Court File No. 37833

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

**HER MAJESTY THE QUEEN**

Appellant

- and -

**RYAN JARVIS**

Respondent

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# FACTUM OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

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

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## PART I – OVERVIEW

1. Voyeurism is more than an invasion of privacy; it is a violation of sexual integrity and autonomy. It is also a highly gendered crime, on the continuum of sexual offenses that disproportionately impact women and girls[1] and undermine their equality and human dignity.[2] Parliament enacted s. 162(1) to protect both the privacy and sexual integrity of these vulnerable groups in the face of rapidly advancing technology.[3]

2. Privacy is relative rather than absolute. It protects people, not places.[4] Reasonable expectations of privacy can and do exist in public spaces, including public schools.[5] The phrase "circumstances that give rise to a reasonable expectation of privacy" in s. 162(1) of the *Code* must be interpreted with sufficient flexibility to recognize the contextual circumstances in which women reasonably expect to be free from sexual intrusions, in accordance with the purpose of the provision and the equality rights enshrined in the *Charter*.

3. The narrow, location-based definition of privacy adopted by the majority below does not achieve this. Privacy, when interpreted as nothing more than "a state in which one is not observed or disturbed by other people, the state of being free from public attention",[6] adversely affects women's equality by tacitly dividing the world into private spaces (in which women have a privacy interest) and public spaces (in which they do not). Rooted in discriminatory gender norms, this places the onus on women, as the primary targets of voyeurism, to ward off intrusions to their sexual integrity by withdrawing from public life.

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[1] Of the 59 publicly available decisions arising from charges under s. 162(1) of the *Code*, 45 involved only female complainants, 5 involved both women and men, and 3 involved both girls and boys. In 3 of the remaining cases, the gender of the complainants was unspecified. See also Department of Justice, "Voyeurism as a Criminal Offense: A Consultation Paper" (Ottawa: Communications Branch of the Department of Justice, 2002) at 4.

[2] *R. v. Osolin*, [1993] 4 S.C.R. 595 ["*Osolin*"], at para. 165.

[3] *Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, 38th Parl., 1st Sess., No. 22 (2 February 2005) ["Cotler"] at 0920, 0925 (Hon. Irwin Cotler).

[4] *R. v. Tessling*, 2004 SCC 67 ["*Tessling*"], at para. 16; *Hunter v. Southam*, [1984] 2 S.C.R. 145, at 159.

[5] *R. v. M.R.M.*, [1998] 3 S.C.R. 393, at paras. 31-33.

[6] *R. v. Jarvis*, 2017 ONCA 778 ["*Jarvis*"], at para. 93.

4. In this way, the majority's interpretation of s. 162(1) reinforces sexist stereotypes and increases the vulnerability of those the provision was created to protect, contrary to Parliament's equality-enhancing purpose. The Women's Legal Education and Action Fund ("LEAF") urges the Court to reject this result, in favour of a flexible approach to privacy – akin to that adopted by this Court in other criminal and constitutional contexts – that recognizes the equality interests at stake.

## PART II – LEAF'S POSITION ON THE QUESTION IN ISSUE

5. The majority of the Court of Appeal for Ontario erred by applying a narrow, location-based definition of "privacy" to the phrase "in circumstances that give rise to a reasonable expectation of privacy".

## PART III – STATEMENT OF ARGUMENT

### A. The majority's interpretation reinforces a discriminatory approach to privacy that undermines equality

6. For women, the protection of "privacy" has traditionally been equated with the protection of their modesty, domesticity, and "respectable femininity".[7] In contrast, privacy for men has been significantly more robust, equated with individual freedom and autonomy.[8] This distinction has undermined women's equality by restricting their access to public life,[9] and by treating the bodies of those women who did not withdraw as public property.

7. Historically, "respectable" women were expected to remain in the home, away from public view. Women who did engage in public life were commonly deemed loose or immodest, and their privacy and sexual autonomy interests considered unworthy of protection. For some groups of women who engaged with the public sphere, especially racialized and Indigenous women, privacy protections were virtually non-existent.[10] In this way, privacy was (and is) used

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[7] Anita Allen and Erin Mack, "How Privacy Got Its Gender" (1990) 10 N. Ill. U. L. Rev. 441 ["Allen and Mack"].
[8] Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43 Alta. L.R. 743 ["Gotell"] at 748.
[9] Allen and Mack, *supra* note 7, at 444, 453.
[10] Gotell, *supra* note 8, at 748-749; Allen and Mack, *supra* note 7, at 450.

to reinforce sexist notions of modesty and seclusion,[11] and to compel women to limit their participation in public life to shield themselves from abuse.[12]

8. The majority's location-based conception of privacy reinforces these harmful gender stereotypes. It makes the application of s. 162 largely contingent on the complainant remaining secluded in the private sphere and denies women access to the robust privacy protections that would facilitate their participation in social, cultural, and political life.

9. This approach also perpetuates the equally damaging stereotype that victims are to blame for sexual violence.[13] For decades, courts have demanded that sexual assault complainants justify their victimhood by proving their efforts to avoid victimization.[14] By denying women meaningful privacy rights in public, the majority burdens voyeurism complainants with the same task, and denies the violation of those who have, in the court's view, insufficiently guarded their sexual integrity. Voyeurs' obligation to respect women's privacy and sexual integrity is strikingly absent from the majority's analysis.

10. The law has the capacity to articulate new cultural and legal norms and change people's behaviour.[15] It has been an effective tool for de-trivializing sexual violence against women.[16] Parliament's decision to enact s. 162 was an important step towards de-trivializing digital-based sexual violence against women as a transient, inconsequential wrong. This Court must enforce these new norms by adopting an equality-enhancing interpretation of s. 162(1).

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[11] Allen and Mack, *supra* note 7, at 477-478.
[12] Sexual violence is a "paradigmatic example of how men keep women in their place": Sheilah L. Martin, "Some Constitutional Considerations on Sexual Violence Against Women", (1994) 32 Alta. L. Rev. 535 ["Martin"] at 550.
[13] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 ["*Ewanchuk*"], at paras. 89, 97 (*per* L'Hereux-Dube J., concurring).
[14] *Ibid*.; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at paras. 141, 155.
[15] Danielle Keats Citron, "Law's Expressive Value in Combatting Cyber Gender Harassment" (2009) 108 Mich. L. Rev. 373 at 407.
[16] Courts have confirmed the wrongs of sexual harassment and domestic violence: *Ibid.* at 409.

### B. Parliament created the offense of voyeurism for equality-enhancing purposes, including the protection of privacy and sexual integrity of vulnerable persons

11. Parliament enacted the offense of voyeurism through omnibus legislation[17] designed to protect society's most vulnerable members, specifically women and children, from sexual exploitation in the face of rapidly evolving technology.[18] This is an equality-enhancing purpose.

12. Voyeurism exists on a continuum of sexual offenses that are predominantly committed by men and overwhelmingly target women and girls. Parliament used the phrase "circumstances that give rise to a reasonable expectation of privacy" in the context of criminalizing voyeurism for equality-enhancing purposes, namely, the eradication of sexual violence.[19] This phrase must therefore be read through the interpretive lens of s. 15 in a manner consistent with women's equality, autonomy, sexual integrity, and human dignity. This Court must reject the influence of sexist stereotypes that deny women meaningful privacy protections.

### C. The majority's decision fails to advance the equality-enhancing purpose of s. 162(1)

#### *(i) The disconnect between Parliament's purpose and the majority's interpretation*

13. The majority's inflexible interpretation of the phrase "circumstances that give rise to a reasonable expectation of privacy" failed to consider either Parliament's purpose or the equality issues at stake. By defining 'privacy' in narrow, location-based terms, the majority tacitly divided the world into 'public' and 'private' spaces and limited the protection afforded by s. 162(1) to locations deemed 'private'. This interpretation reinforces the discriminatory approach to privacy described in paragraphs 6 to 9 above, and effectively strips women – as the primary targets of voyeurism – of dominion over their sexual integrity when they enter the public sphere.

14. This narrow definition of privacy, linked to antiquated, sexist notions about the proper place for women in society, undermines the capacity of s. 162(1) to provide meaningful protection from the myriad ways in which voyeuristic behaviours can violate women's privacy, equality, and sexual integrity in both public and private places.

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[17] An Act to amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act, S.C. 2005, c. 32.
[18] Cotler, *supra* note 3, at 0920, 0925, 1025.
[19] *Osolin*, *supra* note 2, at para 165: "Sexual assault…constitutes a denial of any concept of equality for women." See also Martin, *supra* note 12, at 547- 551.

15. Instead, it presents women with a wholly unpalatable choice: accept the risk that you will be the subject of image-based sexual violence, or stay home. The stark nature of this choice is underscored by this passage from the British Columbia Supreme Court in *R. v. Rudiger*:

> the message… is, once reasonable people venture outside the safety of their own homes, they must expect that they may be followed, filmed, investigated and spied upon, by any person for any purpose….The onus is on individuals to take precautions against being intruded upon – those with whom they share space have no corresponding obligation not to intrude.[20]

16. This is contrary to Parliament's intent to capture a broad spectrum of voyeuristic behaviours within the ambit of s. 162(1). As drafted, subsection (a) describes *one of three* categories of surreptitious observations/recordings to which s. 162(1) applies, which hinges on a complainant being in certain locations when the observation/recording takes place. Subsections (b) and (c) are clearly intended to broaden the application of the provision to cover voyeuristic intrusions that are not explicitly tied to a particular location. The majority's approach narrows s. 162(1) by making location the central requirement of *all three* categories. The result: privacy in the context of voyeurism depends on the target – usually a woman – withdrawing or concealing herself from public view.

### *(ii) The majority's interpretation renders privacy rights in the context of sexual integrity less meaningful than in other contexts*

17. The majority's narrow interpretation is inconsistent with privacy jurisprudence. This Court has repeatedly recognized privacy as a "protean concept" that is circumstantial, normative, and flexible.[21] Under s. 8 jurisprudence, the question of whether an individual is in circumstances giving rise to a reasonable expectation of privacy must be answered with regard to the "totality of the circumstances" of a particular case, which "involves consideration of all, not just some, of the relevant circumstances."[22] Significantly, this contextual analysis is also employed to determine whether a sexual assault complainant has a reasonable expectation of privacy in confidential records in the hands of third parties.[23]

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[20] *R. v. Rudiger*, 2011 BCSC 1397 ["*Rudiger*"], at para. 115.
[21] *Tessling*, *supra* note 4, at paras. 19, 25, 42; See also *Rudiger*, *supra* note 20, para. 89.
[22] *R. v. Gomboc*, 2010 SCC 55, at para. 94.
[23] *R. v. Quesnelle*, 2014 SCC 46, at paras. 21-44.

18. The majority below failed to adopt this approach or to consider any relevant circumstances beyond location. As Justice Huscroft correctly observed, the majority's interpretation renders the application of s. 162(1) to observations and recordings made outside private spaces "so exceptional as to be rare."[24]

19. If the majority's approach is upheld, privacy in the context of s. 162(1) will be less robust than the privacy rights afforded to individuals in almost every other area of the law. A stark illustration: the majority below recognized that the respondent had a privacy interest in the contents of his camera pen, including the images he created of the complainants' breasts. Paradoxically, the majority declined to recognize that the complainants had a privacy interest in the subject of these images, *i.e.* their own breasts. This leads to the untenable result that targets of voyeurism – overwhelmingly women and girls – will be afforded less protection for their sexual integrity than the individual who violates that integrity is afforded in their technology.

20. This Court has recognized privacy as a precondition for fundamental values such as liberty and human dignity, and developed a robust and nuanced understanding of privacy to protect these values.[25] Section 15 requires that the privacy rights necessary to protect the liberty, integrity, and human dignity of women and girls be given as much force in s. 162(1) as in other contexts, consistent with the equality-enhancing purpose of the provision and the *Charter* itself.

### *(iii) The majority's analysis employs a "risk analysis" that ultimately 'blames the victim' and renders the privacy rights in s. 162(1) meaningless*

21. At paragraph 96 of the decision below, the majority accepts that "upskirting" in a public space *would* constitute the offense of voyeurism, since the woman in that scenario would retain a reasonable expectation of privacy over the parts of her body that she has taken care to conceal.

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[24] *R. v. Jarvis*, 2017 ONCA 778, at para. 127: The majority cited "upskirting" as an example of the limited circumstances in which a reasonable expectation of privacy may exist in public. Justice Huscroft noted that this example highlights how rarely s. 162(1) will apply to public spaces under the majority's approach. The same observation flows from the majority's failure to apply its own reasoning to the accused's act of "downshirting", a qualitatively similar act.

[25] *Schreiber v. Canada*, [1998] 1 S.C.R. 841, at para. 19; *A.M. v. Ryan*, [1997] 1 S.C.R. 157, at paras. 79-81.

22. On this interpretation, it is only individuals who conceal themselves – either with clothing or behind closed doors – who maintain a privacy interest in their bodies. Women who reveal parts of their bodies in public or quasi-public spaces are deemed to have 'assumed the risk' of observation and sacrificed any privacy interest in their bodies, regardless of context. They are deemed available for sexual consumption, regardless of consent.

23. This approach mirrors the so-called "risk analysis", under which a person in an ostensibly public location is deemed to have sacrificed any expectation of relative privacy because they have "courted the risk"[26] of surveillance or observation.[27] Applied to s. 162(1), it puts the impossible burden of preventing sexual violence on women. It also reinforces outdated ideas: that women are responsible for guarding their sexual integrity in the face of male aggression, and that women who dress or act in a certain way are 'asking for it' by failing to behave more cautiously or modestly.[28]

24. This Court has, on multiple occasions, rejected the "risk analysis" as an untenable basis for evaluating reasonable expectations of privacy. Technological advances have made it impossible to detect and guard against invasive forms of surveillance. This Court has repeatedly expressed its unwillingness to allow these advances to erode the normative standards central to reasonable privacy expectations.[29] As expressed most recently in *R. v. Marakah*:

> People should not have to assume, at "the price of choosing to speak to another human being", the risk that every time they speak, someone – be it the state **or some other third party** – may be recording their words. [Emphasis added].[30]

25. This statement from *Marakah* applies with equal force in the context of voyeurism: the price for leaving one's home and engaging in public life cannot be that one assumes an unconditional risk of being recorded, particularly for a sexual purpose. Given the ubiquity of surveillance in the digital age, the majority's "risk analysis" renders the privacy protection

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[26] *R. v. Wong*, [1990] 3 S.C.R. 36 ["*Wong*"], at 45.
[27] *R. v. Rudiger*, *supra* note 20, at para. 113.
[28] *Ewanchuck*, *supra* note 13, at paras. 89, 97 (*per* L'Hereux-Dube J., concurring).
[29] *R. v. Marakah*, 2017 SCC 59, at paras. 68, 126-127; *Alberta v. United Food and Commercial Workers,* 2013 SCC 62, at para. 27; *R. v. Duarte*, [1990] 1 S.C.R. 30, at 47-49; *Wong*, *supra* note 26, at 45-48; *Tessling*, supra note 4, at paras. 16, 42; *Rudiger*, *supra* note 20, at paras. 107-117.
[30] *Marakah*, *ibid*., at para 127.

provided by s. 162(1) all but meaningless, even though the surveillance is question is conducted by an individual and not the state.

### *(iv) The majority's interpretation undermines Parliament's attempt to create a cohesive strategy for combatting technology-facilitated violence against women*

26. Recording an image triggers privacy concerns beyond those engaged by mere observation. As technology makes it possible to create a permanent record of otherwise fleeting observations, the extent and quality of any intrusion is materially altered.[31] A permanent digital recording allows the intrusion to be repeated countless times and enables more detailed scrutiny than is possible in real-time. In addition, it gives rise to the risk that the image will be shared and consumed by others, and the violation amplified.

27. In 2014, Parliament enacted s. 162.1 of the *Criminal Code* to prohibit the non-consensual distribution of "intimate images."[32] Read together, ss. 162 and 162.1 create a coherent scheme for combatting image-based sexual violence: they criminalize the non-consensual creation *and* distribution of sexualized images in which the subject has a reasonable expectation of privacy. These provisions must be interpreted in a harmonious manner reflective of Parliament's intent.

28. "Intimate image" is defined in s. 162.1 as an image "in respect of which, *at the time of the recording*, there were circumstances that gave rise to a reasonable expectation of privacy" and in which the complainant maintains this expectation at the time of distribution.[33]

29. The Cybercrime Working Group (the "Working Group"), directed by Parliament, explicitly proposed this language to protect "similar privacy interests as the existing offense of voyeurism."[34] The Working Group intended these privacy interests to extend to non-private locations, specifically noting that a couple photographed engaging in sexual activity at a party

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[31] *Rudiger*, *supra* note 20, at para. 110; *R. v. Lebenfish*, 2014 ONCJ 130, at para. 37; *R. v. Sharpe*, 2001 SCC 2 ["*Sharpe*"], at paras. 169 (*per* McLachlin C.J.), 241 (*per* L'Heureux-Dube, Gonthier and Bastarache JJ., dissenting).
[32] *Criminal Code*, R.S.C., 1985, c. C-46, s. 162.1.
[33] *Ibid*., s. 162.1(2) (emphasis added).
[34] CCSO Cybercrime Working Group, "Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety – Cyberbullying and the Non-consensual Distribution of Intimate Images" (Canada: Department of Justice, 2013) at 16.

may have a reasonable expectation of privacy, depending on the content of the image and "the nature of the circumstances in which the image was taken."[35]

30. This Court's interpretation of the phrase "circumstances that give rise to a reasonable expectation of privacy" in the context of s. 162(1) will inevitably shape the scope of protection provided by s. 162.1. If an image is not *made* in "circumstances that give rise to a reasonable expectation of privacy," s. 162.1 will not criminalize the subsequent *distribution* of that image. The majority's narrow interpretation of this phrase risks limiting the scope of s. 162.1 in a manner inconsistent with the drafter's intent.

31. The consequences of narrowing the scope of s. 162.1 cannot be overstated. Non-consensual distribution of intimate images ("NCDII") disproportionately targets women and girls[36] and is devastating for victims. Referring to the tragic suicides of Rehtaeh Parsons and Amanda Todd, MP Peter McKay described NCDII as "the worst form of harassment, intimidation and humiliation."[37] This highlights the important role of s. 162.1, as a companion to s. 162, in protecting the equality, safety, and dignity of women and girls.

### D. Equality Advancing Interpretation: LEAF's Proposed Approach

32. When faced with two plausible interpretations of a statute, courts must choose the interpretation consistent with the *Charter*.[38] To give effect to both the *Charter* and the equality-enhancing purpose of s. 162(1), this Court must reject the majority's narrow interpretation in favour of a flexible approach capable of protecting sexual integrity and autonomy in both public and private spaces.

33. A contextual approach requires that the provision be read fluidly and as a whole. LEAF recognizes that the three separate elements of s.162(1)(c) must be independently satisfied for the offense to be made out. This does not mean that each component must form a water-tight compartment. To the contrary, the factors that bracket the need for a 'reasonable expectation of

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[35] *Ibid*, at 17.
[36] Moira Aikenhead, "Non-Consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence" (2018) 30 Can. J. Women and L. 117 at 122.
[37] *House of Commons Debates*, 41st Parl., 2nd Sess., No. 025 (27 November 2013) at 1520 (Hon. Peter MacKay).
[38] *R. v. Clarke*, 2014 SCC 28, at para. 15; *R. v. Mabior*, 2012 SCC 47, at paras. 44-45; *Sharpe*, *supra* note 31, at para. 33.

privacy' – surreptitiousness and sexual purpose – bear on the meaning of that expectation. They are relevant to both when an expectation of privacy reasonably exists, and the content of that expectation once established.[39]

34. The question of whether "circumstances that give rise to a reasonable expectation of privacy" exist will depend on the specific facts of each case. However, a *Charter*-compliant interpretation of the phrase must, in all cases, recognize the gendered nature of the offense and strive to give effect to Parliament's equality-enhancing purpose in a manner that accords with:

a. The right of women and girls to equal participation in society's social, cultural, economic, and political life;

b. The right of women and girls to sexual and bodily integrity, sexual autonomy, and human dignity; and

c. Women and girls' normative expectations of privacy, including their reasonable expectation that individuals in positions of power will not exploit that power in a manner that interferes with their sexual and bodily integrity, sexual autonomy, human dignity, and equality rights.

35. The *Code* was amended to protect against emerging forms of sexual violence. Complainants should be able to rely on courts to apply these protections, free from discriminatory stereotypes.[40] The purpose of s. 162(1) should not be undermined by the resurfacing, through the lens of privacy, of the harmful myth that women can and should bear responsibility for preventing sexual misconduct committed against them.

## PARTS IV AND V – COSTS AND ORDER REQUESTED

36. LEAF seeks no costs, and requests that none be awarded against it. LEAF takes no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, April 5, 2018

Gillian Hnatiw / Karen Segal / Alex Fidler-Wener

[39] *Rudiger, supra* note 20, at para. 100.
[40] *Ewanchuck, supra* note 13, at para. 95 (*per* L'Hereux-Dube J., concurring).

## PART VI – TABLE OF AUTHORITIES

| **Cases** | **Para(s)** |
|---|---|
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## PART VII – LEGISLATION

### *Criminal Code*, R.S.C., 1985, c. C-46

**Voyeurism**

**162 (1)** Every one commits an offense 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.

**Definition of visual recording**

**(2)** In this section, visual recording includes a photographic, film or video recording made by any means.

**Exemption**

**(3)** Paragraphs (1)(a) and (b) do not apply to a peace officer who, under the authority of a warrant issued under section 487.01, is carrying out any activity referred to in those paragraphs.

**Printing, publication, etc., of voyeuristic recordings**

**(4)** Every one commits an offense who, knowing that a recording was obtained by the commission of an offense under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing,

### *Code criminel* (L.R.C. (1985), ch. C-46)

**Voyeurisme**

**162 (1)** Commet une infraction quiconque, subrepticement, observe, notamment par des moyens mécaniques ou électroniques, une personne — ou produit un enregistrement visuel d'une personne — se trouvant dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée, dans l'un des cas suivants :

**a)** la personne est dans un lieu où il est raisonnable de s'attendre à ce qu'une personne soit nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite;

**b)** la personne est nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite, et l'observation ou l'enregistrement est fait dans le dessein d'ainsi observer ou enregistrer une personne;

**c)** l'observation ou l'enregistrement est fait dans un but sexuel.

**Définition de enregistrement visuel**

**(2)** Au présent article, enregistrement visuel s'entend d'un enregistrement photographique, filmé, vidéo ou autre, réalisé par tout moyen.

**Exemption**

**(3)** Les alinéas (1)a) et b) ne s'appliquent pas aux agents de la paix qui exercent les activités qui y sont visées dans le cadre d'un mandat décerné en vertu de l'article 487.01.

**Impression, publication, etc. de matériel voyeuriste**

**(4)** Commet une infraction quiconque imprime, copie, publie, distribue, met en circulation, vend ou rend accessible un enregistrement ou en fait la publicité, ou l'a en sa possession en vue de l'imprimer, de le copier, de le publier, de le distribuer, de le mettre en circulation, de

copying, publishing, distributing, circulating, selling or advertising it or making it available.

**Punishment**

**(5)** Every one who commits an offense under subsection (1) or (4)

**(a)** is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years; or

**(b)** is guilty of an offense punishable on summary conviction.

**Defence**

**(6)** No person shall be convicted of an offense under this section if the acts that are alleged to constitute the offense serve the public good and do not extend beyond what serves the public good.

**Question of law, motives**

**(7)** For the purposes of subsection (6),

**(a)** it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good; and

**(b)** the motives of an accused are irrelevant.

**Publication, etc., of an intimate image without consent**

**162.1 (1)** Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

**(a)** of an indictable offense and liable to imprisonment for a term of not more than five years; or

**(b)** of an offense punishable on summary

le vendre, de le rendre accessible ou d'en faire la publicité, sachant qu'il a été obtenu par la perpétration de l'infraction prévue au paragraphe (1).

**Peines**

**(5)** Quiconque commet une infraction prévue aux paragraphes (1) ou (4) est coupable :

**a)** soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

**b)** soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

**Moyen de défense**

(6) Nul ne peut être déclaré coupable d'une infraction visée au présent article si les actes qui constitueraient l'infraction ont servi le bien public et n'ont pas outrepassé ce qui a servi celui-ci.

**Question de fait et de droit et motifs**

**(7)** Pour l'application du paragraphe (6) :

**a)** la question de savoir si un acte a servi le bien public et s'il y a preuve que l'acte reproché a outrepassé ce qui a servi le bien public est une question de droit, mais celle de savoir si l'acte a ou n'a pas outrepassé ce qui a servi le bien public est une question de fait;

**b)** les motifs du prévenu ne sont pas pertinents.

**Publication, etc. non consensuelle d'une image intime**

**162.1 (1)** Quiconque sciemment publie, distribue, transmet, vend ou rend accessible une image intime d'une personne, ou en fait la publicité, sachant que cette personne n'y a pas consenti ou sans se soucier de savoir si elle y a consenti ou non, est coupable :

**a)** soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

**b)** soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

conviction.

**Definition of intimate image**

**(2)** In this section, intimate image means a visual recording of a person made by any means including a photographic, film or video recording,

**(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 offense is committed.

**Defence**

**(3)** No person shall be convicted of an offense under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.

**Question of fact and law, motives**

**(4)** For the purposes of subsection (3),

**(a)** it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and

**(b)** the motives of an accused are irrelevant.

**Définition de image intime**

**(2)** Au présent article, image intime s'entend d'un enregistrement visuel — photographique, filmé, vidéo ou autre — d'une personne, réalisé par tout moyen, où celle-ci :

**a)** y figure nue, exposant ses seins, ses organes génitaux ou sa région anale ou se livrant à une activité sexuelle explicite;

**b)** se trouvait, lors de la réalisation de cet enregistrement, dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée;

**c)** a toujours cette attente raisonnable de protection en matière de vie privée à l'égard de l'enregistrement au moment de la perpétration de l'infraction.

**Moyen de défense**

**(3)** Nul ne peut être déclaré coupable d'une infraction visée au présent article si les actes qui constitueraient l'infraction ont servi le bien public et n'ont pas outrepassé ce qui a servi celui-ci.

**Question de fait et de droit et motifs**

**(4)** Pour l'application du paragraphe (3) :

**a)** la question de savoir si un acte a servi le bien public et s'il y a preuve que l'acte reproché a outrepassé ce qui a servi le bien public est une question de droit, mais celle de savoir si l'acte a ou n'a pas outrepassé ce qui a servi le bien public est une question de fait;

**b)** les motifs du prévenu ne sont pas pertinents.

***An Act to amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, S.C. 2005, c. 32**

**6. The Act is amended by adding the following after section 161:**

**162.** (1) Every one commits an offense 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.

**(2)** In this section, "visual recording" includes a photographic, film or video recording made by any means.

**(3)** Paragraphs (1)(a) and (b) do not apply to a peace officer who, under the authority of a warrant issued under section 487.01, is carrying out any activity referred to in those paragraphs.

**(4)** Every one commits an offense who, knowing that a recording was obtained by the commission of an offense under subsection (1), prints, copies, publishes, distributes, circulates,

***Loi modifiant le Code criminel (protection des enfants et d'autres personnes vulnérables) et la Loi sur la preuve au Canada*, S.C. 2005, c. 32**

**6. La même loi est modifiée par adjonction, après l'article 161, de ce qui suit:**

**162. (1)** Commet une infraction quiconque, subrepticement, observe, notamment par des moyens mécaniques ou électroniques, une personne — ou produit un enregistrement visuel d'une personne — se trouvant dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée, dans l'un des cas suivants :

**a)** la personne est dans un lieu où il est raisonnable de s'attendre à ce qu'une personne soit nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite;

**b)** la personne est nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite, et l'observation ou l'enregistrement est fait dans le dessein d'ainsi observer ou enregistrer une personne;

**c)** l'observation ou l'enregistrement est fait dans un but sexuel.

**(2)** Au présent article, « enregistrement visuel » s'entend d'un enregistrement photographique, filmé, vidéo ou autre, réalisé par tout moyen.

**(3)** Les alinéas (1)a) et b) ne s'appliquent pas aux agents de la paix qui exercent les activités qui y sont visées dans le cadre d'un mandat décerné en vertu de l'article 487.01.

**(4)** Commet une infraction quiconque imprime, copie, publie, distribue, met en circulation, vend ou rend accessible un enregistrement ou

sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available.

**(5)** Every one who commits an offense under subsection (1) or (4)

**(a)** is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years; or

**(b)** is guilty of an offense punishable on summary conviction.

**(6)** No person shall be convicted of an offense under this section if the acts that are alleged to constitute the offense serve the public good and do not extend beyond what serves the public good.

**(7)** For the purposes of subsection (6),

**(a)** it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good; and

**(b)** the motives of an accused are irrelevant.

en fait la publicité, ou l'a en sa possession en vue de l'imprimer, de le copier, de le publier, de le distribuer, de le mettre en circulation, de le vendre, de le rendre accessible ou d'en faire la publicité, sachant qu'il a été obtenu par la perpétration de l'infraction prévue au paragraphe (1).

**(5)** Quiconque commet une infraction prévue aux paragraphes (1) ou (4) est coupable :

**a)** soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

**b)** soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

**(6)** Nul ne peut être déclaré coupable d'une infraction visée au présent article si les actes qui constitueraient l'infraction ont servi le bien public et n'ont pas outrepassé ce qui a servi celui-ci.

**(7)** Pour l'application du paragraphe (6) :

**a)** la question de savoir si un acte a servi le bien public et s'il y a preuve que l'acte reproché a outrepassé ce qui a servi le bien public est une question de droit, mais celle de savoir si l'acte a ou n'a pas outrepassé ce qui a servi le bien public est une question de fait;

**b)** les motifs du prévenu ne sont pas pertinents.