TECHNOLOGICALLY-FACILITATED VIOLENCE:
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;
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> **(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
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> **(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
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> **(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. 2017 ABCA 187

In **2017 ABCA 187,** Mr. K, 39 years old at the time of trial judge's sentencing, was a teacher, coach and mentor for Big Brothers and Big Sisters. He pleaded guilty to multiple accounts of sexual interference, multiple sexual assaults, producing child pornography, possessing child pornography and voyeurism. Mr. T gained access to one of the children, Mr. JF, through his affiliation with Big Brothers as a mentor. Mr. T's sexual interference with Mr. JF began when Mr. JF was 9-years-old and occurred over several years, even after the Big Brothers program terminated their official mentorship. This included multiple sexual assaults when JF was between the ages of 11 and 15, occurring at times when Mr. K was providing child care or playing other supportive roles for Mr. JF. The occurrences of interference increased in severity over several years and included producing child pornography.

The sexual assault and producing child pornography in relation to a second child, Mr. JTE, occurred when Mr. K took photos of the child's penis and anal area and touched the child to greater expose his anus while he was sleeping. There was one incident of sexual interference when Mr. K was babysitting a third child, Mr. JY, when he was 9-years-old. Mr. K was in a position of trust and authority with Mr. JF, Mr. JTE and Mr. JY at the time of the abuse. Mr. K further admitted to voyeuristically filming three change rooms approximately 20 times in 2012 which included 45-50 videos that were considered child pornography. The trial judge sentenced him to a 12-year global sentence as well as an order to provide a DNA sample, be registered as a sex offender for life, a twenty year limitation on his contact with children, the victims, and from working or communicating with children, as well as a ban from using the internet or other digital networks unless supervised by an adult; a communication ban with the complainants, a weapons prohibition, and a victim surcharge fee.

At the court of appeal, Mr. K appealed his global sentence of 12-years' imprisonment, arguing it failed to reduce his sentence for "his early guilty plea, remorse, counselling, favourable FAOS and Pre-Sentence Report. [The trial judge] also failed to deduct the 6 months he allowed for the period that the appellant was on virtual house arrest for the 2 years prior to sentencing."[1] The court's majority, Justice Merger and Justice O'Ferall held that the trial judge properly accounted for most of the disputed factors, however, they found the trial judge did not fully account for the time Mr. K was on virtual house arrest while on bail, therefore imposing an unduly harsh sentence. Taking these factors into account, as well as the lack of additional violence in Mr. K's actions, the court reduced the global sentence to 9 years. Justice Martin, in dissent, would have called for a global sentence of 10 years, taking into consideration Mr. K's early guilty plea, remorse, and the trial judge's failure to consider the totality of the final sentence, stating: "in my view, the global sentence of 12 years is unduly harsh and long in the circumstances. I say this after considering the numerous cases identified by the Crown and appreciating society's growing recognition of the seriousness of sexual offences against children as reflected through this court's admonishment of child pornography and sexual interference, which activities are inherently harmful and impose clear and present danger to children".[2]

In 2018, **2018 ABPC 36**, the complainant, Mr. JF, applied to have the publication ban in relation to the charges against him rescinded. He argued it would help him with his rehabilitation and help other victims of sexual assault who could then identify him and contact him for support if his name was known publicly. The court held that it did not have the jurisdiction to remove the ban on the child pornography offences, as it is mandatory and non-discretionary, but could rescind the ban on the sexual assault charge related to Mr. JF if there was a material change in circumstances. Counsel for the accused argued that rescinding the ban could hurt its client, however, the court noted that the ban was not to protect the accused but the victim. The ban

[1] 2017 ABCA 187 at para 6.
[2] 2017 ABCA 187 at para 39.

for the sexual assault charge was lifted because Mr. JF was an adult now and wanted the ban rescinded so he could "tell his story".

Also see: 2016 ABPC 158 (Trial); 2018 ABPC 36 (Application to have publication ban rescinded)

ii. 2016 ABPC 25

In **2016 ABPC 25**, Mr. M, a 32-year-old man, pleaded guilty to multiple accounts of sexual assault, choking, common assault, and voyeurism, against eight women. Mr. M attacked three different women on three different occasions, including a 14-year-old girl. Following his arrest Mr. M called his friend asking him to dispose of a tote bag and a hoodie of his. The friend did not comply but instead called Mr. M's girlfriend and told her about the request. Mr. M's girlfriend called the police after she found a USB in the tote bag along with various sets of women's underwear in the apartment. The USB contained photographs of five women, asleep, in which Mr. M exposed their vaginas, breasts and buttocks. In some of the photo's Mr. M digitally penetrated the women's vagina's or put his penis near or on their faces or bodies. The women in the photos were identified as friends or acquaintances of Mr. M's as well as Mr. M's girlfriend. Mr. M was sentenced to 12-years' incarceration, additional orders included a DNA order, a probation order, a lifetime weapons ban, a lifetime sexual offender registration order, and a victim surcharge.

iii. 2014 ABPC 61

In **2014 ABPC 61**, a 56-year-old man surreptitiously video 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 a 9-month conditional sentence of imprisonment followed by 2-years' probation. Ancillary orders included a ban on possessing any electronic equipment that is capable of taking digital pictures, except for a cellphone which he could not use to capture images, and an order to forfeit the camera and tablet.

iv. 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 Mr. T commencing sexual activity while the victim was asleep. Although she tells him to stop, he does not. However, Mr. T was not charged with sexual assault.

The court noted that Mr. T did not distribute the videos, but did find "the fact that the Complainant's face can be seen in the videos, there were many of them, [Mr. T] lied about making them, and they were retained for a period after the end of the relationship" all constituted aggravating factors on sentencing. Mr. 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.[3]

Also see: 2012 ABQB 661 (Sentencing); 2012 ABQB 182 (Charter challenge); 2012 ABQB 181 (Trial)

v. 2013 ABPC 66

In **2013 ABPB 66** Mr. A, a 40-year-old man, pleaded guilty to voyeurism for surreptitiously videotaping his 15-year-old step-daughter getting dressed on two occasions. Mr. A was also found guilty of voyeurism with the intent to possess child pornography. He hid his cellphone in the victim's bedroom in a plastic box with a hole in it in order to secretly film her. He initially denied the filming was for a sexual purpose, telling his wife and his step-daughter he was trying to film the dog, and later told the police he was trying to view "possible apparitions" in th his step-daughter's room. Two videos were located on Mr. A's phone's SD card, one of which was hidden by a "KeepSafe" app so it would not display in the normal gallery of the phone. Mr. A was

[3] 2013 ABCA 373.

sentenced to 5-months incarceration, 2-years' probation, and was ordered not to possess or use any electronic equipment capable of capturing a digital image.

vi. 2012 ABPC 203

2012 ABPC 203 involves voyeurism on a college campus. Mr. P, a 24-year-old exchange student, hid outside of his roommate's window and filmed his roommate having sex with her boyfriend. Mr. P was caught filming them and he threw the memory stick away. However, he later confessed via email, apologizing to the victim. The victim, Ms. V, did not submit a victim impact statement. Mr. P turned himself in and expressed deep remorse. The court noted that he was a youthful offender with a promising career. Mr. P was sentenced to a conditional discharge, and 18 months' probation, including 80 hours of community service.

vii. 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, Mr. R crouched down next to the victim, who was standing near the baggage carousel. The victim and her fiancé stated that they thought Mr. R was "working on something" nearby. In fact, Mr. R was using his iPhone to take a photograph under the victim's skirt.

Mr. 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, Mr. R was in a position of trust in relation to the victim. The court held that Mr. R was not in a position of trust because he did not have a relationship with the parties and did not use his persuasive power or influence to render the victim vulnerable. Ultimately, the court found that Mr. 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] Mr. R received a suspended sentence

[4] 2012 ABPC 24 at para 43.

and 15-months' probation, 100 hours of community service, and was ordered not to possess or use any device capable of capturing visual recordings. The court could not order the forfeiture of the phone because the Crown proceeded summarily. However, the court could, and did, order that the images on the phone be deleted.

viii. 2012 ABPC (unreported)

In **2012 ABPC (unreported, February 10, 2012)** Mr. R pleaded guilty to voyeurism. Using a hidden camera, he filmed his sixteen-year-old step-daughter while she used the toilet. The step-daughter discovered the camera and the video of her using the toilet. She showed the video to her mother, which her mother deleted. The court noted that these types of crimes were increasing in occurrence and becoming easier to commit against children. Mr. R received a 90-day sentence to be served intermittently so he would not lose his employment, as well as 18- months' probation.

ix. 2012 ABCA 14

2012 ABCA 14 involved a community youth worker who allowed teenagers to drink and have sex in a spare bedroom of his apartment. He was convicted of voyeurism and possession of child pornography. Mr. K let three young men use his video camera to film their sexual encounters. The young men then sold the footage to Mr. K without the girls' knowledge or consent. One of the victims, 16-year-old Ms. 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." Ms. 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, "[Mr. K] has taken a part of me that should never be taken from a person: my self-worth."[5] Although the

[5] 2011 ABQB 312 at para 115.

Crown recommended a global 15 to 18 months' sentence, the trial judge sentenced Mr. K to a 27-months' imprisonment. The trial judge found the 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 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"[6] (emphasis added)

At trial, Mr. K was found guilty of two counts of possession of child pornography, one count of voyeurism, and one count of making voyeuristic materials. On appeal, 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 an additional 2-year probation.

Also see: 2012 ABQB 312 (sentencing); 2011 ABQB 48 (trial); 2010 ABQB 736 (Evidence); 2010 ABQB 640 (Amendment to indictment)

[6] 2011 ABQB 312 at paras 208-211.

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

In **Edmonton No. 090658113P1 (ABPC)**,[7] 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.

xi. 2011 ABPC (unreported)

In this **unreported case**[8] Mr. U pleaded guilty to voyeurism for surreptitiously recording his thirteen-year-old step-daughter through a hole in the bathroom wall when she was exiting the shower. His wife later discovered the video on his cellphone. The court sentenced Mr. U to 4-months' incarceration and 1-year probation.

xii. 2011 ABPC (Unreported)

In this **unreported case**[9] the accused, Mr. N, hid a camera pen in the staff change room to film a female staff person changing. When it was discovered, there were three video recordings of the complainant changing stored on the camera pen. The accused was the supervisor and manager of the complainant. The court imposed a conditional sentence.

xiii. 2010 ABPC 395

In **2010 ABPC 395** the Crown was seeking detention of the accused pending trial. Mr. L allegedly took surreptitious photos of a child's vagina. Mr. L was accused of voyeurism, sexually assaulting a child and creating, possessing and transmitting for distribution child pornography. There were two known victims who were aged five and six in which the accused was in a relationship of trust. Mr. L allegedly possessed 819 unique images of child pornography, including the images he took

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[7] Noted in para 56 in 2012 ABPC 24.
[8] Noted in 2013 ABPC 66.
[9] Noted in 2014 ABPC 61.

of the two victims, images downloaded from the internet, and a video of children aged four to twelve stored on a digital camera and SD card. The court ordered that Mr. L be detained prior to trial.

xiv. 2009 ABPB (unreported)

In this **unreported case**[10] one of the victims was the accused's niece, and the other was a girl he coached on a hockey team. The accused took surreptitious photos of the girls while they were sleeping in a way that was described as "very perverse". He later printed copies of the photos on a school printer and left them for other people to discover. He was also found to have a digital camera with 284 pictures and 92 video clips of young girls' breasts and groin areas who appeared to be asleep or unconscious. He was sentenced to 18 months' imprisonment (15 months for making child pornography, 3 months for possessing child pornography, and 3 months for voyeurism).

xv. 2007 ABPC 349

In **2007 ABPC 349** Mr. W, a 29-year-old man, surreptitiously filmed 15 men using urinals at his workplace over a two-year period. He documented these photos on a spreadsheet that included the names, birth dates, addresses, insurance account numbers, and notes regarding the victim's genitals. Mr. W pleaded guilty and the court ordered a suspended sentence, along with 2 years' probation, 100 hours of community services, and an order prohibiting him from possessing equipment for recording purposes while in a public bathroom or change room. The court ordered the seizure and destruction of the images.

II. BRITISH COLUMBIA

[10] Noted in 2013 ABPC 66.

i. 2017 BCSC 2000

In **2017 BCSC 2000**, Mr. L was charged with sexual assault, sexual assault causing bodily harm, voyeurism, and administering a stupefying substance with intent to commit sexual assault. On two occasions, someone anonymously contacted the police via Crimestoppers to advise the police that Mr. L and his colleague were selling drugs and sexually assaulting underage women, filming the assaults and then storing copies of the images on a cell phone or on SD cards. The police searched the residence and seized multiple cellphones, digital cameras, computers, SD cards, rolls of film and a digital camera. Four female victims were identified and contacted by the police, others were contacted but did not want to cooperate with the investigation. One victim, Ms. SKJ, appears unconscious in some of the images and the accused was sexually touching her. A second victim, Ms. CHM, also appears unconscious while being touched sexually. A third victim, Ms. CARM appears in a video where she was engaged in sexual activity but may not have been aware that she was being filmed. Additionally, there is footage where Ms. CARM says no to being photographed in the nude. There were other photos of Ms. CARM unconscious and partially undressed. A fourth victim, Ms. KESP, was allegedly given a stupefying substance and sexually assaulted causing bodily harm. There was accompanying video and photographic evidence of this. The accused has brought several challenges related to his bail, challenges to the validity of the warrant, and Charter challenges the search and seizure of the accused, his electronic devices, and his apartment. This case has not made it to trial as of yet.

Also see: 2018 BCSC 12 (Charter challenge); 2017 BCSC 1640 (Charter Challenge); 2017 BCSC 1862 (Search and seizure); 2017 BCSC 1535 (Voir dire); 2017 BCSC 1534 (Search and seizure); 2017 BCSC 1516 (Application for direction); 2017 BCSC 1241 (Search and seizure); 2017 BCSC 1095 (Privilege); 2013 BCPC 393 (Bail)

ii. 2017 BCPC 153

In **2017 BCPC 153**, the accused, a 29-year-old male, was a friend of the complainant's younger brother. The complainant was in her forties and lived with her 17-year-old daughter. While

getting undressed in her bathroom, she noticed a camera hidden behind a plant that the accused had placed there. She retrieved the camera viewed a video of the accused placing the camera in the bathroom and images of her disrobing. The images were not transmitted or distributed. The accused pleaded guilty to voyeurism and was sentenced to a suspended sentence with 2-years' probation.

iii. 2015 BCCA 210

2015 BCCA 210 is a case involving voyeurism, assault, 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 Mr. B's things, the ex-partner discovered a camcorder at the back of the television cabinet. Her son found a tiny surveillance camera among Mr. B's possessions. The camcorder showed Mr. B touching and penetrating his now ex-partner while she was asleep or unconscious, surreptitiously filmed them engaged in consensual sex, and filmed her while she was in the shower. Mr. B also surreptitiously filmed another woman using the toilet. Other footage showed naked, underage girls rollerblading, children playing in the park, and children playing in their neighborhood, with a focus on their genitals or lower body areas.[11] Mr. B's computer contained additional explicit images of young girls.

At trial, Mr. B pleaded guilty to two counts of voyeurism and one count of sexual assault. During sentencing, the court noted that Mr. B's actions profoundly affected the victim:

> 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

[11] 2013 BCSC 307 at para 14.

> 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:

> [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]

In its sentencing decision, the court stated:

> Like the sexual assault offence, the voyeurism offences violated the essential human dignity of the people shown in several different ways. They show a complete disregard for those people's autonomy, or their right to determine which, if any, of their most intimately private actions will be video-recorded and the recordings maintained by another person, outside their own control.[14]

Mr. B was ultimately sentenced to 2 years and 9 months' imprisonment. Mr. B appealed that sentence, arguing that the recording of the sexual assault should not have been considered an aggravating factor and arguing for increased credit for his pre-trial custody. The appellate court held that the video-taping was relevant both to the sexual assault and the voyeurism charges and that the sentence was fit, however, Mr. B received additional credit for time served, reducing his time in prison to 2 years and 190 days.

Also see: 2014 BCSC 284 (Sentencing); 2014 BCSC 3 (Evidence); 2013 BCSC 1878; 2013 BCSC 307 (Charter challenge).

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[12] 2014 BCSC 284 at paras 9-13.
[13] 2014 BCSC 284 at para 26.
[14] 2014 BCSC 284 at para 63.

iv. 2015 BCPC 7

In **2015 BCPC 7**, a 39-year-old restauranteur, Mr. B, pleaded guilty to voyeurism after installing a video camera in his restaurant's unisex washroom. Noting that Mr. B "described a sense of excitement in the surreptitious act of watching patrons in secrecy,"[15] and finding that Mr. B's conduct was "thought out, planned in advance, and deliberate,"[16] 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.[17]

Mr. B received a 12-month suspended sentence with probation including a ban on possessing or using any devices capable of making film or photos, a DNA order, and 60 hours of community service.[18]

v. 2014 BCPC 361

In **2014 BCPC 361**, Mr. P, a 49-year-old man, pleaded guilty to voyeurism. He hid a camera in the public washroom of a bookstore, that transmitted the images to his phone. When the first person entered the washroom, he found that the camera was not pointing where he would like so he returned to the bathroom and changed the angle of the camera. A staff person discovered the camera 45 minutes after it was installed. However, prior to the camera being discovered seven adult women used the washroom. Mr. P was arrested. Following his arrest, it was found that he

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[15] 2015 BCPC 0007 at para 13.
[16] 2015 BCPC 0007 at para 27.
[17] 2015 BCPC 0007 at para 38.
[18] 2015 BCPC 0007 at para 39.

has a predilection for voyeurism pornography and deliberately planned to create his own videos by installing the camera. He also has a history of masturbating in his vehicle where people could observe him and attended a sex offender treatment program. Mr. P tried to blame the internet on his actions, however the court stated:

> I specifically do not accept Mr. Payne's assertions that the Internet caused him to commit these offences. I accept that with pornography being ubiquitously available on the Internet, it certainly had the capacity to fan Mr. Payne's views on things, but I have no doubt that he was acting in a planned and deliberate fashion when he carried out the necessary steps he took to commit the offence.
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> I also, based on what I have read in the pre-sentence report and Dr. Morgan's report, accept that at this point in time, Mr. Payne does not yet have a full appreciation or understanding of first, his offending behaviour and second the effect that that offending behaviour had or could have had not only on the seven women who were subjected to being videoed but to the general sense of safety that the community would feel.
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> It is a particularly socially troubling area when people are advised that there is somebody in the community who is engaging in voyeurism because in our society today, with cameras being practically everywhere, it is not surprising that people take their personal privacy as a very serious matter to protect, and it is a norm in our society that there are certain things that occur that are meant to remain private, and attending a washroom is one of them.[19]

The court further stated:

> I have to try to deter Mr. [P] from further criminal behaviour of this nature, and I think there is a component in this type of case to try to deter others from committing similar offences because without some rebuke by the court, there remains the possibility, given the easy availability of cameras in our society, for others to think this behaviour is worthy of committing because even if the offence is committed, the penalty might not be enough to deter others.[20]

The court sentenced Mr. P to a 4-month conditional sentence, including a ban on internet use other than for employment, ordered that he not possess any pornographic materials or go within

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[19] 2014 BCPC 36 at para 31-33.
[20] 2014 BCPC 36 at para 35.

5 metres the book store, and a 20-month probation order, including an order not to use the internet other than for employment purposes and purposes permitted by his probation officer. The court also ordered a DNA sample and the forfeiture of the camera and phone seized at the time of the events.

vi. 2010 BCPC 182

In **2010 BCPC 182**, Mr. R was charged with voyeurism and possessing child pornography after surreptitiously recording people at a park from his van. Police discovered Mr. R in his vehicle, half-naked and surrounded by wadded tissues. Mr. R told police that he was filming "yummy mummies." After reviewing the camera and recorded footage, police discovered that Mr. 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 either clothed or when their diapers were being changed or they were being changed at that park. At trial, the court found Mr. R guilty on all counts.

Mr. R appealed the conviction, asserting that the trial judge erred in finding that video subjects had a reasonable expectation of privacy at the lakefront park.[21] 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

[21] 2011 BCSC 1397.

> 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.[22]

The court also rejected Mr. 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.

xvi. 2010 BCPC 475

In **2010 BCPC 475**, 59-year-old Mr. C pleaded guilty to voyeurism after videotaping his 13-year-old granddaughter using the shower in his hotel room. Mr. C 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."[23] Nonetheless, noting that Mr. C was genuinely remorseful, that psychological reports suggested he was at low risk of reoffending, and that a criminal record would make it difficult for him to work, the court granted Mr. C a conditional discharge with 3-years' probation.

Also see: 2010 BCPC 470 (Sentencing)

xvii. 2009 BCPC 381

In **2009 BCPC 381**, Mr. H, a chef and manager of a restaurant, installed a camera in a dry storage room without telling his employees and recorded a female employee changing. The camera was connected to Mr. H's desktop computer, and Mr. H stored a video of his female employee

[22] 2011 BCSC 1397 at s 110-111.
[23] 2010 BCPC 475 at 16.

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.”[24] The court found that the room was only used as a change-room, “as a matter of convenience and was not designed for it” and further noted that the room did not have a lock.[25] The court concluded that one of the requirements ("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") for proving voyeurism was not made out and H was acquitted.

Also see: R v Hamilton, 2009 BCPC 272 (Voir Dire)

xviii. 2008 BCPC 130

In **2008 BCPC 130**, a dentist pleaded guilty to voyeurism after hiding a camera in the wastebasket 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 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. 2018 MBCA 48

[24] 2009 BCPC 381 at para 34.
[25] 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.

In **2018 MBCA 48**, Mr. M appealed his sentence of 18 months' imprisonment and three years' probation after pleading guilty to voyeurism, non-consensual distribution of intimate images, and extortion, along with conditions that he report intimate images to probation services and not possess devices that can access the internet without permission. The judge stated that this "sentence appeal illustrated the pernicious effects that the misuse of technology can have on personal privacy and sexual integrity."[26]

When Mr. M was 19, he surreptitiously filmed his sister's 17-year-old friend while she undressed and showered at their family home. He admitted to being aroused by "peeping tom" pornography and the feeling of being in control. Five years later, he tried to use the film to extort the victim by threatening to disseminate images from the film online.

The court noted that Mr. M engaged in the following behaviour:

> To carry out the sextortion, he created multiple email accounts under pseudonyms, he extracted several nude or semi-nude still images from the 2010 recording and he manipulated the image using software to hide their source.
>
> Between July and October 2015, he sent emails from the fake accounts with the intimate images to the complainant and her sister. The emails were menacing. The emails said that cooperation with the demands was the only way to avoid internet publication.[27]

The complainant informed the police, but she did not know who the extortionist was. The police had difficulties investigating the account because the email accounts were deleted after the images were sent. The police were eventually able to discover that the emails came from Los Angeles.

She wrote back to one of the emails asking what the extortionist wanted and he requested an image of her in a bra, which she refused. Mr. M later contacted the victim claiming his email was hacked and that he received a copy of the photos, offering to have his tech-savvy friends help

[26] 2018 MBCA 48 at para 1.
[27] 2018 MBCA 48 at paras 5-6.

her by using more sexualized images of her as bait to trap the extortionist. She thought this was suspicious and reported it to the police. Upon moving back to Winnipeg, the police searched Mr. M's computer and found the images. He confessed to taking the images and using them to extort her upon arrest.

The court noted the significant impact the offence had on the victim, stating:

> The events terrified her, exacerbated her anxiety disorder and took over her life. She lived in constant fear that the extortionist had more intimate images of her and was going to eventually hurt, rape or kill her. She struggled in university, was physically ill and could not sleep. She became disassociated and lost her self-esteem. The intensity of her emotions and fear became so unbearable that she contemplated suicide to free herself from the grip of the extortionist. While the accused's arrest brought some closure, she is haunted by the experience and is so fearful of surveillance that she routinely checks for hidden cameras in bathrooms. She is afraid of being physically harmed by the accused and men generally.[28]

The court noted that:

> It is also important to appreciate that sextortion is a form of sexual violence even though it occurs through the medium of the internet. As with physical abuse, a victim's freedom of choice over his or her sexual integrity is violated. The long-term psychological harm to a victim, as was seen here, closely resembles what happens in a case of physical sexual assault (see R v Innes, 2008 ABCA 129 at paras 7, 11; and R v NG et al, 2015 MBCA 81 at para 33). Finally, it is difficult to hold such offenders accountable because the crime is remotely committed and the nature of the internet provides predators with a degree of anonymity; in this case, it took the efforts of five different law-enforcement agencies in two countries over many months to solve the case.[29]

The court also noted that the non-consensual distribution of intimate images and voyeurism are both sexual and privacy offences.

The court allowed an adjustment of the sentences for voyeurism (reduced to 3 months) and extortion (reduced to 15 months), but did not change the sentence for the non-consensual

[28] 2018 MBCA 48 at para 11.
[29] 2018 MBCA 48 at para 19.

distribution of intimate images (6 months) and deleted the condition of probation that required him to report intimate images to his probation officer. The combined length of imprisonment (18 months) did not change and the internet limitations stayed.

ii. 2015 MBCA 103

In **2015 MBCA 103**, affirmed the conviction of Mr. M. The accused, a 40-year-old man, pleaded guilty to making and possessing child pornography, sexual interference, voyeurism, and criminal harassment. An allegation of industrial espionage led to the police searching his computer and discovering 6,935 unique images of child pornography and 134 unique videos of child pornography of girls aged eight and thirteen-years-old. Some of the videos he made himself, surreptitiously recording the genitalia of his two twin eight-year-old daughters and their friend while they were in the bathroom. Other images were altered to make it appear as if his friend's prepubescent daughter was performing sexual acts on him. Other photos and videos included acts of sexual interference with one of the victims. The computer also contained information related to the accused's historic sexual interference of his friend's daughter when she was eight years old and one of his daughter's friends.

The accused also surreptitiously filmed sexual acts between himself and his girlfriend. His girlfriend ended their relationship upon the discovery of the videos and his child pornography. The accused "then began to incessantly contact her and follow her, despite her moving residences". He was later arrested in her apartment and charged with criminal harassment.

He also failed to comply with an undertaking when the police found photos of nude or partially nude photos on his iPad, which he was prohibited from possessing at the time. He also failed to comply with a recognizance that prohibited contact with his ex-girlfriend and his access to the internet when he sent her three emails.

The trial judge sentenced him to a combined total of 105 months incarceration. On appeal, the judge ordered some of his sentence be served concurrently, not consecutively, and his global sentence was reduced to 87 months. In deciding this the judge stated:

> The judge properly recognized the seriousness of the crime of making child pornography. Victims are harmed not only by the initial production of the child pornography, but also perpetually if the material is made available or distributed. Once on the Internet, sexually explicit material is impossible to eradicate and will be used by other offenders domestically and internationally for the purposes of sexual gratification or to exploit other children. Sentences accordingly must be severe for making child pornography to reflect the gravity of this pernicious crime.[30]

However, the judge also noted that the accused did not solicit sexual acts from the children nor make the pornography he made available to others. He was sentenced to 8 years and 9 months of incarceration, and ordered to provide a DNA sample, comply with the sex-offender registration for 20 years, not be near places with children, placed on the Child Abuse Registry, and to not possess firearms.

Also see: 2014 MBPC 57 (Sentencing)

iii. 2015 MBPC 20

In **2015 MBPC 20**, Mr. W, who was employed as a clinical 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 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, including four videos that were considered child pornography. Mr. W set up a system that he used in his home, his cottage, his workplace, which was a foster home, and the home of a friend to surreptitiously film and photograph people who

[30] 2015 MBCA 103 at para 14.

were using the bathroom facilities and shower. He made these recordings over a two-year period, and the images captured his 14-year-old daughter, her friends, various foster children, family members and colleagues. He later meticulously edited, spliced, complied, labeled and stored the images, which the court noted as an aggravating factor. The court found the facts of the case to be "appalling" and sentenced Mr. W to 3-years' imprisonment, along with several ancillary orders including lifetime prohibitions on possession of firearms and a 20-year ban from attending places where persons under 16 are present, an order to provide a DNA sample, a 20-year registration on the Sexual Offender Information Registry Act, and an order to forfeit all items seized during the investigation of the offences.

iv. 2013 MPBC 11

In **2013 MBPC 11**, Mr. B was charged with various offences on three occasions, including break and enter with intent to commit sexual assault, committing voyeurism while filming a sexual assault, uttering threats, among other things. Mr. B allegedly attacked three separate women as they were exiting their cars and entering their homes in the early hours of the morning. DNA matching Mr. B was located at each scene. Two women described their attacker wearing similar clothing and filming them with a small camera while assaulting them. These two cases were allowed to be heard together, but the other was severed for a separate trial.

Also see: 2013 MBPC 67 (Charter)

v. 2013 MBPC 47

In **2013 MBPC 47**, Mr. C, a 32-year-old man, pleaded guilty to voyeurism, forcible confinement, sexual assault, uttering threats, breach of a no communication order and willfully obstructing lawful use of property. He was in relationships with three of the victims (all of whom the judge characterizes as young, innocent and virgins), and the other victims were strangers. Mr. C met the first victim, Ms. JS, when she was 17-years-old and they entered into a consensual sexual relationship. The relationship became volatile with Mr. C taking her phone when she tried to call

for help, and twice dragging her into a bedroom and not letting her leave. He forced Ms. JS to sleep in the nude against her will. She later found nude photos of her that were taken without her consent.

In the case of the second victim, Mr. C met Ms. AH, who was a Hutterite, when she was 23-years-old and he was 29-years-old. He began messaging her on Facebook telling her she was pretty. They spoke online for some time, she did not want to give him her phone number, but Mr. C said he was a paramedic to gain her trust and she later gave her his phone number. They began to see each other but Ms. AH said she would not have sex until after marriage. She told him she was uncomfortable when he would kiss her on the cheek or touch her buttocks. Ms. AH was kicked out of her home due to the relationship and had nowhere to go so she moved in with Mr. C. Mr. C immediately began sexually assaulting her and made her sleep in the nude against her will. All sexual interactions were forced on AH and he physically and mentally abused Ms. AH, including monitoring her phone calls, controlling her finances, telling her she was being constantly watched, and eventually destroying her phone. He would take naked photos of her without her consent and force her to watch pornographic movies with him. Ms. AH told the court the Mr. C left the house every night around midnight to peep into other people's homes, then would return and sexually assault her.

Prior to the end of his relationship with Ms. AH, Mr. C began a relationship with Ms. LJ. While Ms. LJ and Mr. C were away on a trip, Ms. AH was able to escape and hide from Mr. C. Ms. LJ was 19-year-old when she met Mr. C who was 29-years-old. They initially engaged in consensual sex but Ms. LJ decided she was not ready for a sexual relationship. Mr. C did no respect her wishes and would force himself on her. He also forced Ms. LJ to sleep nude. He requested to take nude photos of her and she refused, but she awoke one night and found him taking photos of her. She later checked his phone and found nude photos and videos of herself that she had not consented to. At one point, he took her phone away from her. She broke off the relationship and obtained a protection order, which Mr. C breached by showing up to a movie LJ was attending. In her victim

impact statement, Ms. LJ said her interactions with Mr. C made her feel suicidal and she developed epilepsy during the relationship. Ms. LJ later reported Mr. C to the police.

Mr. C also pleaded guilty to two voyeurism charges involving strangers. On one occasion, Mr. C attended a tanning salon and entered a room where a woman was tanning in a bed. On another occasion, Mr. C filmed another woman through her bedroom window while she was changing.

Mr. C was sentenced to 10.5 years' incarceration, a DNA order, a lifetime sexual offender registration, a weapon ban for 10 years and a no contact order with the victims.

vi. 2013 MBPC 39

2013 MBPC 39 is a case involving workplace voyeurism. 41-year-old Mr. B became obsessed with Ms. F, his 19-year-old subordinate at work. He monitored her menstrual cycle and hoped 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. Mr. B described these events to his pastor in 2005 and sought discrete monthly counselling with the pastor until 2011. In 2011, after Mr. B's wife discovered voyeuristic recordings of Ms. F on the family computer, Mr. B's pastor decided to reveal to Ms. F (who was also a member of his parish) that someone had "sinned against her." Mr. B 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 Mr. B's actions were extreme, disturbing, "opportunistic and predatory," it held that there was no breach of trust involved.[31] Mitigating

[31] 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

factors on sentencing included the fact that Mr. B had no criminal record, sought counselling, and posed a low risk of reoffending. Mr. B received an 18-month conditional sentence, which included terms such as reporting to his supervising officer every other day and a prohibition on communicating with Ms. F or coming within 200 metres of her place of work, worship, residence or schools.

IV. NEWFOUNDLAND AND LABRADOR

i. 2017 NLTD(G) 62

In **2017 NLTD(G) 62**, the trial judge recognized that a video camera that could transmit live images to the accused's phone was hidden in the TV set of the complainant, but held there was no evidence that a recording was viewed by Mr. B, and therefore acquitted him. The camera was in place for 5 months. Mr. B initially said he installed the camera to watch a sick cat, but the cat was already dead. On appeal the appellant judge ordered a new trial because there was evidence that Mr. B observed the victim.

Also see: 2016 NLPC 0115A00297 (Trial)

ii. [2016] NJ No 239 (Nfld PC)

In **[2016] NJ No 239 (Nfld PC),** Mr. B was charged with voyeurism but argued for a stay of proceedings due to a violation of his section 11(d) *Charter Rights*. The court held that there had been an unreasonable delay in the trial and granted a stay of proceeding.

iii. [2015] 364 Nfld. & PEIR 189 (NLPC)

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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 **[2015] 364 Nfld. & PEIR 189 (NLPC),** a 57-year-old office manager used his iPhone to record a 23-year-old co-worker, Ms. 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 [Mr. M] think he was going to be recording? What do people do in washrooms? [Mr. M] must have known that he was going to be video recording [Ms. S] performing private acts in which portions of her body might be revealed. To suggest otherwise is nonsense. Thus, I do not view [Mr. M's] lack of sexual intent as diminishing his moral responsibility for this offence.[32]

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

In her victim impact statement, Ms. 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 [Ms. S] to lose her employment while [Mr. M] maintains his."[33] Ms. S also described developing depression and anxiety as a result of M's actions. The court wrote:

> 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.[34]

The court suspended Mr. M's sentence considering that he was a first time offender and placed him on probation for twelve months.

iv. 2011 CanLII 13633 (NLPC)

[32] 2015 CanLII 10931 at 54.
[33] 2015 CanLII 10931at para 18.
[34] 2015 CanLII 10931 at para 52.

In **2011 CanLII 13633**, the offender, Mr. G, 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 sexual purposes but admitted he 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 Ms. F picking up his stepdaughter's underpants and sniffing them on camera,[35] 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.[36]

Nevertheless, given that G 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, 3-years' 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, order of forfeiture of the video camera used to make the recording and destruction of the recording.[37]

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[35] 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."
[36] 2011 CanLII 13533 at 9-10.
[37] 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.

V. Nova Scotia

i. 2012 NSSC 408

In **2012 NSSC 408**, Mr. S, a 49-year-old man, was accused of breaking and entering into two separate apartments less than one kilometer apart. He has a lengthy criminal record of similar offences. On both occasions, young women woke up with a man standing in their room. A cell phone was found in one of the homes, which was associated with Mr. S. Upon searching his house, the police found video tapes of two young women being surreptitiously filmed in their homes (not the women from the apartments) but did not find evidence of any recording equipment or equipment to play the video. He was found guilty of break and enter, but not on the counts of voyeurism.

Mr. S was sentenced to 5 years' incarceration, additional orders included a DNA order.

Also see: 2013 NSSC 86 (Sentencing)

VI. Northwest Territories

i. 2011 NWTTC 20

In **2011 NWTTC 20**, Mr. D, a 50-year-old man, pleaded guilty to possessing child pornography and two counts of voyeurism. The police found 1,888 unique images of child pornography on his computer, including violent sexual assaults and adults having sex with young children, and videos of him recording his step-daughter and her 7-year-old son in the bathroom, which he edited. He was sentenced to 12-months' incarceration for possessing child pornography, 3-months' incarceration for voyeurism, as well as 3-years' probation, orders to attend counselling, not

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[…] 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.

possess or use a computer except for employment, provide a DNA sample, 10-year sex offender registration, as well as orders that limit his contact with people under the age of 18.

VII. ONTARIO

i. 2017 ONSC 6900

In **2017 ONSC 6900**, Mr. P was acquitted of two counts of sexual assault and one count of voyeurism at the trial level. The victim, Ms. H, stated that she consented to sex with Mr. P so he would stop hitting her and leave. She also stated that she was aware Mr. P had a cellphone and may have been recording their encounter. The acquittal was appealed, with the Crown arguing in part that the trial judge inappropriately interrelated aspects of the voyeurism offence.[38] On the voyeurism charge, the Crown argued that the trial judge only took into account whether the accused surreptitiously observed the victim, not whether he surreptitiously videotaped her. The appeal judge found that the trial judge properly found that the observation was not surreptitious because the accused, who made the QuickTime Movie and was "actively participating in the sexual activity, filmed. Actively participating is the opposite of something done surreptitiously or

[38] The trial judge found that the complainant, Ms. H, had consented to sex with the accused because she wanted to and "so that he would stop hitting her and leave"; that her lack of visual injuries were inconsistent of the assault she described; and that she was aware that she may have been photographed or filmed. The Crown also argued there was a misinterpretation of evidence because the judge viewed the whole 20 minute video they submitted as an exhibit, rather than only the portion that was relevant to the case. The trial judge watched the whole 20-minute video because when the video was made an exhibit there was no indication that the judge should only view a certain portion of the video.

secretly." He also held that Ms. H was aware of the presence of a cellphone being used. The appeal was dismissed.

ii. 2017 ONSC 6250

In **2017 ONSC 6250**, Mr. G, a 35-year-old man, pleaded guilty to three counts voyeurism and six counts of sexual assault against nine victims that occurred over a six-year period. Mr. G surreptitiously filmed consensual and non-consensual activity with multiple women. Some images showed Mr. G sexually touching the women while they were sleeping, others showed the women nude or semi-nude while they were sleeping. The victims included his girlfriend at the time, women he met on the internet, women who he had a sexual relationship with, a woman he had a platonic friendship with, and a woman who lived in the same apartment as him. Mr. G also admitted to surreptitiously taking screenshots of two separate women during sexual video chats and taking photographs of a babysitter while she was sleeping, however, he was not charged for those recordings. The courts recognized that he had a pattern of behaviour, befriending women and then abusing them while they were sleeping.

He was sentenced to a global sentence of 8.9 years, as well as a 6-year long-term supervision order and was designated a long-time offender. Ancillary orders included providing a sample of DNA, a weapons prohibition for life, and a lifetime registration under the Sex Offender Information Registration Act.

Also see: 2017 ONSC 6529 (Addendum to sentencing)

iii. 2017 ONCA 778

In **2017 ONCA 778**, a high school teacher, Mr. J, was charged with voyeurism after using a camera pen 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 was 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 19 more videos, two of which were deleted. 27 of the 30 surreptitiously recorded individuals were female high school students ranging in age from 14 to 18 years old. Although all subjects were fully clothed, a number of the recordings focused exclusively on girls' breasts.[39] 5 videos were primarily focused on the cleavage of three female students.

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. At the trial level 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 were made for a sexual purpose.[40]

At the court of appeal, the acquittal was upheld but for different reasons.

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[39] Discussing the students' reasonable expectation of privacy at school, the trial court noted, "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.

[40] 2015 ONSC 6813 at s 68-77, on the point of sexual purpose the trial court stated: 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.

The majority at the court of appeal held that the material was made for a sexual purpose, as no other reason or inference for their filming was raised at the trial level. The court also stated that a person does not need to be nude for the content to be sexual, stating:

> […] while nudity may certainly be relevant to an analysis of the sexual purpose of the video, the fact that the person is clothed cannot be a factor that negatives that purpose. If the person were nude, the charge could be laid under paragraph (1)(b). Because observing or visually recording for a sexual purpose is a separate offence, it is clear that it can be committed where the victims are not naked, but where the focus of the observation or videos is on sexual organs or where there are other indicia that the intent of the accused is for a sexual purpose.[41]

However, the court held that the girls did not have a reasonable expectation of privacy while they were engaged in normal school activity in public areas of the school, particularly because that school has 24-hour surveillance security cameras in and around the school, including signage telling students they were being recorded. The court recognized that the girls had a subjective expectation of privacy that a teacher would not surreptitiously video or audio record them. However, it stated:

> In my view, as a matter of statutory interpretation, for the purpose of s. 162(1)(c), in order to give the requirement of "circumstances that give rise to a reasonable expectation of privacy" any effect where the person being surreptitiously videoed is not naked or doing a private sexual or toileting act, the person must be in circumstances, including type of place, where they expect privacy. If the fact that they are being surreptitiously recorded without their consent for a sexual purpose were enough to give rise to a reasonable expectation of privacy, that would make the privacy requirement redundant. If a person is in a public place, fully clothed and not engaged in toileting or sexual activity, they will normally not be in circumstances that give rise to a reasonable expectation of privacy.
>
> I conclude that the trial judge erred in law by finding that the students were in circumstances that gave rise to a reasonable expectation of privacy, within the meaning of s. 162 of the Code, while engaging in normal school activities and

[41] ONCA at para 44.

> interactions in the public areas of the school where there were many other students and teachers.[42]

The appeal was dismissed, but is currently being appealed to the Supreme court of Canada.

On dissent, Judge Huscroft, agreed that the videos were for a sexual purpose, but held that the girls did have a reasonable expectation of privacy. The dissent stated that privacy is normative and evaluative and not descriptive or predictive, arguing that the majority focused too much of its analysis on location and that there can be an expectation of privacy in public places.

This case was appealed to the Supreme court of Canada, which heard arguments on April 20, 2018. The decision from the SCC has yet to be released.

Also see: 2014 ONSC 1801, 2015 ONSC 6813, [2017] SCCA No 440, currently appealed to the SCC

iv. 2017 ONSC 3904

In **2017 ONSC 3904**, Mr. G, a public-school teacher, pleaded guilty to 16 counts of voyeurism, and was charged with 2 counts of making and possessing child pornography in relation to some of the voyeuristic images. Mr. G placed a backpack with a hidden camera in a staff change room at the school. It was positioned to capture the genital and buttocks area of the person in the change room, who were typically staff members. Mr. G hired a 16-year-old co-op student, Ms. JT, who was also captured changing in the change room. In regard to the child pornography charges, the court held that a fleeting view of the side of the girls' breasts and vagina did not constitute child pornography, but that the buttocks did meet the definition of "anal region" and was the dominant characteristic of video. Mr. G pleaded guilty to voyeurism and was found guilty on the counts of making and possessing child pornography.

v. 2017 ONCJ 377

[42] ONCA at para 108,110.

In **2017 ONCJ 377**, Mr. H was a school teacher at an elementary school, who later got promoted to a vice-principal at another school in the district. Over several months, Mr. H placed a hidden a camera in the men's washroom at the elementary school to capture images of his male colleagues using the bathroom. Mr. H would come to the school to visit colleagues and go into the bathroom and switch out the batteries and retrieve the images, which were used for sexual purposes. The court noted that he did not post the images on the internet and only filmed men. However, one day the camera was discovered by someone using the washroom who heard it making a beeping noise. Mr. H pleaded guilty to 9 counts of voyeurism and was sentenced to a 16-month conditional sentence served in the community, 8-months of house arrest, and 2- years' probation, additional orders included a no contact order with the victims, an order to provide a DNA sample and a requirement to attend programming. The loss of his career, family and reputation were noted in the decision.

vi. 2017 ONCJ Unreported

In this **unreported case**,[43] Mr. L hid a camera in his bathroom and surreptitiously filmed his 15-year-old step daughter and her friends as they used the bathroom. He was charged with voyeurism and child pornography offences and received a sentence of 6-months incarceration for the voyeurism conviction.

vii. 2017 ONCJ 58

In **2017 ONCJ 58**, Mr. M, a 47-year-old actor, placed a BlueRay Player equipped with a hidden camera in his living room which he had constant access to via an internet transmission. He later rented that apartment to two women in their twenties, despite his lease forbidding her rent out the space. Mr. M also did not inform the women of the hidden camera. At trial, he claimed that he installed the camera for security purposes. However, his text messages to the tenants alerted

[43] Noted in 2017 ONCJ 377.

them to the fact that he was somehow watching them from inside the apartment and one of the tenants discovered the camera. The court stated:

> Does the lawful enjoyment of residential premises include a right to be free of surreptitious surveillance, or as Mr. Manoux called it a nannycam, a security camera hidden in the middle of the living space, set up to be available to his remote viewing at any time? Can Mr. Manoux claim an honest belief in a state of fact, which amounts to a colour of right? In my view the answer is clearly no, as the right to privacy is nowhere as significant as in one's home.[44]

He was not charged with voyeurism offences but was convicted with two counts of mischief to private property.

viii. 2016 ONSC 6585

In **2016 ONSC 6585**, Mr. T is a 42-year-old teacher who was in an 18-month romantic relationship with the victim. They would talk over Skype and the victim would occasionally pose nude for Mr. T, which Mr. T took screen shots of. She did not consent to him taking screen shots of her. A fake account later sent a series of seven emails with these pictures to her family, friends, co-workers and her new partner, suggesting she and her new partner were looking to include new sexual partners in their relationship. The victim was negatively impacted by this, the court stated:

> The victim indicates that she was humiliated, shocked and confused by the defendant's actions. Her sleep patterns have been seriously disrupted, she has been diagnosed with PTSD, anxiety and depression and has resorted to alcohol to cope. The victim describes herself as suffering from low self-esteem and has considered suicide.
>
> The victim has experienced setbacks in her teaching career and anticipates that her career aspirations will be limited as a result of what has occurred.[45]

Mr. T was convicted of voyeurism but acquitted of the charge for non-consensual distribution of intimate images because it was not proven beyond a reasonable doubt that he was the one to

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[44] 2017 ONCJ 58 at para 54.
[45] 2016 ONSC 6585 at para 14-15.

set up the fake account and distribute the images. He was sentenced to 12-months' probation and 50 hours of community service, as well as a no contact order with the victim and another individual.

Also see: 2016 ONSC 2537 (Evidence)

ix. 2016 ONCJ 858

In **2016 ONCJ 858**, Mr. L was charged with 129 adult criminal counts and 88 counts under the Youth Criminal Justice Act. He pleaded guilty to 35 adult charges, including bestiality, compelling to commit bestiality, voyeurism, making child pornography, making available child pornography, possessing child pornography, agreeing to commit sexual assault on a person under the age of 16-years by telecommunication, communicating with a person under 16 to facilitate bestiality, sexual assault, counsel to make child pornography, counsel to commit bestiality, conspire to administer a noxious substance, conspire to make child pornography and conspire to commit sexual assault, and the Crown withdrew all of the youth charges.

The court relied on an extensive record of text messages with his victims and others, content on his computer that documented his crimes and plans to commit future crimes, and photographs used as evidence in this complicated case.

Mr. L was 22-years-old at the time and was dating a 15-year-old girl. He had sex with her and filmed it and encouraged her to film her 9-year-old sister in the nude. He also encouraged her to babysit young children so he could gain sexual access to these children. He sent her sexual images involving animals. She later went to the police who arrested Mr. L and seized five cellphones, his laptop, a GoPro camera that was positioned above his bed, and small children's underwear. It was discovered that Mr. L was committing sexual offences against young girls, children and young animals for nearly a decade (when he was between the ages of 14 and 22) and actively planned to sexually assault specific infants, young children, his friend's mother and animals. He counselled young women to take images of children as young as two for the purposes of child pornography.

He would use young women to gain access to young children and stated a desire to abduct a young girl for sexual purposes, among other things. Fourteen victims were identified ranging from 2-years-old to adulthood. Two people were involved with Mr. L and assisted him in committing sexual offences against children and animals, which the court noted as "very very unusual" behaviour for a pedophile. Mr. L also secretly filmed sexual acts with young teens and young women and later distributed the images and videos.

Mr. L was designated as a dangerous offender.

x. 2016 ONCA 757

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 victims, seven were minors.

For years Mr. K was engaged inappropriately with one of his step-daughters, including exposing himself to her, having her watch adult pornography with him, and taking pictures of her naked buttocks. She eventually told her mother, who reported Mr. K to the police. Upon searching the home, the police discovered Mr. K hid a camera in the bathroom of the family home for a number of years. They found 268 unique videos, and 1,814 unique images on his devices which could be classified as child pornography. He edited some of these images he took from the bathroom to

appear as though he was engaging in sexual activity with his youngest step-daughter and/or her friend.[46]

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 it required a severe consequence. Mr. K 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, prohibition on internet use, 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 for life.

Mr. K appealed his conviction, arguing that the trial was not completed in a reasonable time, thus infringing his section 11(b) Charter rights. His appeal was dismissed. He appealed his sentence, arguing he should be granted additional pre-trial custody credit and that his lack of remorse

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[46] At para 12: “K had hidden a bathroom in the family home for a number of years. He edited some of these images to appear to be engaging in sexual activity with his youngest step-daughter or her friend.” At para 18: “the disk reveals the following: a close-up photograph of S.T.'s vagina; an image manipulated using photo editing software to make it appear that S.T. is performing fellatio on Mr. K.; an hour long video which includes S.T.'s vaginal and anal area as the focus; and a video slide show showing many images of S.T. under the age of 18 with a focus on her anal and genital areas. In some of the images, Mr. K. inserted naked images of himself to give the appearance that he was committing sexual acts with S.T. and other victims including several that depict S.T. performing fellatio on him and having his ejaculate in her mouth.

should not have been considered an aggravating factor. The court agreed and his sentence was reduced.

Also see: 2015 ONSC 2391 (Sentencing), 2014 ONSC 5709 (Endorsement of pretrial motion), [2014] OJ No 6462 (ONSC) (Endorsement of pretrial motion)

xi. 2016 ONSC 6228

In **2016 ONCJ 6228**, Mr. R posted naked pictures of his ex-girlfriend on Facebook that he took with his webcam. The ex-girlfriend was alerted to the post by an acquaintance. The victim, a 17-year-old girl, was not aware that the photos were taken. She was naked and posing provocatively, but Mr. R did not appear in the photos except for one, where a part of someone's body could be seen in the photo. Mr. R was convicted of voyeurism for surreptitiously filming the victim while engaged in explicit sexual activity. On appeal, the defense argued that the Crown failed to make out a case on the "explicit sexual activity" element of the charge. At the trial level the court took into account the victim's evidence that these photos were taken while engaged in session of sexual activity, making an inference that from the content of the photos that sexual activity had "occurred, is occurring, or is about to occur".

At the trial level, the court found:

> The depiction of the naked complainant in the applicant's bedroom while on the applicant's bed, in circumstances where the images were secured during the course of an intimate relationship between the applicant and complainant, are factors that might reasonably be relied upon to conclude sexual activity either has occurred, is occurring, or is about to occur.
>
> […]
>
> 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."[47]

On appeal the court held that:

> […] the inferences drawn by the learned trial judge were entirely appropriate on a motion for a directed verdict. A review of the photographs themselves, particularly the photograph marked as Photograph 6, in my view fall well within the description of "explicit sexual activity", as particularized in the following quotation of the Supreme court of Canada in *Sharpe* at paragraph 49. I conclude that "explicit sexual activity" refers to acts which viewed objectively fall at the extreme end of the spectrum of sexual activity — acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion, with persons under or depicted as under 18 years of age. The law does not catch possession of visual material depicting only casual sexual contact, like touching, kissing, or hugging, since these are not depictions of nudity or intimate sexual activity. Certainly, a photo of teenagers kissing at summer camp will not be caught. At its furthest reach, the section might catch a video of a caress of an adolescent girl's naked breast, but only if the activity is graphically depicted and unmistakably sexual . . . (For a discussion of such concerns see B. Blugerman and L. May, "The New Child Pornography Law: Difficulties of Bill C-128" (1995), 4 *M.C.L.R.* 17)
>
> Objectively viewed, what is depicted in Photograph 6 falls well within the definition of "explicit sexual activity". The learned trial judge did not make any error in denying the defence motion for a directed verdict. The appeal is therefore dismissed.[48]

The court made particular note of the photo where the body parts of another person could be seen in the images when making this conclusion.

Also see: 2011 ONCJ 905 (Motion of non-suit)

xii. 2016 ONCJ 171

In **2016 ONCJ 171**, Mr. W, a 41-year-old man, was caught taking videos on his cellphone of a young woman with her underwear showing as she bent down. Mr. W was previously arrested at

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[47] 2011 ONCJ 905 at para 25, 29.
[48] 2016 ONCJ 6228 at para 42-43.

the same store for taking an "upskirt" photo of a 16-year-old woman. Upon searching W's residence, the police seized seven hard drives, a jump drive, four DVDs, four SD cards, three cellphones, and a camera. On some of these devices the police found 14,000 images of unknown women taken without their consent between 2005 and 2011, including upskirt photos and photos of women's buttocks area while in public. Mr. W took these photos using a "spy cam" application that made it appear as though the user was using the phone for another purpose or made his phone appear to be locked when in fact it was being used to take a photo or video. The images and videos included multiple images of his co-worker's upper leg area, breast area, and underwear when it was exposed, taken surreptitiously while in the office. It included twenty-five videos of him masturbating and ejaculating in his boss' office, including into her coffee cup and on her desk, and touching his penis on her phone. He also secretly filmed a woman in his basement taking a shower and images of a woman's bedroom. The court stated:

> […] Voyeurism offences violate the essential human dignity of the people shown and are a serious invasion of their privacy and personal space. In this case, as I have already set out, the impact on the victims was particularly significant. The disclosure by the police to the victims of their being videotaped surreptitiously by Mr. W. was shocking and emotionally overwhelming, causing significant fear and anxiety in the victims.[49]

He pleaded guilty to six charges including mischief, voyeurism, and unlawfully entering a dwelling house. Upon sentencing the court stated:

> Therefore, given the nature of smart phones today, this increases the need for sending a message to the general public that taking pictures of individuals in compromising positions, for example, women who might be wearing a top that is loose and if they bend over, shows cleavage. It is inappropriate to take photographs of that. It is inappropriate to take pictures of a man or a woman bending over and exposing their buttocks because the pants they are wearing are too tight or too low in the hip. That is what Mr. W. did and apparently that is what a lot of other people do, because it appears the Internet is filled with this type of pornography. Therefore,

[49] 2016 ONCJ 171 at para 82.

> in my view, this is one of those cases where I think general deterrence may actually play an enhanced and meaningful role in sentencing.

He was sentenced to 18-months' imprisonment, a section 110 order for 10 years, 3-years' probation, a drug prohibition order, an order not to have an electronic device that can take pictures, and not to access a computer or device with internet access unless permitted by his parole officer or for work, an order to provide a DNA sample, a restitution order, and a victim surcharge order.

Also see: 2016 ONCJ 772 (Sentencing)

xiii. 2015 ONCJ 741

In **2015 ONCJ 741**, Mr. T hid a camera in a towel and filmed several women's buttocks while they were sun bathing at a public beach. He was previously charged for similar criminal conduct and was on probation, which included terms that he not attend that particular beach. He was charged with mischief, voyeurism and criminal harassment. Mr. T filmed the victim on two other occasions and she told him that he was making her uncomfortable and asked him to stop.

In regard to the mischief charge, the judge found that:

> I further conclude the defendant was very much aware that photographing, by zooming in on private areas was interfering with the lawful use and enjoyment of the beach by women. At the very least he was aware that this activity would probably cause distress and was reckless to its occurring (see s. 429 of the Criminal Code). Firstly, unlike in Lebenfish, he did it secretly. He covered his camera, I find, because he knew that women would be upset, and unlikely to continue their activities on the beach if they discovered him. Secondly, when he was discovered twice in 2010 by the complainant, she made him aware of her discomfort. When confronted, he denied responsibility then retreated (even leaving his video camera behind on the second occasion). So, at the very least, he had been made aware on two previous occasions that his actions caused interference with enjoyment of a public beach, and his words and actions showed that he knew that.[50]

[50] 2015 ONCJ 449at para 49.

In regard to the voyeurism charge, the court found that the women had a reasonable expectation of privacy on a public beach stating:

> In my view, it is entirely reasonable to expect that, while wearing a bathing suit on a public beach, you will be seen, maybe ogled and possibly find your way into a photograph. It is equally reasonable to expect that close-ups of your private areas will not be captured as a permanent record for the photographer, and potentially millions of others on-line.[51]

However, the court held that the Crown failed to prove beyond a reasonable doubt that the images were taken for a sexual purpose, stating:

> In my view, while a conclusion that the defendant was photographing women's buttocks for a sexual purpose is the most likely, it is not the only rational conclusion. I cannot completely discount the possibility that he made these recordings for an aesthetic purpose. There are many artists (Robert Mapplethorpe, for example) that create nude images that are designed to be appreciated for reasons other than sexual gratification. In my view, consent to be photographed present in those cases but not here is not relevant to the purposes for which the photographs were taken or used.[52]

In her victim impact statement, the victim stated:

> In a place where I should feel comfortable in a bathing suit I no longer do. Mr. Taylor's complete disregard for privacy has made me question other people's motive while at the beach, making it a less likely place to visit. Mr. Taylor has created an ongoing sense of fear and paranoia that where ever I go or whatever I am doing it is an unwanted invitation to be unwillingly videotaped. On a daily basis I often find myself questioning places of expected privacy; public bathrooms, changing rooms, gyms or even what I am wearing. I no longer dress with the intent of functionality and personal expression but with the fear that what I am wearing can make me a victim of being taped without consent. I often try to avoid these places having experienced that some people may have no regard for privacy and will go to lengths to violate it for their own gain.[53]

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[51] 2015 ONCJ 449at para 32.
[52] 2015 ONCJ 449at para 35.
[53] 2015 ONCJ 741 at para 5.

Mr. T was found guilty of mischief but not voyeurism or criminal harassment. He was sentenced to 7-days incarceration, served intermittently, and 2-years' probation, including orders that he not attend that beach or contact either of the victims. The fact that he did not transmit the images was considered a mitigating factor.

Also see: 2015 ONCJ 449 (Trial)

xiv. 2014 ONCA 840

In **2014 ONCA 840**, Mr. B hid a video camera in his bathroom to film his 13-year-old niece as she changed her clothes. He also lured a 16-year-old girl off of the internet using Facebook, grooming her over time and taking advantage of her poverty by offering to pay her to pose nude for him. He took over 600 photos of the girl that constituted child pornography. He pleaded guilty to voyeurism, producing child pornography, and luring off the internet. He was sentenced to four-years' incarceration, which he appealed. The sentence was seen as fit and the appeal was dismissed.

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

At trial, Mr. 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, Mr. L did not photograph

them "in circumstances that give rise to a reasonable expectation of privacy."[54] 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."[55]

With respect to the mischief charge, the court found that Mr. 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.[56]

Mr. L was acquitted on both charges.

xvi. 2014 ONSC 674

In **2014 ONSC 674**, 72-year-old Mr. S pleaded guilty to possession of child pornography, making available child pornography and voyeurism. Mr. S' IP address, which located him in Toronto, was flagged by international authorities for distributing child pornography on the eDonkey file sharing network. The victims were young females ranging from 4-years-old to 11-years-old. Authorities seized Mr. S' computers and discovered, among other things, videos of his 13-year-old step-

[54] 2014 ONCJ 130 at para 40.
[55] 2014 ONCJ 130 at para 40.
[56] 2014 ONCJ 130 at para 49.

granddaughter changing her clothing. 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."[57] Mr. 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.

xvii. 2014 ONCA 69

In **2014 ONCA 69**, Mr. N 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, Mr. N's counsel argued that the word "surreptitiously" includes a *mens rea* element and asserted that the trial judge was equivocal about whether Mr. N intended to record the victim without her knowledge. The Ontario court of appeal dismissed Mr. N's appeal[58] and his attempt to appeal to the Supreme court of Canada was unsuccessful.

Also see: [2015] SCCA no 278 (Leave to appeal)

xviii. 2014 ONSC 344

In **2014 ONSC 344**, Mr. W used a hidden camera to surreptitiously film his 15-year-old step-daughter. The camera transmitted the image wirelessly and was caught on a contractor's wireless back up cam as he was driving past the house for work. At one point the images being transmitted included a video of a girl changing in her bedroom and the contractor told someone in the neighbourhood, who reported it to the police. The police found two hidden cameras in the home. Both were installed in clock radios, one was pointed at his step-daughter's bed and one at the

[57] 2014 ONSC 674 at 11.
[58] 2015 CarswellOnt 13002.

bed in the master bedroom. The police did not find the receiving computer or device that would capture the images, however. The court found that:

> [The trial judge] found that the appellant surreptitiously placed the hidden camera in his stepdaughter's bedroom to transmit images of her for sexual purposes. The hidden camera was placed in a strategic location in her bedroom; it was connected to an electrical outlet; and, the unit was turned on. The hidden camera did, in. fact, transmit at least one image of her in the nude observed by Mr. Ehlers. The only "step" left for the Crown to have proven for the substantive offence was evidence that the appellant had observed a transmission from that hidden camera.
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> […]
>
> The trial judge was entitled to and did make a "common sense" determination on where on the continuum the appellant's conduct fell and there was evidence for him to make the determination that he did. There was no error in the trial judge's reasoning.[59]

Mr. W was sentenced to 90 days, served intermittently, 3-years' probation and his appeal was dismissed.

Also see: 2011 ONCJ 656 (Trial)

xix. 2013 ONCJ 598

In **2013 ONCJ 598**, Mr. C was 17-years-old. He allegedly recorded his girlfriend's 10-year-old sister changing her clothes. This case is in regards to a pre-trial delay and the accused's section 11(b) *Charter* rights. Due to a delay in the trial, the charge of voyeurism was stayed.

xx. 2013 ONSC 5243

In **2013 ONSC 5243**, Mr. C filmed a sexual encounter with the complainant without her knowledge. Mr. C was convicted of assault, assault with a weapon, mischief, voyeurism, and a

[59] 2014 ONSC 344 at para 23, 26.

preach of probation. On appeal, the appellant argued that the trial judge failed to conduct an analysis on whether the Crown proved that the recording happened "in circumstances that give rise to a reasonable expectation of privacy". The Crown argued the issue was not raised at trial and that the recording happened in a private dwelling place which would give rise to a reasonable expectation of privacy. The Appeal court found that although the trial judge did not specifically address this component of the offence in her findings, it is not necessary to address an issue not raised at trial, and that evidence supported a finding of this element beyond a reasonable doubt because the sexual activity "did not take place in a public place but in Mr. Coombs' bedroom in his private residence."[60] The appeal was dismissed.

xxi. [2011] 102 WCB (2d) 169

In **[2011] 102 WCB (2d) 169**, Mr. R, a 52-year-old man, pleaded guilty to voyeurism. He hid several mini video cameras that recorded female friends, trusted associates and family changing clothing, using the bathroom and engaging in "personal intimacies" over a five-year period. The court noted that his efforts were planned, deliberate and took a "great deal of effort" and "stand high on the serious end of the spectrum of facts for an offence of voyeurism."[61] Further, he manipulated some of the recorded images by superimposing the images on other pornographic videos he downloaded on the internet. Victims were severely impacted by his actions, the court noted:

> Those victim impact statements speak to the long-lasting damage he has done to those he victimized and to their families. His victims have had the unimaginable embarrassment of being contacted by the police to view scenes captured by the defendant while they were in private, carrying on such activities as changing their clothes, using the washroom, staying over as a houseguest and engaging in personal intimacies. The complainants feel betrayed by a man they liked and trusted. Some

[60] 2013 ONSC 5243, at para 45.
[61] [2011] 102 WCB (2d) 169, at para 5.

> have lost the ability to trust others and in particular, men. Others are unable to disrobe without taking extreme protective measures for fear of being secretly photographed.[62]

He was sentenced to 18-months' to be served in his community, 100 hours of community service, was ordered to provide a DNA sample, follow the Electronic Supervision Program, not to possess weapons, not to contact any of the victims, and was forbidden from using a recording device other than his cellphone, which he was not allowed to use as a recording device.

xxii. 2011 ONCJ 133

In **2011 ONCJ 133**, Mr. D, a 34-year-old male, was found guilty of four counts of voyeurism. Mr. D and the victim were in a relationship when Mr. D made a sexually explicit video of them without her knowledge or consent. Following the end of the relationship, Mr. D posted the video on a Facebook page and sent an email to 13 of her friends and family, inviting them to watch the video along with an attachment of the video.[63] The Crown failed to prove that the posting resulted in a general release of the video on the internet,[64] but the posting was an aggravating factor on sentencing. The accused continued to express the view that the incident was blown out of proportion, suggesting that the woman wanted to be photographed, only complained when her

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[62] [2011] 102 WCB (2d) 169 at para 3.

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

[64] 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.

family became aware of the video and claimed only to release the video after he found out of her infidelity, which the court found was untrue.

The court stated:

> The most serious of the voyeurism convictions is that of the offence under s. 162(4) of the Code, of distributing the video. The distribution of the video was a planned and contemplated act. It was not the result of a spontaneous outburst of emotion. To effect his plan, Mr. DeSilva had to think first of the plan, then open a Facebook account specifically to execute his plan; he had to post the video to his Facebook page and he then had to send emails with the video as an attachment to some of the people who could not access Facebook. It took some time to both hatch and execute the plan.
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> The plan was designed to achieve maximum embarrassment. On Mr. DeSilva'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 Mr. DeSilva 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, he also ensured, by design, the continued and long-term victimization of the complainant. As expressed by Ms. S., it created a negative effect on her reputation by creating a negative image of her. As Madam Crown characterized it, "It poisoned the way people saw her."
>
> The embarrassment was not just isolated to the fact the video was disclosed but that the accused also identified the complainant, whose face could not be seen, as being the person on the video. This ensured that the victim's embarrassment would be relived whenever she meets a person who she knew viewed or was aware of the video. The impact of this was demonstrated when the complainant in her victim impact statement explained how she felt when she had to leave a public function to avoid contact with one of the recipients of the video and how she had to change her gym, as one of the recipients also was a member of that gym.

> I find it also aggravating that the material circulated was a video as opposed to a single still picture.[65]

His failure to take responsibility, blaming the victim, and failure to understand the severity on the victim's sexual integrity were factors related to deterrence, as was his use of social media to conduct the violation.

The court stated:

> In addition to the deterrence to the accused, this offence is one where general deterrence plays an enhanced role. With the proliferation of social networking sites, the opportunity to misuse such sites is significant and with devastating results to the victims; many of the impacts are significant and long lasting. This is one of those rare cases where general deterrence may actually play an enhanced and meaningful role in sentencing. The principle of general deterrence has been the subject of considerable judicial comment with great concern expressed over its over-use to justify incarceration, but it remains a recognized sentencing principle. Satisfying general deterrence when it plays an enhanced role is difficult within the context of a conditional sentence. The significant denunciatory effect of jail is needed in expressing the message.[66]

Mr. D also taunted the victim in further emails after she asked him to stay out of her life. He was sentenced to 7 months globally (5 months for distributing the video, 2 months incarceration for the voyeurism and 2 months for the criminal harassment (concurrent), as well as a probationary period of 2 years with an order to attend programming, a ban on weapons and a no contact order with the victim. With respect to Mr. 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."[67]

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[65] 2011 ONCJ 133 at para 20-24.
[66] 2011 ONCJ 133 at para 52.
[67] 2011 ONCJ 133 at para 56.

xxiii. 2010 ONCJ 347

In **2010 ONCJ 347***,* Mr. M, a 37-year-old man, 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 asked her 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 Mr. M was filming their sexual encounter, including zooming in on her face and genitals, without her knowledge or consent. Horrified and upset, the victim reported Mr. M to the police. Officers executed a search warrant at Mr. M's home and found photographs of the victim on his computer taken earlier in the evening.

The court found that Mr. M 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:

> 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.[68]

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

[68] 2010 ONCJ 347 at para 4.

> that he does not understand that to do so will attract an appropriate response by the authorities.[69]

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

Also see: 2010 ONCJ 104 (Trial)

xxiv. 2008 ONCJ 476

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 Mr. G had previously taken photographs of her without her consent.

At trial, Mr. 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."[70] Noting the lack of case law available, the court suspended Mr. 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."[71] Nonetheless, the court noted during

[69] 2010 ONCJ 347 at para 12 [emphasis added].
[70] 2008 ONCJ 476 at para 22.
[71] 2008 ONCJ 476 at para 13.

sentencing, "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."[72]

xxv. [2007] OJ No 5811 (ONSC)

In **[2007] OJ No 5811 (ONCJ)**, Mr. C pleaded guilty to possessing child pornography, breaching recognizance of bail, making child pornography and voyeurism. He had been surreptitiously making recordings of his niece and other children in the community and editing the images and storing them in different formats. Mr. C was arrested and his computer, storage devices, hard drives, CDs, DVDs and thumb drives were seized containing 14,869 unique images of child pornography, 44,487 images of nude children, 650,063 "other" unique images of children, and 600 videos of child pornography, 112 videos of child nudity, and 7,743 other videos of children. Most children were prepubescent females, including photos of adults sexually assaulting children. The court cited *R v Strohmeier*, in which Justice DeFilippis stated:

> Possession of child pornography is a serious offence. The following general observations explain why: First, the prevalence of the offence is of great concern to the community. Whether it is because of the greater use of the Internet or an increase in law enforcement, there are more cases of possession of child pornography. In any event, the minimum jail term is a recent amendment to the *Criminal Code* and reflects Parliament's decision to remove the possibility of a conditional sentence for the offence. Second, the victimization of children captured in picture and video never ends. Time passes but the images remain. With the push of a button, those images can be shared with countless individuals throughout the world. Third, notwithstanding the permanent record that exists, greater exposure of child pornography leads to increased production, and the abuse of more children. Finally, there is a link between images of child pornography and inhibitions about the sexual assault of children.

He was sentenced to 18-months' incarceration for possession of child pornography, 12 months for distributing child pornography, 6 months for the voyeurism, 2 months for the breach of

[72] 2008 ONCJ 476 at para 29.

recognizance, as well as 3 years of probation, and orders to not use or possess devices capable of storing digital data unless for work, not to use email unless allowed by probation officer, to provide the probation officer with information on his ISP, not to communicate with people under the age of 18, not to use social networking sites or chatrooms, not to possess images of children naked or in sexual manner, not to possess a firearm, to provide a DNA sample, to be registered as a sex offender for 10 years, not to be in public places with children, not to use a computer to communicate with a person under the age of 14 and to forfeit his devices.

xxvi. 2007 ONCJ 513

In **2007 ONCJ 513**, Mr. K suggested that his 15-year-old step-daughter take a shower. She found two cameras hidden in towels in the bathroom. A police search of the property revealed a video of the step-daughter on his laptop and multiple images of her with her breasts and genitals exposed. He was charged with voyeurism, making and possessing child pornography. He pleaded guilty to the voyeurism and not guilty to the child pornography charges. The accused brought an application under s 24(2) to exclude the images and s 8 of his *Charter* rights. The application to exclude evidence was dismissed.

VIII. QUEBEC

i. 2018 QCCA 597

In **2008 QCCA 597**, the accused, who was a minor, discovered he could see into the basement bedroom of his 13-year-old female neighbor when her blinds were open. On three occasions he attached a cellphone to the end of a hockey stick and managed to take photographs of his neighbor when she was nude or semi-nude in her bedroom. The accused then shared 11 photos of the victim with Mr. Y, who added them to the collection of nude photographs of the females in his region. The collection of photos was shared with other individuals, one of whom recognized the victim and informed her of the photographs.

The accused was convicted on voyeurism and child pornography charges and was given a conditional sentence. On appeal, he was found guilty of the child pornography offences, for which he was given a conditional sentence, and the voyeurism charge was stayed according to the *Kienapple* principle.

Also see: 2017 QCCA 1143 (Appeal)

ii. 2018 QCCQ 80

In **2018 QCCQ 80**, the accused, Mr. R, used his cell phone to observe his teenage stepdaughters while they used the bathroom and showered. The eldest daughter was observed on four different occasions and later informed her mother about his behaviour. The youngest daughter was observed on two different occasions but she was not aware she was being observed. The accused claimed he did not take any photographs and took only one video.

He was convicted of voyeurism and given a conditional discharge, as well as two years of probation.

iii. 2017 QCCS 4745

In **2017 QCCS 4745**, an 18-year-old man tried to take a photo of another person underneath a bathroom stall. The victim confronted the man, who apologized for attempting to take the photograph. He was charged with voyeurism and received a conditional discharge. On appeal, the sentence was reduced to an absolute discharge on the basis that the accused was young, had no prior record and immediately denounced his actions.

Also see: 2017 QCCA 1980 (Appeal)

iv. 2017 QCCA 499

In **2017 QCCA 499**, the victim, a 15-year-old girl, was part of the Mr. C's Scouts group. Mr. C was very affectionate towards the victim while she was in Scouts and would tell her about his sex life

and ask her about her sexual practices. On one occasion, she stayed over at Mr. C's home because there was a Scout event she wished to attend. She alleged that prior to his spouse and children arriving at the home, Mr. C leant her a bikini to go swimming in his pool then made sexual comments towards her and asked her to touch herself for him. On the same occasion, Mr. C showed her pornography on her computer for 30-45 minutes. The images he showed her included images of his partner engaged in BDSM, nude photos of a neighbor, and photos of a sexual nature of one of her friends, who was 16-years-old at the time.

Mr. C was convicted of sexual assault, sexual interference, voyeurism and invitation to sexual touching.

The accused appealed the judgement. The appeal was allowed in part. Based on the rule against multiple convictions as set out in *R v Kienapple*, the sentence was reduced to a conditional discharge for the sexual aggression and voyeurism charges.

Also see: 2015 QCCA 439 (Request for release), 2014 QCCA 2284 (Appeal), 2014 QCCQ 13251 (Sentencing)

v. 2016 QCCQ 5288

In **2016 QCCQ 5288**, Mr. M, a CEGEP de l'Outaouais swim coach, was convicted of voyeurism. Mr. M placed a cellphone in the women's change room that recorded girls changing. The complainant, an 18-year-old woman, noticed the cellphone in the changeroom and that it had been recording for several minutes. She reported it to her swim coach who told her that he would hand over the phone to security but did not. Later, two fathers confronted the coach about the recordings. Mr. M confessed to the recording, claiming to be depressed and did not know why he did it. He claimed he only did it on one other occasion, the week prior to the incident at hand. He claimed to have watched the recordings but deleted them afterwards.

After his confession he was cooperative and sought help for depression and burnout. He also apologized to his victims.

The court sentenced him to a conditional discharge, along with 2-years' probation. Additional orders included community service hours, a donation to a local victim's aid organization and a prohibition from acting in a position of authority with minors.

vi. 2015 QCCQ 4512

In **2015 QCCQ 4512**, the offender, Mr. P, pleaded guilty to taking "up-skirt" photos of a woman in a department store. When Mr. P's phone was seized, police found hundreds of photos of a similar nature. Noting that Mr. P was gainfully employed, pleaded guilty, and was seeking treatment, the court ordered a conditional discharge with 1-year probation.

vii. 2015 QCCQ 196

In **2015 QCCQ 196**, the accused, Mr. C, owned a corner store with his wife. He tried to use his cellphone to record his young female employee, Ms. D, while she was using the bathroom. The recording only lasted a few seconds before the employee noticed. Mr. C pleaded guilty to voyeurism and informed his wife and other employees about his actions. He was given a suspended sentence as well as 12-months' probation.

viii. 2013 QCCQ 1950

In **2013 QCCQ 1950**, the accused, Mr. S, picked up his girlfriend at a bar where she had been drinking to the point of blacking out. She later discovered a video of her on Mr. S' camera where he could be seen masturbating while touching her body and penetrating her with his fingers when she was blacked out. He was convicted of voyeurism and sexual assault and sentenced to 8-months' house arrest and 2-years' probation. Additional orders included a no contact order, a DNA sample, a 10-year registration on the sex offender registry, and an order not to use the internet through his cell phone for longer than 15 minutes consecutively.

ix. 2012 QCCS 206

In **2012 QCCS 206**, Mr. B was charged with making child pornography, distributing child pornography, possessing child pornography, voyeurism, and inciting a person under 16 to touch him. The police seized thousands of child pornography photos and hundreds of videos involving children between the ages of one and twelve-years-old. Mr. B posted images of his daughter on the internet to get men to talk with him about their fantasies about children. Mr. B did not deny any of the allegations made against him, save the charge of invitation to touching, but sought to review his pre-trial detention. The court found that there were not sufficient conditions for him to be supervised and his motion was dismissed.

x. 2011 QCCA 6888

In **2011 QCCA 6888**, Mr. G was found guilty of voyeurism for filming a very young girl using the bathroom. A police search of Mr. G's home resulted in the discovery of 175 different videos and 10 photographs containing child pornography. One video showed Mr. G installing a camera in a public washroom which captured the image of an eight-year-old girl urinating. Mr. G was found guilty of making and possessing child pornography. He was also found guilty of breaching his recognizance which included a court order to keep good behaviour when he yelled at two young girls, aged 12 and 14, demanding that they show him their breasts and vagina.

On appeal, the court reduced his sentence to 18-months' incarceration and 3-years' probation. Additional orders included limitations on being in the presence of minors, and a prohibition form owning devices that could access the internet, take photographs or film.

Also see: 2011 QCCA 2387 (Appeal), 2011 QCCA 1398 (Appeal), 2011 QCCQ 991 (Evidence).

xi. 2011 QCCQ 2770

In **2011 QCCQ 2770**, Mr. D, a 47-year-old man, owned a triplex that he rented out to tenants. He set up an elaborate video recording system in the units' bathroom that pointed over the shower. The tenants noticed the system and left the unit immediately. He was released on bail with orders that prohibited him from using electronic devices and a no contact order with the victims.

xii. 2009 QCCQ 20918

In **2009 QCCQ 20918**, the accused, Mr. B, has a long history of sexual deviance, sexual aggression, and prior child pornography charges. He was designated as high risk of reoffending by several psychologists. At the time of these offences, Mr. B was on probation and was prohibited from being near minors. Over a two-week period, he entered two different elementary schools where he hid in the bathroom stalls and took pictures of young girls, typically 6-years-old or younger, while they were in the bathroom. On three occasions the children informed a parent or teacher about the incident. Mr. B was convicted of nineteen counts of possession and distribution of child pornography. Mr. B was designated as a dangerous offender and was sentenced to an indeterminate time of imprisonment.

The accused appealed the trial decision, claiming that the court did not prove his actions constituted serious personal injury. The appeal was dismissed.

Also see: 2012 QCCA 1138 (Appeal)

IX. Saskatchewan

i. 2016 SKPC 113

In **2016 SKPC 113**, Mr. R, a 45-year-old man, was found guilty of voyeurism. He surreptitiously filmed his niece while she was sleeping in a bed under the stairs at his house. The 19-year-old victim arrived at the home and consumed alcohol and marijuana and fell asleep in a bed in the house. Her cousin later found her father in bed with the victim with her pants pulled down and the accused had his arms around her. Her mother later found a video of the victim. The video was of low quality, but the cousin could identify her father in the video by what he was wearing and the bed that she discovered them in.

ii. 2016 SKQB 123

In **2016 SKQB 123,** Mr. G, a 27-year-old man, pleaded guilty to making available child pornography and possessing child pornography. He was discovered when he provided access to 25 child pornography files via GigaTrive, a file sharing network, to an undercover officer. The undercover officer also captured screenshots of 2,126 other files. Under a warrant, the police seized Mr. G's computer, laptop and two "DataLocker" external hard drives that had military grade encryption on them and could not be opened. Mr. G was charged at the first trial on the evidence that was accessible. He was warned that when the police cracked the hard drive there could be additional charges. He was sentenced to two-years less a day incarceration, and three years' probation.

When the police were able to crack the encryption on the hard drives some time later, they uncovered 12,775 unique images and videos surreptitiously taken of boys in a changing room and one of a boy urinating, that were focused on the boys' genitals. The videos were of boys under his care as a volunteer with the Big Brothers Big Sisters organization. Mr. G was further charged with voyeurism, possessing child pornography and making child pornography. The accused pled autrefois acquit and autrefois convict but failed to establish a basis for these pleas. Mr. G later plead guilty to the offences. His failure to assist in the investigation was not an aggravating circumstance and the surreptitious filming of the child pornography was considered at the "lower end" of the scale, but the fact that he was in a position of trust to the boys he filmed and the sheer number of child pornography images he had was an aggravating factor. He was sentenced to 29-months' incarceration, 3-years' probation and ancillary orders including a DNA order, a life time registration as a sex offender, a 5-year prohibition from being near places where people under the age of 16 are, a 5 year prohibition from using a computer to communicate with people under 16, and a forfeiture order.

Also see: **2015 SKQB 372** (Application for autrefois acquit and autrefois convict)

iii. 2015 SKQB 408

In **2015 SKQB 408**, Mr. T was charged with various counts of sexual assault, invitation to sexual touching, voyeurism (observing, not recording), making child pornography available, sexually touching a person under the age of 16, and exposing his genitals to a person under the age of 16. The victims were his two underage daughters. He pleaded not guilty. This case was in regards to whether recorded statements of the victim could be edited or redacted, which was permitted, and whether the victim could provide her testimony using a mode of shielding. The court held that a screen was permissible.