SUPREME COURT OF CANADA

CITATION: R. *v.* Downes, 2023 SCC 6

APPEAL HEARD: October 13, 2022
JUDGMENT RENDERED: March 10, 2023
DOCKET: 40045

BETWEEN:

His Majesty The King
Appellant

and

Randy William Downes
Respondent

- and -

Attorney General of Ontario, Attorney General of Alberta and Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
Interveners

CORAM: Karakatsanis, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 59)
Jamal J. (Karakatsanis, Rowe, Martin, Kasirer and O'Bonsawin JJ. concurring)

[*] Brown J. did not participate in the final disposition of the judgment.

His Majesty The King *Appellant*

v.

Randy William Downes *Respondent*

and

Attorney General of Ontario,
Attorney General of Alberta and
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic *Interveners*

Indexed as: R. *v.* Downes

2023 SCC 6

File No.: 40045.

2022: October 13; 2023: March 10.

Present: Karakatsanis, Brown*, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

* Brown J. did not participate in the final disposition of the judgment.

Criminal law — Voyeurism — Elements of offence — Place in which a person can reasonably be expected to be nude — Accused convicted of voyeurism for surreptitiously photographing two adolescent boys in their underwear in hockey arena dressing rooms — Trial judge finding that Crown proved that boys were in place in which a person can reasonably be expected to be nude — Court of Appeal setting aside convictions and ordering new trial on basis that trial judge failed to address conflicts in evidence about whether nudity could reasonably be expected in dressing rooms at specific time photos were taken — Whether element of offence that person surreptitiously observed or recorded be in place in which a person can reasonably be expected to be nude has implicit temporal component — Criminal Code, R.S.C. 1985, c. C-46, s. 162(1)(a).

The accused was convicted of 2 counts of voyeurism for surreptitiously taking 38 photos of 2 boys aged between 12 and 14 years old in their underwear in hockey arena dressing rooms. The accused was the boys' hockey coach. The trial judge held that the Crown had proved the four elements of the voyeurism offence under s. 162(1)(a) of the *Criminal Code* beyond a reasonable doubt: the accused took the photos of the boys (1) intentionally; (2) surreptitiously; (3) in circumstances that gave rise to a reasonable expectation of privacy; and (4) in a place in which a person can reasonably be expected to be nude. Specifically, regarding the fourth element, she effectively interpreted s. 162(1)(a) as having no implicit temporal component, stating that s. 162(1)(a) focuses on the nature of the place in which an observation or recording is made, but does not require that the person who is the subject of the observation or

recording was, or ever had been, nude, or that the person could reasonably be expected to be nude. She found that individuals of various ages change their underwear or shower in dressing rooms, and thus can reasonably be expected to be nude in them, and that this finding was sufficient for the purposes of s. 162(1)(a).

A majority of the Court of Appeal allowed the accused's appeal, set aside the convictions, and ordered a new trial. It concluded that the trial judge had failed to consider whether nudity was reasonably expected at the time when the offences allegedly occurred. It stated that s. 162(1)(a) was intended to apply to persons who expect to observe or record nudity or sexual activity. The dissenting judge would have dismissed the appeal. She was of the view that s. 162(1)(a) contains no implicit temporal component; the provision instead focuses on the "place", which, under s. 162(1)(a), is a place in which a person can reasonably be expected to be nude, regardless of the expected use of that place specifically when the conduct occurred.

Held: The appeal should be allowed and the convictions restored.

Properly interpreted based on its text, context, and purpose, s. 162(1)(a) of the *Criminal Code* has no implicit temporal component. Accordingly, the Crown need not establish that a person could reasonably be expected to be nude in the place at the specific time when the photos were taken. As a result, the trial judge appropriately convicted the accused of voyeurism under s. 162(1)(a).

Parliament's purposes in enacting the voyeurism offence in s. 162(1) were to protect individuals' privacy and sexual integrity. Parliament's objective of protecting privacy appears in the opening words of s. 162(1), which refer to circumstances that give rise to a reasonable expectation of privacy. These are circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred. As for Parliament's objective of protecting sexual integrity, it is apparent in each of paras. (a), (b), and (c) of s. 162(1). Section 162(1)(a) protects the sexual integrity of persons in specific places. It does not require the person to be actually nude, exposing intimate parts of his or her body, or engaged in sexual activity; it suffices if they are in a place where a person may reasonably be expected to be in such a state, such as a changing room, toilet, shower stall, or bedroom. In addition, para. (a) does not require the accused to act for a sexual purpose. Section 162(1)(b) protects the sexual integrity of persons engaged in specific activities: when the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity. Under para. (b), the nature of the location does not matter, but the accused must have the purpose of observing or recording the subject in such a state or engaged in such an activity. Similarly to para. (a), the Crown need not prove that the accused acted for a sexual purpose. Section 162(1)(c) protects the sexual integrity of persons when the observation or recording is done for a sexual purpose. It applies whether the subject is clothed or unclothed — no matter what they are doing, and regardless of the location

of the targeted subject. The opening words of s. 162(1) also protect sexual integrity, and each of paras. (a), (b), and (c) of s. 162(1) also protect privacy.

The question as to whether the "place" referred to in s. 162(1)(a) is qualified by an implicit temporal component is one of statutory interpretation. The words in s. 162(1)(a) must be considered in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Section 162(1)(a) must be interpreted according to a textual, contextual, and purposive analysis to find a meaning that is harmonious with the Act as a whole. The text of s. 162(1)(a) refers to a test for the "place" that is objective in two respects. First, s. 162(1)(a) uses the definite article "*the* person" when referring to the subject of the observation or recording, but uses the indefinite article "*a* person" when referring to the reasonably expected uses of the place. This means that *the* person being surreptitiously observed or recorded must be in a place in which *a* person can reasonably be expected to be nude. Second, s. 162(1)(a) asks whether a person can reasonably be expected to be nude in the place, and not whether the accused subjectively expected them to be nude.

The use of an objective test in s. 162(1)(a) is not determinative of whether the provision contains a temporal component, however, because Parliament still might have intended that the objective evaluation be made at a specific time. The key textual point is the lack of express language in s. 162(1)(a) suggesting that Parliament intended the "place" to be evaluated at the specific time when the observation or recording was

made. Had Parliament intended to insist on such a temporal component, it could have done so expressly by referring to the observation or recording being made in a place in which a person can then reasonably be expected to be nude, or being made in a place in which a person would reasonably be expected to be nude at the time of the observation or recording.

The statutory context and purpose of s. 162(1)(a) also suggest that Parliament did not intend the provision to contain a temporal component. Parliament's purposes of protecting privacy and sexual integrity are promoted by interpreting s. 162(1)(a) as a location-based offence without a temporal component. Rather than providing a specific list of places protected under s. 162(1)(a), Parliament chose to define the protected places in a principled and normative way. Section 162(1)(a) stipulates a rule that normatively identifies a class of quintessentially "safe places", such as bedrooms, bathrooms, and dressing rooms, in which people should be entitled to not be non-consensually observed or visually recorded, whether or not they or another person in the place are reasonably expected to be nude at the time of the observation or recording. An observation or recording in such a quintessentially "safe place" violates trust and can result in the person's humiliation, objectification, exploitation, shame, or loss of self-esteem, and can cause emotional and psychological harm, even if the person is not observed or recorded when nude. In this way, s. 162(1)(a) protects privacy, as well as sexual integrity as it is understood today.

Cases Cited

Considered: *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488; **referred to:** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. Trinchi*, 2019 ONCA 356, 145 O.R. (3d) 721; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; *R. v. Wookey*, 2016 ONCA 611, 363 C.R.R. (2d) 177.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7.

Criminal Code, R.S.C. 1985, c. C-46, Part V, ss. 162, (2) "visual recording", 162.1(1), (2) "intimate image", 693(1)(a).

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APPEAL from a judgment of the British Columbia Court of Appeal (Willcock, Dickson and Grauer JJ.A.), 2022 BCCA 8, 409 C.C.C. (3d) 464, 77 C.R. (7th) 355, [2022] B.C.J. No. 17 (QL), 2022 CarswellBC 25 (WL), setting aside the convictions for voyeurism entered by MacNaughton J., 2019 BCSC 992, [2019] B.C.J. No. 1134 (QL), 2019 CarswellBC 1751 (WL), and ordering a new trial. Appeal allowed.

Micah Rankin and *Rome Carot*, for the appellant.

Donald J. Sorochan, *K.C.*, and *Faisal Al-Alamy*, for the respondent.

Matthew Asma and *Lisa Henderson*, for the intervener the Attorney General of Ontario.

Danielle E. Green, for the intervener the Attorney General of Alberta.

Jane Bailey and *David Fewer*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

The judgment of the Court was delivered by

JAMAL J. —

I. Overview

[1] This appeal concerns the scope of the voyeurism offence in s. 162(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. Section 162(1)(a) provides that it is an offence to surreptitiously observe or make a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if 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". The question in this appeal is whether the "place" referred to in s. 162(1)(a) is qualified by an implicit temporal component; specifically, must the person be in a place in which a person can reasonably be expected to be nude *at the specific time* when the person is surreptitiously observed or recorded?

[2] On the facts of this case, the issue is whether a hockey coach, the respondent, Randy William Downes, committed the offence of voyeurism under s. 162(1)(a) by surreptitiously photographing 2 boys aged between 12 and 14 years old in their underwear in hockey arena dressing rooms, even if a person could not reasonably be expected to be nude at the specific time when the photos were taken. There was conflicting evidence at trial on whether boys at this age shower or are nude in dressing rooms.

[3] The trial judge relied on this Court's decision in *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, on the scope of the voyeurism offence. She effectively interpreted s. 162(1)(a) as having no implicit temporal component, and convicted Mr. Downes of two counts of voyeurism. A majority of the Court of Appeal for British Columbia (per

Willcock J.A., Grauer J.A. concurring) disagreed with the trial judge's interpretation, set aside the convictions, and ordered a new trial on the basis that the trial judge had failed to address conflicts in the evidence about whether nudity could reasonably be expected when the photos were taken. In dissent, Dickson J.A. agreed with the trial judge and would have dismissed the appeal.

[4] The Crown now appeals to this Court as of right on the question of law as to whether s. 162(1)(a) has an implicit temporal component. In addition, Mr. Downes submits that if s. 162(1)(a) is interpreted as lacking a temporal component, then the provision is unconstitutionally overbroad contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. Mr. Downes did not raise this constitutional issue at trial. He raised it for the first time before the Court of Appeal, but the court did not address it.

[5] In my view, properly interpreted based on its text, context, and purpose, s. 162(1)(a) has no implicit temporal component. The text of s. 162(1)(a) lacks language suggesting that Parliament intended the "place" to be evaluated at the specific time when the observation or recording was made. Further, as this Court observed in *Jarvis*, Parliament's purposes in enacting the voyeurism offence were to protect individuals' privacy and sexual integrity. Those purposes are promoted by interpreting s. 162(1)(a) without an implicit temporal component, and would be detracted from by reading in such a component. In effect, s. 162(1)(a) designates places such as bedrooms, bathrooms, and dressing rooms as "safe places" where people should be free from intrusions onto their privacy and sexual integrity, whether or not a person in the place

could reasonably be expected to be nude or engaged in sexual activity at the specific time the person is surreptitiously observed or recorded. Finally, I would decline to address the constitutional issue because this is not an appropriate case for this Court to exceptionally exercise its discretion to decide such an issue for the first time on appeal. I would therefore allow the appeal and restore the convictions.

II. Background

[6] Mr. Downes was convicted of 2 counts of voyeurism under s. 162(1)(a) of the *Criminal Code* for surreptitiously taking 38 photos of 2 adolescent male hockey players, T.R. and G.C., in hockey dressing rooms. Mr. Downes was the boys' hockey coach. He also ran a sports photography business from his home.

[7] In March 2016, Canada Border Services Agency ("CBSA") officers searched Mr. Downes' electronic devices at the border when he returned to Canada from the United States after a brief shopping trip and found thousands of photos of children engaged in sporting activities. Some of the children were in locker rooms. Mr. Downes explained to the CBSA that the photos were from his sports photography business. Although none of the photos involved nudity or child pornography, the CBSA alerted the RCMP because of a concern that Mr. Downes might have child pornography on his home computer.

[8] In April 2016, the RCMP obtained and executed a warrant to search Mr. Downes' home and electronic devices. They found the photos of T.R. and G.C.

that led to the voyeurism charges. The photos of T.R. were taken when he was 13 or 14 years old and show him sitting on a bench wearing only his underwear, revealing his crotch area and bare torso, or putting on street clothes after a hockey practice. The photos of G.C. were taken when he was about 12 years old and show him wearing only his underwear, wearing a shirt and underwear, or fully clothed; in some photos, G.C. is standing clothed at a sink in the washroom area of a dressing room. Mr. Downes told the RCMP that he liked young boys but that it was "not a sexual thing" (A.R., vol. III, at p. 207).

[9] Mr. Downes took the photos of T.R. and G.C. using his iPhone. He deleted some photos but emailed others to himself, downloaded them onto a computer, and copied them onto a USB stick. He also cropped some photos to focus on G.C.

[10] None of T.R., G.C., or G.C.'s mother knew that Mr. Downes had taken the photos. The trial judge found that Mr. Downes likely knew that a hockey league rule prohibited the use of cell phones in dressing rooms to prevent photos being taken of children.

[11] At trial, both parties led evidence about whether a person could reasonably be expected to be nude in a hockey dressing room. The evidence centred on whether boys would remove their underwear or shower in dressing rooms. T.R. and G.C. testified that they did not shower in dressing rooms, but that some of their teammates did. One of Mr. Downes' former hockey players testified that he would change his underwear in dressing rooms, and although he did not shower, other players

occasionally did. Another of Mr. Downes' former hockey players testified that from ages 11 to 14 or 15 he never got completely naked or showered in dressing rooms and never saw others do so. Three hockey coaches (two of whom had coached with Mr. Downes) testified that boys of T.R. and G.C.'s ages rarely are naked or shower in dressing rooms; a former manager of one of Mr. Downes' hockey teams testified to the same effect. One hockey coach explained that this was because boys of T.R. and G.C.'s ages are too self-conscious about their bodies. But it was common ground that children a little older than T.R. and G.C. and adults often are naked or shower in dressing rooms.

III. Decisions Below

A. *Supreme Court of British Columbia, 2019 BCSC 992 (MacNaughton J.)*

[12] The trial judge convicted Mr. Downes on both voyeurism charges. She held that the Crown had proved the four elements of voyeurism under s. 162(1)(a) beyond a reasonable doubt: Mr. Downes took the photos of T.R. and G.C. (1) intentionally, (2) surreptitiously, (3) in circumstances that gave rise to a reasonable expectation of privacy, and (4) in a place in which a person can reasonably be expected to be nude.

[13] The trial judge applied the contextual factors identified by this Court in *Jarvis* and found that T.R. and G.C. were in circumstances that gave rise to a reasonable expectation of privacy. She noted that T.R. and G.C. were in a private or semi-private place set aside for dressing and undressing; their parents entrusted them to Mr. Downes, an experienced coach; and they did not expect to be photographed by their coach

through the surreptitious use of a cell phone for non-instructional purposes. The trial judge ruled that although T.R. and G.C. would expect to be observed by others in the dressing room, they would not expect to be photographed, nor would they expect Mr. Downes to email photos of them to himself and to keep them long after he stopped having contact with them.

[14] At trial, Mr. Downes did not expressly argue that s. 162(1)(a) contains an implicit temporal component. Instead, he argued that the Crown had to prove that T.R. and G.C. were in a place in which *they* could reasonably be expected to be nude. He argued that the evidence showed that neither T.R. nor G.C. had any expectation of being nude in the dressing rooms in which they were photographed. The trial judge rejected that argument. She stated that s. 162(1)(a) focuses on the nature of the place in which an observation or recording is made, but does not require that the person who is the subject of the observation or recording was, or ever had been, nude, or that the person could reasonably be expected to be nude. It is sufficient under s. 162(1)(a) that *a* person (not "*the* person") could 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. In the trial judge's view, homes, bathrooms, and changing rooms are traditionally private or quasi-private places in which a person can reasonably expect privacy, and in which they can reasonably be expected to be nude or partially nude. The focus in s. 162(1)(a) on the place in which an observation or recording is made recognizes that there are private or semi-private spaces in which a person should be protected from being observed or recorded.

[15] The trial judge found that individuals of various ages change their underwear or shower in dressing rooms, and thus can reasonably be expected to be nude in them. She concluded that this finding was sufficient for the purposes of s. 162(1)(a). As a result, the dressing rooms where Mr. Downes photographed T.R. and G.C. were places in which a person can reasonably be expected to be nude.

B. *Court of Appeal for British Columbia, 2022 BCCA 8, 409 C.C.C. (3d) 464 (Willcock and Grauer JJ.A., Dickson J.A. Dissenting)*

[16] A majority of the Court of Appeal for British Columbia allowed Mr. Downes' appeal, set aside the convictions, and ordered a new trial. The majority concluded that the trial judge had failed to consider whether nudity was reasonably expected "at the time" when the offences allegedly occurred (paras. 40 and 55). The majority stated that s. 162(1)(a) was intended to apply to persons who expect to observe or record nudity or sexual activity. In its view, s. 162(1)(a) does not criminalize an invasion of privacy alone. The majority noted that although Mr. Downes' conduct involved a breach of trust and an invasion of privacy, that did not necessarily make it conduct that s. 162(1)(a) criminalized as a sexual offence.

[17] The majority ruled that although it was open to the trial judge to find that nudity was reasonably expected in the dressing rooms in which T.R. and G.C. were photographed, she had failed to address conflicts in the evidence on whether nudity was expected at the time the photos were taken. The majority therefore ordered a new trial.

[18] Dickson J.A. dissented. In her view, s. 162(1)(a) contains no implicit temporal component; the provision instead focuses on the "place". The relevant place under s. 162(1)(a) is "*a place* in which a person can reasonably be expected to be nude, exposing intimate body parts or engaging in sexual activity, regardless of the expected use of that place specifically when the conduct occurred" (para. 56 (emphasis in original)). She stated that when a person is in "a manifestly private place such as a bathroom or dressing room they are generally entitled to expect that they will not be surreptitiously observed or recorded there" (para. 92). In her view, Parliament intended to criminalize surreptitious observation or recording of persons in such places.

[19] Dickson J.A. concluded that Mr. Downes criminally invaded the personal privacy and sexual integrity of T.R. and G.C. by surreptitiously photographing them in their underwear in the dressing rooms, irrespective of whether nudity could be expected at that specific time. His conduct was "seriously exploitative and personally invasive", and was "appropriately criminalized as a form of sexual offence" (para. 97).

IV. Issues

[20] This appeal raises two issues:

(1) Does s. 162(1)(a) of the *Criminal Code* have an implicit temporal component?

(2) If s. 162(1)(a) does not have an implicit temporal component, is the provision unconstitutionally overbroad contrary to s. 7 of the *Charter*?

V. Analysis

A. *Does Section 162(1)(a) of the Criminal Code Have an Implicit Temporal Component?*

(1) The Voyeurism Offence

[21] Parliament enacted the voyeurism offence, s. 162(1) of the *Criminal Code*, in 2005. Section 162(1) provides:

> **Voyeurism**
>
> **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;
>
> **(b)** the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
>
> **(c)** the observation or recording is done for a sexual purpose.

[22] Mr. Downes was charged with voyeurism under s. 162(1)(a). The offence is committed when a person surreptitiously observes or makes a visual recording of

another person who is in circumstances that give rise to a reasonable expectation of privacy, if the observation or recording is done 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". A "visual recording" under s. 162 is defined under subs. (2) as including "a photographic, film or video recording made by any means".

[23] It is not disputed that the photos taken by Mr. Downes are "visual recordings". It is also no longer disputed that Mr. Downes took the photos surreptitiously and in circumstances that gave rise to a reasonable expectation of privacy. The issue before this Court is whether the photos were taken in "a place in which a person can reasonably be expected to be nude". Does this element of the offence have a temporal component? Must the Crown establish that a person could reasonably be expected to be nude in the place at the specific time when the photos were taken?

[24] This question of statutory interpretation requires this Court to consider the words in s. 162(1)(a) "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Jarvis*, at para. 24). Section 162(1)(a) must be interpreted "according to a textual, contextual and purposive

analysis to find a meaning that is harmonious with the Act as a whole" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10).

[25] In what follows, I will first review this Court's decision in *Jarvis* and the purposes of the voyeurism offence. I will then interpret s. 162(1)(a) based on its text, context, and purpose.

(2) This Court's Decision in *Jarvis* and the Purposes of Section 162(1)

[26] This Court considered s. 162(1) for the first time in *Jarvis*. In that case, this Court ruled that a high school teacher who used a camera concealed inside a pen to surreptitiously record female students at the school by focussing on their faces, upper bodies, and breasts, committed the offence of voyeurism under s. 162(1)(c) ("the observation or recording is done for a sexual purpose"). The elements of the offence were established because the students were surreptitiously recorded in circumstances that gave rise to a reasonable expectation of privacy and the recordings were made for a sexual purpose.

[27] In *Jarvis*, Wagner C.J. for the majority noted that the voyeurism offence was enacted as part of Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004-2005 (assented to July 20, 2005), the overarching purpose of which was to "protect children and other vulnerable persons from sexual exploitation, violence, abuse and neglect" (para. 51). Most sex crimes, including voyeurism, are committed

by men, while the victims are usually women and children (see Department of Justice, *Voyeurism as a Criminal Offence: A Consultation Paper* (2002), at p. 4; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 65, citing *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 2; J. Bailey, "Implicitly Feminist?: The Supreme Court of Canada's Decision in *R v Jarvis*" (2020), 32 *C.J.W.L.* 196, at pp. 200-201).

[28] Parliament's object in enacting s. 162(1), Wagner C.J. found in *Jarvis*, was "to protect individuals' privacy and sexual integrity, particularly from new threats posed by the abuse of evolving technologies" (para. 48). The new voyeurism offence "was motivated by concerns about the potential for rapidly evolving technology to be abused for the secret viewing or recording of individuals for sexual purposes and in ways that involve a serious breach of privacy" (para. 49, citing Department of Justice, at p. 1). Voyeurism is thus *both* a sexual and a privacy-based offence. Section 162(1) is intended to deal with both these related harms: behaviour that violates sexual integrity, and behaviour that breaches privacy (paras. 51-52). Rowe J., concurring in the result in *Jarvis*, agreed with Wagner C.J. that the purpose and object of s. 162(1) is "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" (para. 113).

[29] Parliament's objectives of protecting against the related harms of violations of privacy and sexual integrity are apparent in the wording and structure of s. 162(1). I will consider each objective in turn.

[30] Parliament's objective of protecting *privacy* appears in the opening words of s. 162(1), which state that it is an offence for someone to surreptitiously observe or record a person "in circumstances that give rise to a reasonable expectation of privacy" if any of paras. (a), (b), or (c) applies. In *Jarvis*, Wagner C.J. explained that the circumstances that give rise to a reasonable expectation of privacy under s. 162(1) are "circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred" (para. 28). A court should consider the entire context in which the observation or recording occurred, including the following non-exhaustive factors: (1) the location of the person when they were observed or recorded; (2) the nature of the impugned conduct (i.e., whether it consisted of observation or recording); (3) the awareness or consent of the person who was observed or recorded; (4) the manner in which the observation or recording was made; (5) the subject matter or content of the observation or recording; (6) any rules, regulations, or policies that governed the observation or recording; (7) the relationship between the parties; (8) the purpose for which the observation or recording was made; and (9) the personal attributes of the person who was observed or recorded (paras. 5 and 28-29).

[31] Parliament's objective of protecting *sexual integrity* is also apparent in each of paras. (a), (b), and (c) of s. 162(1).

[32] Section 162(1)(a) protects the sexual integrity of persons in *specific places*: when "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". I agree with the observations of Juriansz J.A. in *R. v. Trinchi*, 2019 ONCA 356, 145 O.R. (3d) 721, at para. 8, that para. (a) "does not require the person to be actually nude, exposing intimate parts of his or her body, or engaged in sexual activity"; it suffices if they are in a place where a person may "reasonably be expected to be in such a state, such as a changing room, toilet, shower stall, or bedroom" (see also *Jarvis*, at para. 46, per Wagner C.J.; M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at ¶21.245). I also agree that, unlike para. (c), para. (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" (*Trinchi*, at para. 8; see also *Jarvis*, at para. 32, per Wagner C.J., and at paras. 143-44, per Rowe J.).

[33] Section 162(1)(b) protects the sexual integrity of persons engaged in *specific activities*: when "the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity". I again agree with Juriansz J.A. that, under para. (b), the "nature of the location does not matter, but the accused must have the purpose of observing or recording the subject in such a state or engaged in such an activity" (*Trinchi*, at para. 9; see also *Jarvis*, at paras. 46-47 and 52, per Wagner C.J.). In addition, the Crown need not prove that the accused acted for a sexual purpose: "[p]aragraph (*b*), like para. (*a*), would apply to an accused whose purpose was

commercial" (*Trinchi*, at para. 9; see also *Jarvis*, at para. 32, per Wagner C.J., and at para. 143, per Rowe J.).

[34] Section 162(1)(c) protects the sexual integrity of persons when the observation or recording is done for a *sexual purpose*. This provision applies "whether the subject is clothed or unclothed — no matter what she or he is doing" (*Trinchi*, at para. 10). In *Jarvis*, for example, the accused teacher was convicted under s. 162(1)(c), even though the students surreptitiously video recorded were fully clothed and going about common school activities. Paragraph (c) applies regardless of the location of the targeted subject (*Jarvis*, at paras. 46-47 and 52, per Wagner C.J., and at para. 129, per Rowe J.).

[35] I hasten to add that the opening words of s. 162(1) also protect sexual integrity, and each of paras. (a), (b), and (c) of s. 162(1) also protect privacy. Parliament's two objectives of protecting against the related harms of violations of sexual integrity and privacy appear throughout s. 162(1). For example, in considering whether a person "is in circumstances that give rise to a reasonable expectation of privacy" in the opening words of s. 162(1), a court must consider whether a person "would reasonably expect not to be the subject of the type of observation or recording that in fact occurred", based on the non-exhaustive list of considerations identified in *Jarvis* (paras. 5 and 28-29). These considerations include factors relating to sexual integrity, such as whether the subject matter of the observation or recording includes intimate parts of a person's body (para. 29(5)), and whether the recording is for a sexual

purpose (paras. 29(8) and 31-32). Similarly, paras. (a), (b), and (c) of s. 162(1) protect privacy from surreptitious observations or recordings in circumstances where sexual integrity is engaged.

[36] I now turn to consider whether s. 162(1)(a) has an implicit temporal component; in other words, whether the Crown must prove that nudity was reasonably expected *at the specific time* when the surreptitious recording was made.

(3) The Interpretation of Section 162(1)(a)

(a) *Positions of the Parties*

[37] The Crown submits that the majority of the Court of Appeal erred by interpreting s. 162(1)(a) as requiring proof that nudity is reasonably expected in the place at the specific time when a surreptitious recording is made. The Crown says that it is sufficient for it to prove that the "place" where a surreptitious recording was made is one in which nudity could reasonably be expected to occur at any time. Section 162(1)(a) thus protects the privacy of persons in certain "places", whether or not nudity is expected at the time of the alleged offence. The Crown claims that there is ample evidence to support the trial judge's conclusion that "the hockey dressing rooms, in which Mr. Downes took the photographs of T.R. and G.C., are places in which a person can reasonably be expected to be nude" (A.F., at para. 95, quoting trial reasons, at para. 228 (CanLII)).

[38] Mr. Downes argues that s. 162(1)(a) requires the Crown to prove that nudity is reasonably expected at the specific time and place at which a surreptitious recording is made. He claims that a temporal component ensures that the voyeurism offence maintains its purpose of prohibiting breaches of sexual privacy. In his view, s. 162(1)(a) should be interpreted in light of the harms contemplated in the scheme for sexual offences in Part V of the *Criminal Code*, and is breached only when the person is recorded in a way that infringes their sexual integrity. He claims that an actual infringement of sexual integrity is needed; a risk of infringement is insufficient. Mr. Downes notes that none of the photos at issue depicted nudity or was pornographic. He claims that since none of the boys in his photos was nude and there was no reasonable expectation at the time the photos were taken that anybody would be nude, it cannot be inferred that he intended to take a nude or otherwise prohibited voyeuristic photo.

[39] In my view, when s. 162(1)(a) is properly interpreted based on its text, context, and purpose, the provision does not have an implicit temporal component.

(b) *Text*

[40] The text of s. 162(1)(a) refers to an objective test for the "place" without regard to time. Although not determinative, the text of s. 162(1)(a) thus suggests that the provision lacks a temporal component.

[41] The test in s. 162(1)(a) for the "place" is objective in two respects. First, s. 162(1)(a) uses the definite article "*the* person" ("*la personne*") when referring to the subject of the observation or recording, but uses the indefinite article "*a* person" ("*une personne*") when referring to the reasonably expected uses of the place. This means that *the* person being surreptitiously observed or recorded must be in a place in which *a* person can reasonably be expected to be nude. Second, s. 162(1)(a) asks whether a person can "reasonably" be expected to be nude in the place, and not whether the accused subjectively expected them to be nude. The use of an objective test in s. 162(1)(a) is not determinative of whether the provision contains a temporal component, however, because Parliament still might have intended that the objective evaluation be made at a specific time.

[42] The key textual point is the lack of express language in s. 162(1)(a) suggesting that Parliament intended the "place" to be evaluated at the specific time when the observation or recording was made. Had Parliament intended to insist on such a temporal component, it could have done so expressly. For example, an adjacent provision, s. 162.1(1) — the offence of publishing an intimate image without consent — contains two express temporal components. An "intimate image" is defined under s. 162.1(2) as a visual recording of a person made by any means, "(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity; (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and (c) in respect of which the person depicted retains a reasonable expectation of privacy at

the time the offence is committed". Section 162(1)(a) contains no such temporal language. Had Parliament intended s. 162(1)(a) to contain a temporal component, it could easily have referred to the observation or recording being made in "a place in which a person can *then* reasonably be expected to be" nude, or being made in a place in which a person would reasonably be expected to be nude "*at the time of the observation or recording*" (see C.A. reasons, at para. 77, per Dickson J.A. (emphasis in original)). But Parliament chose not to do so.

[43] Thus, while not determinative, the lack of express temporal language in s. 162(1)(a)'s objective test for the "place" suggests that Parliament did not intend the provision to contain a temporal component.

(c) *Statutory Context and Purpose*

[44] The statutory context and purpose of s. 162(1)(a) also suggest that Parliament did not intend the provision to contain a temporal component. Interpreting s. 162(1)(a) as prohibiting surreptitious observation or recording of persons in specific places without a temporal component promotes Parliament's purposes of protecting privacy and sexual integrity, especially for children and other vulnerable persons. Interpreting s. 162(1)(a) with a temporal component detracts from these purposes and leads to arbitrary and absurd results.

[45] Parliament's purposes of protecting privacy and sexual integrity are promoted by interpreting s. 162(1)(a) as a location-based offence without a temporal

component. As noted by the intervener, the Attorney General of Ontario, rather than providing a specific list of places protected under s. 162(1)(a), Parliament chose to define the protected places 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" (I.F., at para. 18). Thus, when a person is in circumstances that give rise to a reasonable expectation of privacy, s. 162(1)(a) stipulates a rule that normatively identifies a class of quintessentially "safe places", such as bedrooms, bathrooms, and dressing rooms, in which people should be entitled to not be non-consensually observed or visually recorded, whether or not they or another person in the place are reasonably expected to be nude *at the time* of the observation or recording. In this way, s. 162(1)(a) protects both privacy and sexual integrity.

[46] It is worth elaborating on how prohibiting voyeurism in such "safe places" under s. 162(1)(a), whether or not nudity is reasonably expected at the time of the surreptitious observation or recording, protects sexual integrity as it is understood today. As noted in this Court's decisions in *Friesen* and *Jarvis*, society's conception of sexual offences has evolved from a focus on the wrongful interference with sexual propriety to a concern with protecting sexual integrity (*Friesen*, at para. 55, and *Jarvis*, at para. 127, per Rowe J., both citing E. Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (2012), at p. 68). In the passage cited approvingly in *Friesen* and

the concurring reasons in *Jarvis*, Professor Elaine Craig explained that "[t]his shift from focusing on sexual propriety to sexual integrity enables greater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety)" (p. 68). Under a sexual integrity analysis, the focus is "not simply [on] the sexual motives, arousal, or body parts of the accused, or the community's standard of sexual propriety, but also [on] the perception, experience, and impact on the complainant" (p. 75). In addition, a sexual integrity analysis focuses not just on physical harm to the complainant, but also on emotional and psychological harm, which is often more lasting than physical harm, especially for children (*Friesen*, at paras. 56-59).

[47] Surreptitious observation or recording of a person where there is a reasonable expectation of privacy, and which occurs in a "safe place" under s. 162(1)(a), violates or poses a risk of violating sexual integrity, even if nudity is not reasonably expected at the specific time of the observation or recording. An observation or recording in such a quintessentially private and "safe place" violates trust and can result in the person's humiliation, objectification, exploitation, shame, or loss of self-esteem (Craig, at p. 68). It can also cause emotional and psychological harm, even if the person is not observed or recorded when nude. As the intervener, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, observes: "Such violations of trust objectify those targeted by reducing them to body parts, creating images that in a digital environment can be easily replicated, cropped and

manipulated in ways and for uses that disregard their right to control their own bodies. These violating images hinder subjects from developing their sexuality as they see fit, while also potentially exposing them to the shame and humiliation that often results from instantaneous and widespread dissemination" (I.F., at para. 24).

[48] The emotional and psychological harms caused by violations of sexual integrity, even from non-nude photographs, are illustrated in this case. The sentencing judge noted the statement of T.R.'s mother that "when she told T.R. about the photographs, he was disappointed as he had considered Mr. Downes one of his more positive coaches. She said T.R.'s trust was broken and, as a result, T.R. is more cautious and less trusting of coaches and people in general" (2020 BCSC 177, at para. 18 (CanLII)). As Dickson J.A. noted aptly, "[t]he potentially traumatic impact for adolescent boys of being photographed surreptitiously in such a manifestly private place is obvious" (para. 97).

[49] To sum up, reading s. 162(1)(a) as prohibiting surreptitious observation or recording of persons in specific places and without a temporal component promotes Parliament's purposes of protecting privacy and sexual integrity.

[50] By contrast, interpreting s. 162(1)(a) with a temporal component detracts from Parliament's purposes of protecting privacy and sexual integrity. On such an interpretation, surreptitious photos of children in their underwear in inherently private places would be permitted without criminal sanction simply because the children in those places were too self-conscious to undress (such as boys around the age of

puberty) (see trial reasons, at para. 220). Such an interpretation would fail to protect the privacy and sexual integrity of some of the most vulnerable persons in our society — persons whom Parliament sought to protect through the voyeurism offence.

[51] Relatedly, the Crown argues that such an interpretation of s. 162(1)(a) would result in arbitrary and absurd results: groups of children who are too self-conscious about their bodies to shower or be nude in dressing rooms could be photographed surreptitiously, but children who are just a few years older and less self-conscious — and who thus might shower or be nude — could not be photographed. I agree with the Crown that Parliament could not have intended such arbitrary and absurd results (see *Rizzo*, at para. 27). Parliament could not have intended that persons who ordinarily choose to disrobe in a place where nudity can reasonably be expected are protected from voyeurism, while persons who ordinarily choose to keep their clothes on are not.

[52] The majority of the Court of Appeal concluded otherwise by taking a narrow perspective that views sexual offences as concerned with sexual propriety alone rather than also with sexual integrity. The majority ruled that an implicit temporal component is essential for s. 162(1)(a) to fulfill its purpose as a sexual offence, rather than as an offence protecting privacy alone. In its view, reading s. 162(1)(a) as criminalizing surreptitious observation or recording when nudity is not reasonably expected at the time of the observation or recording would "capture conduct that does not bear any of the hallmarks of voyeurism *as a breach of sexual privacy*" (para. 41

(emphasis in original)). The majority declared that the voyeurism offence in s. 162(1) "[is] fundamentally concerned with bodily and sexual privacy" and "[is] not intended to establish [an] offenc[e] founded upon an invasion of privacy alone" (para. 54). It stated that while Mr. Downes' conduct was "undoubtedly a breach of trust and invasive of privacy, that does not necessarily make it conduct that this section criminalizes as a sexual offence" (para. 54).

[53] I disagree. The majority's reasoning assumes that in order to stigmatize conduct as a violation of sexual integrity, and thus as a sexual offence, there must be a risk of capturing nude images at the relevant time. But, as I have explained above, taking surreptitious photographs of children in their underwear in an inherently "safe place" like a hockey dressing room violates not only the children's privacy but also their sexual integrity, even if nudity was not reasonably expected when the photos were taken. Taking surreptitious photos in such an inherently "safe place" may injure many interests associated with sexual integrity: such conduct violates trust and can result in the humiliation, objectification, exploitation, shame, and loss of self-esteem of the targeted individuals. Such photos can injure a person's sexual integrity by reducing them to body parts, by hindering them from developing their sexuality as they see fit, and by creating a risk of widespread dissemination of the photos to strangers. When viewed through the lens of Parliament's purpose of protecting sexual integrity rather than simply sexual propriety, Mr. Downes' conduct violated both the children's privacy and their sexual integrity. He thus engaged in conduct that Parliament has criminalized as a sexual offence.

(d) *Conclusion*

[54] Section 162(1)(a) does not have an implicit temporal component requiring the Crown to prove that nudity was reasonably expected at the specific time when the photos were taken. As a result, the trial judge appropriately convicted Mr. Downes of two counts of voyeurism under s. 162(1)(a).

B. *If Section 162(1)(a) Does Not Have an Implicit Temporal Component, Is the Provision Unconstitutionally Overbroad Contrary to Section 7 of the Charter?*

[55] Mr. Downes submits that if this Court accepts that s. 162(1)(a) does not have an implicit temporal component, then the provision is unconstitutionally overbroad contrary to s. 7 of the *Charter*. He states that the objective of s. 162(1) is to target exploitative sexual conduct and says that the lack of a temporal component "extends the offence to cover conduct bearing no connection to its underlying purpose of preventing sexual exploitation" (R.F., at para. 68). Mr. Downes did not raise this constitutional issue at trial, and although he raised it at the Court of Appeal, the court did not address it.

[56] There is a serious question as to whether Mr. Downes can challenge the constitutionality of s. 162(1)(a) in this Crown appeal as of right under s. 693(1)(a) of the *Criminal Code*. Such an appeal is limited to the question of law on which a judge of the court of appeal dissents, which in this case was whether s. 162(1)(a) has an implicit temporal component. Although in a Crown appeal as of right the respondent

can raise "any argument which supports the order of the court below" (*R. v. Keegstra*, [1995] 2 S.C.R. 381, at para. 23), Mr. Downes' overbreadth argument does not support the Court of Appeal's order: if accepted, it would likely result not in a new trial but in no trial, since s. 162(1)(a) would be unconstitutional (para. 36). Thus, ordinarily Mr. Downes could not challenge the constitutionality of s. 162(1)(a) without first obtaining leave to cross-appeal on this issue under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[57] I have concluded, however, that it is unnecessary to decide whether the constitutional issue raised by Mr. Downes is properly before this Court because, in any event, this is not a case in which this Court should exceptionally exercise its discretion to decide such a constitutional question for the first time on appeal. As noted in *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 20, "[w]hether to hear and decide a constitutional issue when it has not been properly raised in the courts below is a matter for the Court's discretion, taking into account all of the circumstances, including 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." The test is a stringent one: this Court must be satisfied that hearing and deciding the new constitutional issue causes no prejudice to the parties (paras. 22-23).

[58] In this case, deciding whether s. 162(1)(a) is unconstitutionally overbroad would prejudice the Crown and would require the Court to address an important

Charter issue in a factual vacuum. Because the *Charter* issue was not raised at trial, the Crown has filed no evidence on whether any infringement of s. 7 of the *Charter* could be justified under s. 1. As noted in *Guindon*, "[a] respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial" (para. 32 (citations omitted in original), quoting *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 58). This is especially so in constitutional cases. This Court has often stressed the importance of a full evidentiary record when deciding constitutional questions and has cautioned that "*Charter* decisions should not and must not be made in a factual vacuum" (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361; *Guindon*, at para. 116, per Abella and Wagner JJ.). As the Court of Appeal for Ontario has stated, "[a]rguing the interpretation of a statute is much different than arguing its constitutional validity" (*R. v. Wookey*, 2016 ONCA 611, 363 C.R.R. (2d) 177, at para. 61, per Tulloch J.A. (now C.J.O.)). As a result, in all the circumstances, I would decline to decide the constitutional issue.

VI. Disposition

[59] I would allow the appeal, set aside the judgment of the Court of Appeal for British Columbia, and restore the convictions.

Appeal allowed.

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