TECHNOLOGICALLY-FACILITATED VIOLENCE AGAINST WOMEN: VOYEURISM CASE LAW

A. OFFENCE ELEMENTS

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.

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 offence who, knowing that a recording was obtained by the commission of an offence 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, copying, publishing, distributing, circulating, selling or advertising it or making it available.

Punishment

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

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

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

Defence

(6) No person shall be convicted of an offence under this section if the acts that are alleged to

constitute the offence serve the public good and do not extend beyond what serves the public good.

B. SELECTED CASE LAW

I. ALBERTA

i. 2014 ABPC 61

In **2014 ABPC 61**, a 56-year-old man surreptitiously recorded over 80 men, women, and children in five separate washrooms (four public, and one in his home). He pleaded guilty to one count of voyeurism and received 9-months imprisonment followed by 2-years probation.

ii. 2013 ABCA 373

In **2013 ABCA 373**, Mr. T was found guilty of unlawful confinement, three counts of common assault, assault with a weapon, and breaching a condition of a recognizance. He also pleaded guilty to voyeurism, marijuana possession, and two charges of breaching a recognizance. The voyeurism charge related to multiple videos that Mr. T made while engaged in sexual activity with his former partner. One video showed T commencing sexual activity while the victim was asleep. Although she tells him to stop, and he does not, T was not charged with sexual assault.

The Court noted that T did not distribute the videos, but also found that "the fact that the Complainant's face can be seen in the videos, there were many of them, [T] lied about making them, and they were retained for a period after the end of the relationship" all constituted aggravating factors on sentencing. T received 4-months imprisonment on the voyeurism charge, and a global sentence of 12-months imprisonment followed by 2-years probation. His sentence was upheld on appeal.[1]

[1] 2013 ABCA 373.

iii. 2012 ABCA 14

2012 ABCA 14 involved a community youth worker who allowed teenagers to use his apartment's spare bedroom as a place to drink and have sex. Mr. K let three young men use his video camera to film their (consensual) sexual encounters with young women and girls.[2] The young men then sold the footage to K without the girls' knowledge or consent.[3] At trial, K was found guilty of two charges of possession of child pornography, one charge of engaging in voyeurism, and one charge of making voyeuristic materials. Although the Crown recommended a global 15-18 months imprisonment sentence, the trial judge sentenced K to a 27-months imprisonment. The Alberta Court of Appeal found that this was not an unfit sentence, and dismissed K's sentencing appeal.

iv. 2012 ABPC 203

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[2] Interestingly, the Court finds that the use of sophisticated camera equipment is an aggravating factor on sentencing: "Modern camera and telecommunication technology potentially allows a voyeur to use much more sophisticated mechanical and electronic tools that would be far more difficult for a complainant or other person to detect. I believe I may take judicial notice that commercial sources have developed in the past decade that provide to the public highly sophisticated surveillance and recording apparatus, such as pinhole cameras, cameras disguised to appear to be innocuous objects such as pens, or smoke detectors, and wireless communications systems to connect cameras to recording devices and computers. There are no doubt legal and valid reasons for a person or business to employ these kinds of technologies, but their potential for misuse is easily understood when one reviews the instances where voyeuristic activities led to criminal convictions. I think it is a strongly aggravating factor that a voyeur uses sophisticated and difficult to detect technologies for illegal purposes for the simple fact of reducing the probability that the person being observed would detect that they were observed surreptitiously. Deployment of that kind of technology also indicates the voyeurism was a highly planned and premeditated activity. That is not to say that use of a 'low-tech' approach is a mitigating circumstance, rather that an unsophisticated observation scheme would be a neutral factor": 2011 ABQB 312 at paras 208-211 [emphasis added].

[3] One of the victims, 16-year-old JW, read her victim impact statement in Court. The Court finds that her statements were, "to say the least, disturbing and epitomized that of a young teenage girl, whose trust was abused and has literally been scarred for life." JW told the Court that she "finds it extremely hard to trust another person and that is the most disgusting feeling, 'almost like you shower and shower but you can never really get clean.'" She further stated that, "[K] has taken a part of me that should never be taken from a person: my self-worth.": 2011 ABQB 312 at para 115.

2012 ABPC 203 involves voyeurism on a college campus. Mr. P, a 24-year-old exchange student, hid in the bushes and filmed his roommate having sex with her boyfriend. The victim, Ms. V, did not submit a victim impact statement. P turned himself in and expressed deep remorse. The Court noted that he was a youthful offender with a promising career. P was sentenced to a discharge conditional on completing18-months probation on terms that included 80 hours of community service.

v. 2012 ABPC 24

2012 ABPC 24 is a case involving "upskirt" photos. Mr. R worked as an airport employee. While wearing his uniform and airport identity card, R crouched down next to the victim, who was standing near to the baggage carousel. The victim and her fiancé stated that they thought R was "working on something" nearby. In fact, R was using his iPhone to take a photograph under the victim's skirt.

R pleaded guilty to voyeurism. The Crown proceeded summarily and sought a six month prison sentence. Crown and defence counsel disagreed over whether, as an airport employee, R was in a position of trust in relation to the victim. The Court held that R was not in a position of trust because he did not have a trust relationship with the parties and did not use his persuasive power or influence to render the victim vulnerable. Ultimately, the Court found that R's actions were impulsive and foolish, but not brazen, and held that the gravity of the offence was on the "mid-to-lower end of the spectrum."[4] R received a suspended sentence and 15-months probation.

vi. [2011] Edmonton No. 090658113P1 (ABPC)

[4] 2012 ABPC 24 at para 43.

In (June 24, 2011) Edmonton No. 090658113P1 (ABPC),[5] a 26-year-old man strapped a cell phone to his shoe and took "up-skirt" photos of female customers at a drug store. The Court accepted a joint submission on sentencing, and sentenced Mr. C to 12-months probation.

vii. 2011 ABQB 312

In **2011 ABQB 312**, Mr. K, a community youth worker was convicted of two charges of possession of child pornography, one charge of engaging in voyeurism, and one charge of making voyeuristic materials. K had allowed teenagers to use his apartment's spare bedroom as a place to drink and have sex and let three young men use his video camera to film their (consensual) sexual encounters with young women and girls. The young men then sold the footage to K without the girls' knowledge or consent. One of the victims, 16-year-old JW, read her victim impact statement in Court. The Court found that her statements were, "to say the least, disturbing and epitomized that of a young teenage girl, whose trust was abused and has literally been scarred for life." JW told the Court that she "finds it extremely hard to trust another person and that is the most disgusting feeling, 'almost like you shower and shower but you can never really get clean.'" She further stated that, "[K] has taken a part of me that should never be taken from a person: my self-worth." [6] Although the Crown recommended a global 15-18 month sentence, the trial judge sentenced K to a 27-months imprisonment. The trial judge found use of sophisticated camera equipment to be an aggravating factor on sentencing, writing:

> Modern camera and telecommunication technology potentially allows a voyeur to use much more sophisticated mechanical and electronic tools that would be far more difficult for a complainant or other person to detect. I believe I may take judi-

[5] *Only accessible through para 56 in 2012 ABPC 24.*
[6] 2011 ABQB 312 at para 115.

> cial notice that commercial sources have developed in the past decade that provide to the public highly sophisticated surveillance and recording apparatus, such as pinhole cameras, cameras disguised to appear to be innocuous objects such as pens, or smoke detectors, and wireless communications systems to connect cameras to recording devices and computers. There are no doubt legal and valid reasons for a person or business to employ these kinds of technologies, but their potential for misuse is easily understood when one reviews the instances where voyeuristic activities led to criminal convictions. I think it is a strongly aggravating factor that a voyeur uses sophisticated and difficult to detect technologies for illegal purposes for the simple fact of reducing the probability that the person being observed would detect that they were observed surreptitiously. Deployment of that kind of technology also indicates the voyeurism was a highly planned and premeditated activity. That is not to say that use of a 'low-tech' approach is a mitigating circumstance, rather that an unsophisticated observation scheme would be a neutral factor" [emphasis added.]: *R v Rudiger*, 2011 ABQB 312 at paras 208-211.

On appeal in **2012 ABCA 14**, the Alberta Court of Appeal found that the sentence imposed was not unfit, but reduced it to 18-months imprisonment because the 9-month sentence for child pornography offences should have been served concurrently with the sentences for other offences, rather than consecutively. However the Court of Appeal also imposed a 2-year period of probation in addition.

II. BRITISH COLUMBIA

i. 2015 BCPC 7

In **2015 BCPC 7**, a restauranteur, Mr. BO, pleaded guilty to voyeurism after installing a video camera in his restaurant's washroom. Noting that BO, "described a sense of excitement in the surreptitious act of watching patrons in secrecy,"[7] and finding that BO's conduct was "thought

[7] 2015 BCPC 0007 at para 13.

out, planned in advance, and deliberate,"[8] the Court concluded that a conditional discharge would be contrary to the public interest. As the Court wrote:

> It is my view that given the times in which we live, where privacy in the public sphere has been eroded by the prevalence of surveillance cameras or the ready deployment of cell phone cameras in public places, the expectation of personal privacy in highly private places must be protected. Members of the public who use the restroom facilities of any bar, restaurant or similar establishment must be assured of their utmost privacy. The law must protect that privacy by ensuring a deterrent and denunciatory sentence which sends the message that a criminal record is likely to result if criminal acts involve a serious breach of personal privacy.[9]

BO received a 12-month suspended sentence with probation.[10]

ii. 2014 BCSC 284

2014 BCSC 284 is a case involving domestic voyeurism and sexual assault. After physically assaulting his common law partner, Mr. B moved out of the residence he shared with her and her son. Later, while cleaning B's things, the ex-partner discovered a camcorder at the back of the television cabinet. Her son also found a tiny surveillance camera among B's possessions. The camcorder showed that B had touched and penetrated the ex-partner while she was asleep or unconscious. Other footage showed (i) naked, underage girls rollerblading and children playing in the park, (ii) men and women using the bathroom in their home, and (iii) a woman taking a shower.[11] B's computer contained more explicit images (and featured a photo of a young woman with her legs spread and genitals visible as the desktop background image).

B pleaded guilty to two counts of voyeurism and one count of sexual assault. During sentencing, the Court noted that B's actions had a profound effect on the victim:

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[8] 2015 BCPC 0007 at para 27.
[9] 2015 BCPC 0007 at para 38.
[10] 2015 BCPC 0007 at para 39.
[11] 2013 BCSC 307 at para 14.

> As [the victim] explains in her victim impact statement, the change to her life involved unrest, turmoil, anxiety, depression, and blows to her dignity, character, and self-esteem. Her sleep is seriously affected even three years later by anxiety and by recurring nightmares of a monster climbing walls to get through windows carrying a camera. The offences shattered her sense of safety in her own home, and left areas of her home and things in it feeling tainted. […] Although [she] did not know until later, when the videos were found and viewed, that you, [Mr. B], had sexually assaulted her, she did notice discomfort, both vaginal and anal, at what she infers was the time of the sexual assault.[12]

The Court also cited from a psychologist's report, which stated that:

> [Mr. B] thought [the victim] was playing a 'game' with him, where she pretended to be sleeping, and described him waking her up with sexual activity as part of their sex life (i.e., "I played along"). He seemed to endorse some fairly entrenched attitudes related to the "games" women play (i.e., pretend to be asleep) and how they play these games because they want to engage in sexual activity. He was unable to think of alternative explanations for such behaviour. He also shared how women would initially say a particular sex act (e.g., anal sex) was off limits only to agree to it at a later date; it was for this reason that he believed it was okay to engage in these "off limit" behaviours while [she] slept.[13]

B was ultimately sentenced two years and nine months imprisonment.

iii. 2014 BCPC 361

In **2014 BCPC 361**, the offender, Mr. P, hid a camera in a bookstore washroom in order to monitor that washroom from his smartphone. Less than an hour later, a store employee found the camera and called the police. Seven women used the washroom and were secretly filmed in that time. Upon arrest, Mr. P gave a brief statement and blamed his conduct on the Internet:

He had, according to the information provided to the court, for many months prior, been observing adult pornography on the Internet. His interest focused on what could be described as

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[12] 2014 BCSC 284 at paras 9-13.
[13] 2014 BCSC 284 at para 26.

voyeurism pornography; in other words, observing people on the Internet who either were unaware that they were being photographed in various sexual activities or, alternatively, were actors acting like they were unaware of being filmed. That observation of pornography led [Mr. P] to investigate and eventually obtain the necessary camera equipment.[14]

The Court rejected this assertion, and held instead that P's actions were planned and deliberate. P was ultimately given a 4-month conditional sentence followed by 20-months probation, with conditions. Some conditions of Mr. P's probation included not having internet at home, not possessing pornography, and attending therapy or a sex-offender treatment program.

iv. 2010 BCPC 155

In **2010 BCPC 155**, 32-year-old offender Mr. JHN pleaded guilty to one count of voyeurism. He had driven around late at night to observe women changing and become obsessed with two girls aged 15 and 18 who lived with their parents. For four months, JHN repeatedly visited the girls' residence at night. At one point, he climbed onto the roof of the victim's home to peer into their windows. JHN received a suspended sentence with a year of probation and counselling.

v. 2010 BCPC 155

In **2010 BCPC 155**, the 32-year-old offender JHN pleaded guilty to one count of voyeurism. He had driven around late at night to observe women changing and become obsessed with two 15 and 18-year-old girls who lived with their parents. For four months, JHN repeatedly visited the girls' residence at night. At one point, JHN climbed onto the roof of the victims' home to peer into their windows.

JHN received a suspended sentence with a year of probation and counselling.

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[14] 2014 BCPC 361 at para 9.

vi. 2010 BCPC 182

In **2010 BCPC 182**, R was charged with voyeurism and possessing child pornography after surreptitiously recording people at a park from his van. Police discovered R in his vehicle, half-naked and surrounded by wadded tissues. R told police that he was filming "yummy mummies." After reviewing the camera and recorded footage, police discovered that R has actually been filming young (sometimes naked, mostly female) children at the playground. Some footage showed close up images of the genitals of young girls. At trial, the Court found R guilty on all counts.

R appealed, asserting that the trial judge erred in finding that video subjects had a reasonable expectation of privacy at the lakefront park.[15] The British Columbia Superior Court rejected this argument, stating:

> Technology has the potential to dramatically change the reality of all such considerations and expectations. In this case the videotape dramatically magnifies and permanently captures the genital areas and buttocks of the young girls who were photographed. It is as though, as I have said, an individual was positioned but a few feet away from these children. Thus, each reasonable expectation is altered. Observations are not fleeting, they are extended in the sense that the video is more than 40 minutes long and permanent in the sense that a recording has been made. Observations are not muted, they are enhanced. Furthermore, the observer is not removed or distant but is, in real terms, immediately adjacent to the child being observed. There are few privacy interests which are more personal and more intimate or which impinge on personal dignity more forcefully than those captured on this videotape.[16]

The Court also rejected R's other grounds for appeal: (i) that the trial judge erred by admitting the video into evidence under s 24(2) of the *Charter*, and (ii) that the trial judge erred by finding that the recordings constituted child pornography.

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[15] 2011 BCSC 1397.
[16] 2011 BCSC 1397 at s 110-111.

viii. 2010 BCPC 475

In 2010 BCPC 475, 59-year-old RHC pleaded guilty to voyeurism after videotaping his 13-year old granddaughter using the shower in his hotel room. RHC hid the small camera in the bottom of his shaving bag.

In her impact statement, the child victim told the Court that, "her self-confidence has been shattered in an unfixable way and the breach of trust has strained her relationship between her and her father's side of the family."[17] Nonetheless, noting that RHC was genuinely remorseful, that psychological reports suggested he had a low risk of reoffending, and that a criminal record would make it difficult for him to work, the Court granted RHC a conditional discharge with 3-years probation.

ix. 2009 BCPC 381

In 2009 BCPC 381, a restauranteur, Mr. H, installed a surveillance camera in a dry storage room and recorded a female employee changing. The camera was connected to H's desktop computer, and H stored a video of his female employee changing into her uniform in a folder labelled "fun.wmv." The recording was later discovered by a male employee, who reported it to the police.

At trial, the Court held that although the multi-purpose storage room was sometimes used as a change-room, it was not clearly "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."[18] The Court found that the room was only used as a change-room, "as a matter of convenience and was not designed for

[17] 2010 BCPC 475 at 16.
[18] 2009 BCPC 381 at para 34.

it" and further noted that the room did not have a lock.[19] As a result, the Court concluded that one of the requirements for proving voyeurism was not made out and H was acquitted.

x. 2008 BCPC 130

In 2008 BCPC 130, a dentist pleaded guilty to voyeurism after hiding a camera in the waste-basket of his office bathroom, reportedly to prevent office supply theft. The camera captured footage of one of his female employees using the bathroom. She discovered the camera and reported it to police. At trial, the Court found that Mr. L was under a lot of stress and had expressed remorse for his actions. Noting that civil litigation was pending, the Court held that a 12-month probationary term was a fit sentence.

III. MANITOBA

i. 2015 MBPC 20

In 2015 MBPC 20, a Mr. W, a foster parent, pleaded guilty to nine counts of voyeurism, one count of making child pornography, one count of possessing child pornography, and one count related to carrying a spring-loaded knife. Mr. W had hosted foster children for sixteen years. In November 2012, one foster child discovered a pen camera in the home. Following this report, police began an investigation and subsequently found numerous voyeuristic recordings among W's possessions. The Court found the facts of the case to be "appalling" and sentenced W to 3-years imprisonment, along with several ancillary orders including prohibitions on possession of firearms and attending places where persons under 16 are present, an order to provide a DNA sample, an order to comply with the Sexual Offender Information Registry Act, and an order to forfeit all items seized during the investigation of the offences.

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[19] As the Court further writes, "None of the male employees removed their underwear when changing into their uniform and did not expect the complainant to do so […] The complainant sometimes did not wear undergarments at work": 2009 BCPC 381 at para 33.

ii. 2013 MBPC 39

2013 MBPC 39 is a case involving workplace voyeurism. 41-year-old GB became obsessed with F, his 19-year-old subordinate at work. He monitored her menstrual cycle, hoping to impregnate her. He also secretly watched and videotaped her while she showered at work. On one occasion, he put on her underpants and ejaculated into them while she was in the shower. GB described these events to his pastor in 2005, and sought discrete monthly counselling with the pastor until 2011. In 2011, after GB's wife discovered voyeuristic recordings of F on the family computer, GB's pastor decided to reveal to F (who was also a member of his parish) that someone had "sinned against her." GB was subsequently charged and pleaded guilty to one count of voyeurism.

At trial, the Crown recommended a conditional sentence, while defence counsel sought a suspended sentence. Although the Court noted that GB's actions were extreme, disturbing, "opportunistic and predatory," it held that there was no breach of trust involved.[20] Mitigating factors on sentencing included the fact that GB had no criminal record, had sought counselling, and posed a low risk of reoffending. GB received an 18-month conditional sentence, which included terms such as reporting to his supervision officer every other day and a prohibition on communicating with F or coming within 200 metres of her places of work, worship, residence or schools.

iii. 2013 MBPC 47

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[20] Describing the impact that GB's actions had on F, the Court writes, "[F's] life has been turned upside down as a result of these matters. It is unclear to what degree the impact to her is a result of GB's actions, her Pastor's inaction, or the perceived reaction of the congregation. To [F], it is irrelevant. The trusting life she led as part of the same congregation as [GB] is gone. She cannot fathom how people she believed would protect and support her could hide this offending conduct from her for so many years. If this blow was not enough, she anguished over the possibility that she might have contracted a sexually transmitted disease, or worse, borne [GB's] child. The impact to [F] has been pervasive and life-changing. It has impacted her employment, her friendships and her relationships": 2013 MBPC 39 at paras 21-23.

In **2013 MBPC 47**, 32-year-old Mr. CS pleaded guilty to several charges including voyeurism, forcible confinement, and sexual assaults committed against against three former girlfriends. CS had been in intimate relationships with three of his victims and had also offended against strangers. Those women that C dated shared common traits: all were "young, innocent, vulnerable women, all of whom were virgins."[21]

CS committed violent sexual, physical, and mental assaults on his victims. He manipulated his girlfriends and took photos of their naked bodies while they slept.[22] As the Court notes:

> […] many of the offences here are horrific. They include numerous sexual assaults over extended periods of time. [CS's] degree of moral blameworthiness is very high. He sought out a particular type of victim; young and vulnerable. He manipulated and abused them. And in terms of the harm done, it is substantial. That is clear when the facts are reviewed and is clear from the victim impact statement delivered by [one victim]. The harm they suffered was entirely a result of [CS's] conduct. They are in no way to blame for the harm they have suffered.[23]

CS also watched a woman tanning in the nude at a tanning salon, and recorded a video of a woman changing through her bedroom window.

After he was charged, CS sought various treatment services. After taking an Anger Management course, the facilitator noted that CS had said, "my lawyer told me to take this program, it should get me a year off my sentence."[24] CS' guilty plea, limited criminal record, and remorse all con-

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[21] 2013 MBPC 47 at para 79.
[22] For example, "[victim 1] later found nude pictures of herself in [CS'] computer room. The pictures were taken without her consent. She indicated [CS] would remove her clothes, position her nude body and take extremely intimate pictures of her from different angles. These included pictures with her legs spread as [CS] had positioned them. She tried to take the pictures back by placing them in her backpack before she left the residence. But once she had left she realized they were no longer in the backpack. She believes [CS] took the pictures back and that he had copies of these pictures on his computer.": 2013 MBPC 47 at para 14. Similarly, "[CS] asked [victim 2] several times if he could take nude photos of her. She refused. He then asked her to let him take suggestive photos of her and again she refused. Despite these clear objections, she woke one night to find him taking nude pictures of her. She confronted him and told him his actions were creepy. She then became suspicious so when she had an opportunity, she checked his phone. She found nude photos and nude videos of herself. She had not consented to any of these recordings being taken": 2013 MBPC 47 at para 30.
[23] 2013 MBPC 47 at para 104.
[24] 2013 MBPC 47 at para 48.

stituted mitigating factors on sentencing. He ultimately was sentenced to 10.5-years imprisonment, in addition to several ancillary orders, including prohibitions on possessing firearms and communicating with his victims, and requirements to provide a DNA sample and comply with the Sexual Offender Information Registry.

IV. NEWFOUNDLAND AND LABRADOR

i. 2015 CanLII 10931 (NLPC)

In **2015 CanLII 10931 (NLPC)**, a 57-year-old office manager used his iPhone to record a 23-year-old coworker, S, while she used the washroom at work. He attempted to record her three times, and hid his iPhone in various places in the washroom. At trial, Mr. M stated that he did not record the complainant for a sexual purpose, but rather sought to catch her texting with her phone at work. The Court rejected this suggestion, writing:

> [Mr. M]advised the author of the pre-sentence report that there was no sexual intent in his actions. However, what did [M] think he was going to be recording? What do people do in washrooms? [M] must have known that he was going to be video recording [S] performing private acts in which portions of her body might be revealed. To suggest otherwise is nonsense. Thus, I do not view [M's] lack of sexual intent as diminishing his moral responsibility for this offence.[25]

M did, however, acknowledge that his conduct was criminal, and pleaded guilty to voyeurism.

In her victim impact statement, S stated that she left her job because she could no longer work with the offender. She suffered financial hardship as a result, and the Court recognized that, "It is a perverse result for [S] to lose her employment while [M] maintains his."[26] S also described developing depression and anxiety as a result of M's actions. The Court wrote:

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[25] 2015 CanLII 10931 at 54.
[26] 2015 CanLII 10931at para 18.

> Setting up a device in a washroom to videotape a female employee is not only a gross breach of her privacy, but constitutes a serious criminal offence. It sends a chilling message to women that even the washrooms at their places of employments are not safe.[27]

Given that M was a first-time offender, however, the Court suspended his sentence and placed him on probation for twelve months.

ii. 2011 CanLII 13633 (NLPC)

In **2011 CanLII 13633**, the offender, FG, pleaded guilty to one count of voyeurism after recording his 17-year-old stepdaughter changing in her room. He claimed that he recorded her for disciplinary reasons and not for a sexual purpose, but admitted he had made a visual recording of a person in circumstances giving rise to a reasonable expectation of privacy contrary to s. 162(1)(a) of the *Criminal Code*. Despite the fact that the video showed F picking up his stepdaughter's underpants and sniffing them on camera,[28] the Crown reluctantly accepted that the act was not done for a sexual purpose (and as a result charges were not laid under s. 162(1)(c)). The Court found that:

> The damage to the complainant's sense of personal security was high. The expectation of privacy was extremely high. It seems to me that the principal focus of the sentence here should be denunciatory. It should also strive to deter this person and others from this type of offence. In this age of computers, "iPhones", facebook, and YouTube, there is a very real risk that images like this could be disseminated around the world. The sentence should also reflect the concern of the court to ensure the protection and integrity of children. Even though this person was not an infant, she was very much a young person and this behaviour must be sharply denounced.[29]

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[27] 2015 CanLII 10931 at para 52.
[28] The Court writes, "His counsel explained this act by telling me that his client assured him that he was merely checking to see if the undergarment needed to be laundered. Crown Counsel seemed skeptical about this."
[29] 2011 CanLII 13533 at 9-10.

Nevertheless, given that FG was a first time offender, and given that the case law suggested a low sentencing range, the Court sentenced him to a conditional sentence of 3-months imprisonment served in the community, a 3-year period of probation and several ancillary orders, including being subject to continuous electronic monitoring during his period of incarceration, an order not to communicate with his step daughter, an order to provide a DNA sample, and order of forfeiture of the video camera used to make the recording.[30]

V. ONTARIO

i. 2015 ONSC 2391

In **2015 ONSC 2391**, 56-year-old Mr. K pled guilty to two counts of making child pornography with respect to his common law partner's teenage daughter and her friend. He also pled guilty to possessing child pornography with respect to the same girls, and three counts of voyeurism with respect to one victim, her mother, and 15 other women and girls. None of the eighteen individuals captured on the videos were aware they were bringing taped and none consented. Of the eighteen, seven were under the age of 18.

The Court listed breach of trust, the length of time of the offences, the sheer volume of images, planning and sophistication of the acts, the number of victims and victim impact statements, as well as breach of recognizance and lack of remorse as the most egregious aggravating factors. It found that while K was a first-time offender and held a high rank in society, it was clear that his obsessions were in-depth and meticulous enough that he required a severe consequence. Mr. K

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[30] The Court writes, "…I agree with Crown counsel that the sentences cited all seem to be on the low side, but each case presents with compellingly different facts that can nearly all be distinguished from the case before me. Additionally, in some cases, the Crown has proceeded by way of summary conviction which would automatically reduce the range of sentence since the maximum for these offences would be six months imprisonment. In this case, the Crown proceeded by indictment which automatically increases the range up to a maximum of five years. […] Most of the cases I have reviewed seem to suggest that this criminal activity of watching is lower on a scale of blameworthiness than an actual touching. This theory, in my respectful view, tends to minimize the traumatic effect of this crime on the victim as an intrusion upon his or her privacy.": 2011 CanLII 13533 at 17.

was ultimately sentenced to 5 years and 3 months in prison (less pre-sentence custody), along with several ancillary orders including prohibitions on contacts with minors and communications with the victims, forfeiture of all items seized during the investigation, possession of firearms and on contacting the victim, an order to provide a DNA sample, and an order to comply with the Sexual Offender Information Registry Act.

ii. 2015 ONSC 6813

In **2015 ONSC 6813**, a high school teacher, Mr. J, was charged with voyeurism after using a pen camera to surreptitiously record female students and staff. Mr. J's pen camera emitted a red light, and a fellow teacher noticed that he often pointed it at his female students. Police later discovered that the pen contained a USB drive and had been used to take video recordings. Officers found three active video files on the seized camera: one of an empty classroom, one of an adult woman (panning from her face to her breasts) and one of a teenage girl (again, panning from face to breasts several times). Forensic analysis revealed 17 more videos. 27 of the 30 surreptitiously recorded individuals were female high school students. Although all subjects were fully clothed, a number of the recordings focused exclusively on girls' breasts.[31]

The key issues at trial were (i) whether the video subjects had a reasonable expectation of privacy in the circumstances, and (ii) whether the recordings were made for a sexual purpose. The Court concluded that the students had an expectation of privacy, but held that it was not satisfied beyond a reasonable doubt that the recordings had been made for a sexual purpose. To the latter point, the Court writes:

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[31] Discussing the students' reasonable expectation of privacy at school, the Court notes, "It may be that a female student's mode of attire may attract a debate about appropriate reactions of those who observe such a person leading up to whether there is unwarranted and disrespectful ogling. That being said, it is equally reasonable to expect that close-ups of female students' cleavage or breasts will not be captured by a pen camera as a permanent record. There is no dispute that the female students had a subjective expectation of privacy": 2015 ONSC 6813 at 46-47.

> The determination of whether an image or images are intended to cause sexual stimulation must be assessed on the totality of the evidence. Nudity, sexual contact or sexual posing, indicia of sexual stimulation, whether the images are associated with sexual activities, other indicia of sexuality, whether the images are a series in a collection of sexual materials or whether they have been surreptitiously taken are all relevant considerations […] There was no evidence advanced in this trial regarding the accused's purpose or sexual interest in recording the students' cleavage or breasts. Of course, unless the accused testified as to his purpose, reliance must be made on the totality of the circumstantial evidence. […] Unlike other cases proffered by the Crown attorney, the students here are fully clothed and not so situated, that I am persuaded that the recordings, even with images that predominately display the students' cleavage, have as their focus the student's sexual organs. While a conclusion that the accused was photographing the student's cleavage for a sexual purpose is most likely, there may be other inferences to be drawn that detract from the only rationale conclusion required to ground a conviction for voyeurism.[32]

Left with reasonable doubt as to whether the recordings were made for a sexual purpose, the Court acquitted J.

iii. 2014 ONCA 69

In **2014 ONCA 69**, MN was convicted of voyeurism and extortion after using his iPhone to record his sexual partner while she was coming out of the shower. On appeal, MN's counsel argued that the word "surreptitiously" includes a *mens rea* element, and asserted that the trial judge was equivocal about whether MN intended to record the victim without her knowledge. The Ontario Court of Appeal dismissed MN's appeal[33] and his attempt to appeal to the Supreme Court of Canada was unsuccessful (2015 CanLII 66246).

iv. 2014 ONCJ 130

In **2014 ONCJ 130**, the offender, Mr. L, took photos of women at a clothing-optional beach. One woman told him it was "not okay" for him to photograph her without her consent and re-

[32] 2015 ONSC 6813 at s 68-77.
[33] 2015 CarswellOnt 13002.

quested that he delete the photos. L agreed to delete the photos he had taken of her naked body. She later alerted the lifeguards, who called the police. L was subsequently charged with voyeurism and mischief.

At trial, L asserted that he photographed the nude women for "aesthetic" and not sexual purposes. He further argued that there were no signs prohibiting photography at the beach. The Court held that he did not photograph the women surreptitiously. The Court also found that while his victims had a subjective expectation of privacy in the circumstances, L did not photograph them "in circumstances that give rise to a reasonable expectation of privacy."[34] Ultimately, the Court determined that, "The same photographs preserve no more of the nudity the beachgoers elected to expose than would observation by the naked eye [,] [and] [t]here is no evidence of concern that any nude photography would be disseminated to others by any means."[35]

With respect to the mischief charge, the Court found that L did not willfully interfere with his victim's enjoyment of the property. The Court wrote:

> I have already held that [the victim's] privacy expectations did not, in all the circumstances, reasonably include an expectation that she would not be photographed while sunbathing on a nude beach. To now hold that her subjective annoyance at such photography makes out the offence of mischief would permit unreasonable sensibilities to dictate, indeed criminalize, otherwise lawful conduct. Imagine a teenage boy who, on occasion, would look up from his book and gaze momentarily at the nude [victim] as she frolicked by the shoreline. Imagine, further, that [the victim], took offence on learning of the adolescent's conduct, sincerely believed that his glances had ruined her day at the beach and reported the event to the police. Given the obvious limits of reasonable privacy expectations for nude sunbathers on public clothing optional beaches, I simply cannot conclude that this hypothetical interference with [the victim's] subjective expectation of privacy, no matter how earnestly held, could ground a charge of mischief for interference with her lawful enjoyment of the beach.[36]

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[34] 2014 ONCJ 130 at para 40.
[35] 2014 ONCJ 130 at para 40.
[36] 2014 ONCJ 130 at para 49.

L was acquitted on both charges.

v. 2014 ONSC 674

In **2014 ONSC 674**, 72-year-old Mr. S pleaded guilty to possession of child pornography, make available child pornography and voyeurism. S's IP address had been flagged by international authorities as distributing child pornography on the eDonkey network, originating from Toronto, ON. The female children victimized ranged from 4 to 11 years in age. Authorities seized S's computers and discovered, among other things, videos of his 13-year-old step-granddaughter dressing and undressing. In total, a collection of 22,696 unique images of child pornography and 586 videos depicting child sexual abuse were seized.

The Court cited mitigating factors, including his age and that "…[a]part from his problems with child pornography, [the defendant] appears to be a person of good character."[37] S was ultimately sentenced to 4-years imprisonment (less pre-trial time spent in pre-trial custody) to be served concurrently for all counts, along with several ancillary orders including mandatory sex-registry compliance, and a prohibition from using the internet.

vi. 2011 ONCJ 133

2011 ONCJ 133, 34-year-old Mr. PD was convicted on four counts of voyeurism after distributing a sexually explicit video of his former girlfriend on Facebook. He made the video without the victim's knowledge or consent. After the relationship ended, PD posted the video to his Facebook page and sent the video to a number of the victims' friends and family members.[38] At

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[37] 2014 ONSC 674 at 11.

[38] As the Court notes, "The plan was designed to achieve maximum embarrassment. On Mr. [PD's] own evidence, he published the video to humiliate the victim. Given his past relationship with the complainant, he was aware of the fact the complainant held her brother in high regard and that he was someone she looked to for approval. It was no accident that [PD] chose to forward the email to her brother to 'prove' to the victim he possessed a sex video of her. In doing so he achieved his purpose of maximizing the embarrassment to the victim. In the words of the victim, he 'tortured me by telling me he was sending the video to my brother.' By forwarding the video to their mutual friends,

trial, Crown counsel argued that distributing the video online was an aggravating factor on sentencing. Following a hearing, the Court held that, "the Crown had failed to prove that the posting on Facebook, for the very short time that the account was active, and the sending of the emails, had resulted in a general release of the video to the internet."[39]

The Court sentenced PD to 7-months imprisonment followed by 2-years probation. With respect to PD's distribution of a voyeuristic recording, the Court wrote "The offence of distributing the video under section 162(4) is the most serious of the voyeurism offences. Had the video been shown to have been posted on the internet I would have considered a sentence of 6 months. However, in light of the fact its circulation was more limited, a sentence of 5 months is appropriate."[40]

vii. 2011 ONCJ 905

In **2011 ONCJ 905**, Mr. TR faced charges of voyeurism for having posted intimate photos of his 18-year-old ex-girlfriend on Facebook. The Crown particularized the offence as voyeurism involving the surreptitious recording of "explicit sexual activity." Mr. TR's counsel argued that the pictures — which show the victim naked, on her knees, and in sexual poses — did not depict explicit sexual activity but instead "sexualized nudity."

The Court dismissed TR's application for summary dismissal of the charges, holding that at least several photographs depicted explicit sexual activity. In oral reasons, the Court found:

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he also ensured, by design, the continued and long term victimization of the complainant." (emphasis added): 2011 ONCJ 133 at para 21

[39] 2011 ONCJ 133 at para 5. However, the Court also finds that, "The accused lost control of the video when he posted it on Facebook and forwarded it as an attachment to emails. But for the fact that the accused was almost immediately contacted by the police resulting in him attempting to cover his tracks by closing his newly minted Facebook account, the distribution of the video would likely have been much more extensive. The steps taken to limit its distribution appeared more by fluke than design": 2011 ONCJ 133 at para 34.

[40] 2011 ONCJ 133 at para 56.

> Consideration of the parts of the bodies depicted, the nature of the depiction; the circumstances and context wherein the images were captured; consideration of all the surrounding circumstances, including such factors, as noted, as the age of the complainant and applicant, the nature of their relationship and the testamentary reference to the applicant's reported intention to release naked images of the complainant for wider public viewing; are all factors that could form the basis for a reasonable conclusion that "explicit sexual activity" was depicted by one or more of the images, and not simply so-called "sexualized nudity."[41]

No further reasons were reported in this case.

viii. 2010 ONCJ 347

In **2010 ONCJ 347**, Mr. M was convicted of voyeurism after non-consensually videotaping consensual sex with his former partner. After Mr. M and the victim ended a long-term romantic relationship, he her asked for one more "romantic date" so he would have "closure." She agreed, and they met at a hotel to have consensual sex. The victim was restrained and blindfolded during the encounter. At one point, the blindfold slipped and the victim saw the light of a video camera. She then learned that M had been filming their sexual activity, including zooming in on her face and genitals, without her knowledge or consent. Horrified and upset, the victim took the videotape and reported M to the police. Officers executed a search warrant at M's home, and found photographs of the victim on his computer taken earlier in the evening.

The Court found that M had recorded the victim without her consent, and convicted him of two counts of voyeurism. The victim presented an impact statement, which the Court described as follows:

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[41] 2011 ONCJ 905 at para 29.

She reports that the loss of personal intimacy and the fear that the defendant may still have a copy of the images for distribution has caused "numerous emotional breakdowns". She also fears retaliation by the defendant because she reported the matter to the police.[42]

The Court further noted that:

> […] the victim's fear that the images in question will be distributed is, no doubt, prompted by the fact that modern technology makes it so easy to share images quickly and widely. In this regard, it should be noted that the still images of the victim in the bathtub were later found by the police downloaded on the defendant's computer. Nevertheless, this fear appears not to be well founded since the defendant turned over the recording at the scene of the crime and there is no suggestion he had a second copy. In addition, there is no evidence that the defendant will retaliate or that he does not understand that to do so will attract an appropriate response by the authorities.[43]

Given that M was a first-time offender with stable employment, the Court ultimately suspended his sentence and ordered him to complete 18-months probation.

ix. [2008] OJ No 2803 (ONCJ)

In [2008] **OJ No 2803**, Mr. G was charged with mischief and attempted voyeurism after entering the women's washroom of a condominium pool and trying to spy on a woman in the shower. The Court determined that Mr. G's actions constituted attempted voyeurism because he entered the women's washroom, had his pants unzipped when he was caught, and ran when the complainant yelled at him. G's appeal from his conviction was dismissed.[44]

x. 2008 ONCJ 476

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[42] 2010 ONCJ 347 at para 4.
[43] 2010 ONCJ 347 at para 12 [emphasis added].
[44] 2008 CanLii 35678.

In 2008 ONCJ 476, the offender, Mr. G, pleaded guilty to voyeurism after filming his former wife while she showered. After noticing Mr. G's hand and camera protruding through the bathroom window, the victim, Ms. X, screamed and called 911. Police seized the camera, sought a warrant to search the device, and forensically recovered a deleted video recording. The Court noted that G had previously taken photographs of her without her consent.

At trial, G claimed that he made the video for his own sexual gratification and did not intend to distribute the video. The Court accepted that "there was no evidence that the defendant took any steps to distribute images of the complainant, for example, on the internet" but also noted that "given the time frame involved here after he was discovered, these last images could not have been distributed in any event."[45] Noting the lack of case law available, the Court suspended G's sentence and placed him on 18-months probation. Ms. X's victim impact statement indicated that, "she no longer trusts men, has a fear of contact with men and so fears windows and she has covered the windows in her residence with black garbage bags and duct tape. She is being counseled through a local woman's shelter and likely will need much more medical therapy to overcome the effect of this offence upon her."[46] Nonetheless, the Court noted during sentencing that, "While the voyeurism of the defendant here was an abusive attack on the complainant's personal privacy and while the effect of this on the complainant was, as already described, devastating, the offence is one of voyeurism, not of physical assault."[47]

VI. QUEBEC

i. 2015 QCCQ 4512

In 2015 QCCQ 4512, the offender, Mr. P, pleaded guilty to taking "up-skirt" photos in a department store. When Mr. P's phone was seized, police found hundreds of similar upskirt pho-

[45] 2008 ONCJ 476 at para 22.
[46] 2008 ONCJ 476 at para 13.
[47] 2008 ONCJ 476 at para 29.

tos. Noting that P was gainfully employed, pleaded guilty, and was seeking treatment, the Court ordered a conditional discharge with 1-year probation.