2), or by the public good defence in section 162(6). These are more reasons to conclude that the offence is tailored and narrow, not overbroad.

B. JUSTIFICATION UNDER SECTION 1

53. If this Court finds that section 162(1)(a) is overbroad of its legislative purpose, then the overbreadth is justified under section 1 of the *Charter*.

54. Ontario notes at the outset that the parties, and the Court, are disadvantaged in this analysis by the manner in which this constitutional claim has been raised for the first time on appeal.[52] Statistical, criminological, and expert evidence might have been tendered and explored in a trial court. For example, a court could have benefitted from statistical evidence about the incidence of voyeurism offences, the demographic characteristics of the most frequent victims of voyeurism, and the impacts of voyeurism on those populations; evidence about the experience of voyeurism investigations and prosecutions since the offence was enacted; and evidence about the impact of technological changes on personal privacy in the past two decades. Further, apart from the evidentiary deficit, this Court does not have the benefit of considered decisions by the courts below.

55. Although constrained by the state of the record, Ontario submits any overbreadth of section 162(1)(a) is justified by the evidence which informed Parliament's decision to enact the offence, and by a contemporary legal understanding of the privacy rights of victims.

56. As this Court held recently in *Brown*, the rights of victims are not considered at the section 7 stage of analysis, but are a proper consideration under section 1.[53] The Department of Justice consultation paper from 2002, which informed Parliamentarians and which this Court relied upon in *Jarvis*, indicates that voyeurism is a gendered crime: most voyeurs

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[52] Contrast *R. v. K.R.J.*, 2016 SCC 31 at para. 59

[53] *R. v. Brown*, 2022 SCC 18 at paras. 67-71

are men, and most victims of voyeurism are women and children.[54]

57. The legislative history of section 162 makes plain that Parliament was concerned about the proliferation of miniature cameras and near-instantaneous distribution of media through the Internet. More recently, this Court made a similar observation: "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests."[55] Although written in a different context, the observation is apt in relation to voyeurism involving digital cameras.

58. Both Parliament and this Court have long recognized that privacy rights go beyond the section 8 *Charter* right to be free from unreasonable search and seizure by the state. Privacy against fellow citizens is also a right worthy of legal protection. As was recently noted in *Sherman Estate v. Donovan*, "this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society".[56]

59. In criminal law, there is a robust body of legislation and jurisprudence regulating the rights of victims and witnesses to their privacy when weighed against the right of an accused person to obtain and adduce potentially relevant evidence.[57]

60. This Court has held that the open courts principle, an aspect of the right to free expression, can validly be required to yield to the needs of individual privacy and personal dignity. An invasion of privacy which affronts personal dignity violates both a private and a public interest.[58] When held against the *Charter*-protected open courts principle,

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[54] Department of Justice, *Voyeurism as a Criminal Offence: A Consultation Paper* (2002) (online: www.justice.gc.ca/eng/cons/voy/voy.pdf) at p. 4

[55] *Douez v. Facebook, Inc.*, 2017 SCC 33 at para. 59

[56] *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 31

[57] *Cr. Code* s. 276(3)(f), s. 278.1, s. 278.5(2)(e), s. 278.92(3)(g), s. 278.95(1)(d); *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, [2000] 2 S.C.R. 443; *R. v. Quesnelle*, 2014 SCC 46; *R. v. J.J.*, 2022 SCC 28 at paras. 44-45

[58] *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 1-7, para. 33-34

protection of individual privacy is a pressing and substantial legislative objective.[59]

61. Privacy as between private actors is regulated by both Federal and Provincial statutes. Privacy legislation has been described as having "quasi-constitutional status."[60]

62. In the voyeurism context, there is little in the way of countervailing interests to be weighed against the rights of the victims. The intentional invasion of someone's privacy is a tortious act in many provinces, including Ontario,[61] as well as in several other Commonwealth jurisdictions,[62] and in most U.S. jurisdictions.[63] A voyeuristic privacy violation can attract significant punitive damages in a civil action.[64]

63. There is no apparent violation of freedom of expression by section 162(1)(a). None is suggested by the respondent. Anyone who wants to express themselves by recording others in private circumstances can simply obtain consent or give notice of their intention to observe or record, so that they are not acting surreptitiously. Or, they can make the observation or recording in a place that is not protected by section 162(1)(a). Even legitimate expressive conduct is not protected in every location.[65] And, the public good defence additionally provides protection for legitimate journalism.

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[59] *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 52

[60] *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 51-52

[61] *Jones v. Tsige*, 2012 ONCA 32 at paras. 52-53 and paras. 70-71

[62] *Jones v. Tsige*, 2012 ONCA 32 at paras. 61-64

[63] *Jones v. Tsige*, 2012 ONCA 32 at paras. 18-20

[64] *Jones v. Tsige*, 2012 ONCA 32 at paras. 85-88

[65] *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at paras. 60-72; *CBC v. Canada (A.G.)*, 2011 SCC 2 at paras. 34-38

64. Applying the four-part *Oakes* test,[66] Ontario submits that any overbreadth of section 162(1)(a) is justified in a free and democratic society:

a. Protecting against surreptitious observation or visual recording, to promote both personal privacy and sexual integrity, is a pressing and substantial legislative objective. The legislative history cited by the appellant, and by this Court's decision in *Jarvis*, amply demonstrate this.

b. The means chosen by Parliament are rationally connected to the objective. It is rational to prohibit, through criminalization, the very conduct which is sought to be prevented.

c. Any overbreadth minimally impairs whatever constitutional right this Court might find in observing or visually recording people without notice in private places. (No such right has been identified by the respondent.)

d. In the overall balancing, the rights of the victims of voyeurism — predominantly women and children — to privacy and sexual integrity outweigh whatever societal value could exist in the intentional and secret observation or recording of another person in a private place, in violation of the other person's reasonable expectation of privacy without their consent or knowledge, in the absence of a warrant, and in a manner that does not serve the public good.

[66] *Canada (A.G.). v. Bedford*, 2013 SCC 72 at para. 126; *R. v. Brown*, 2022 SCC 18 at para. 110

PART IV: COSTS

65. Ontario does not seek cost and asks that it not be ordered to pay costs.

PART V: ORDER SOUGHT

66. Ontario requests permission to present oral argument at the hearing of the appeal.

All of which is respectfully submitted this 22nd day of July, 2022, by

for Lisa Henderson and Matthew Asma
Counsel for the Attorney General of Ontario

PART VII: TABLE OF AUTHORITIES

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