



Voyeurism as a Criminal Offence:

A Consultation Paper

2002



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VOYEURISM AS A CRIMINAL OFFENCE: A CONSULTATION PAPER

INTRODUCTION

The rapid technological developments of recent years have brought many benefits to Canadian society, but they have also had implications for such basic matters as privacy and the role of the law. Web cameras, for example, which can transmit live images over the Internet, have raised concerns about the potential for abuse, notably the secret viewing or recording of citizens for sexual purposes or where the viewing or recording involves a serious breach of privacy. In light of the Government's commitment in the Speech from the Throne to protect Canadians from new and emerging forms of crime, this may be a good time to review the law in this area and ensure that it is up to date and able to deal with new challenges appropriately and effectively.

There is currently no specific offence in the *Criminal Code* that addresses voyeurism or the distribution of voyeuristic materials. It is true that existing provisions of the Code apply in some cases of voyeurism, such as those that involve child pornography or trespassing at night. However, with the new technology, voyeurism itself may now involve a breach of privacy much greater than could have been foreseen when the Code was drafted – one that undermines basic notions of freedom and privacy found in a democratic society.

Incidents involving voyeurism and modern technology are increasingly receiving public attention and generating concern. For instance, at the New Brunswick Department of Justice in 1999, a male employee surreptitiously installed a video camera in the co-ed washroom and taped his female colleagues using the bathroom facilities. Similarly, a *Maclean's* magazine article in February 2001, aptly titled "Peeping Toms Go Electronic," described the case of a young woman who discovered a video camera hidden in the air vent of her rental apartment. The article highlighted the increasing availability of inexpensive video cameras that can be concealed in "every imaginable device" such as clocks, lamps, teddy bears, and exit signs. When technology allows images obtained by voyeurism to be posted instantly on the Internet, it raises concerns about the considerable potential harm generated by the distribution of these images.

In response to this situation and to a number of calls to reform the law by creating a new offence or offences to address voyeurism directly, most recently from the Provincial and Territorial Ministers of Justice, the Department of Justice is conducting this consultation to determine what steps should be taken.

The purpose of this consultation paper is to allow the Department to benefit from the views of stakeholders and the public on whether new offences should be created to deal with voyeurism and, if so, what the elements of these offences should be. The paper is arranged in two parts: the first provides information to place the consultation issues in context; the second looks at specific

proposals and issues that must be addressed in preparing legislation. The second part also includes a series of questions on possible options. These questions are intended to help focus the discussion and to provide reference points for responses.

Please send your response to the consultation document **by September 30, 2002**, to the following address:

Public Consultation on Voyeurism
Criminal Law Policy Section
284 Wellington Street, 5th floor
Ottawa, Ontario K1A 0H8

Responses may also be sent by fax to (613) 941-9310 or via e-mail to Voyeurism-Consultation-Voyeurisme@justice.gc.ca.

An abridged version of this paper, summarizing the issues and questions but omitting some of the technical detail, is also available. Both consultation papers are available in electronic form on the Department of Justice Web site <http://www.canada.justice.gc.ca/en/cons/voy>. Additional paper copies can be ordered by telephone at (613) 957-4752 or from the address above.

After the public consultations have concluded, a summary of the results will be made available on the Department of Justice Web site at <http://www.canada.justice.gc.ca/en/cons/voy>.

Thank you for your interest in this consultation.

PART ONE: CONTEXT

History

Over the past six years, the provinces and territories have expressed interest in creating a new offence to deal with voyeurism. At the Uniform Law Conference in August 2000, a motion presented by Saskatchewan at the Criminal Law Section with respect to criminal voyeurism was carried. The motion proposed:

That Part V of the *Criminal Code* be amended to create a specific offence that would prohibit surreptitious, non-consensual viewing, photographing or videotaping of another person in a dwelling house or business premises where there is an expectation of privacy and if the viewing, photographing or videotaping is done for a sexual purpose.

A similar resolution had been proposed earlier by New Brunswick at the Uniform Law Conference in August 1996.

Over the past year and a half the federal Department of Justice has been working with senior officials in the provinces and territories to identify relevant issues regarding voyeurism and to discuss options for public consultation on a voyeurism scheme. On February 12, 2002, Provincial and Territorial Ministers Responsible for Justice passed a resolution urging the Minister of Justice to amend the *Criminal Code* to criminalize voyeurism and the distribution of visual representations obtained through voyeurism.

Defining Voyeurism

There are two ways to define voyeurism: as a behaviour and as a sexual disorder. In general terms, a voyeur is “a person who derives sexual gratification from the covert observation of others as they undress or engage in sexual activities” (*Canadian Oxford Dictionary*). In this context, the behaviour is concerned with three things: the surreptitious nature of the observations; the private and intimate nature of what is observed; and sexual gratification. Voyeuristic behaviour may extend not only to the making of the voyeuristic images, but may include distribution of voyeuristic visual representations to others.

A second way to consider voyeurism is as symptomatic of a sexual disorder. A subgroup of the persons who engage in voyeuristic behaviour suffer from this sexual disorder. According to the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*:

Voyeurism is viewing some form of nudity or sexual activity, accompanied by sexual arousal. To be classified as a sexual disorder, or a paraphilia, voyeurism must be characterized by observing unsuspecting individuals, usually strangers, who are naked or engaging in sexual activity, for the purpose of seeking sexual excitement.¹

¹ Quoted in Meg S. Kaplan and Richard B. Krueger, “Voyeurism: Psychopathology and Theory” in *Sexual Deviance: Theory, Assessment and Treatment* (New York: The Guilford Press, 1997), pp. 297-310, at p. 297.

The voyeur usually does not seek any contact with the victim. The perpetrator may masturbate during the act of voyeurism or, more commonly, afterwards in response to the memory of what he or she observed.² It is only when this behavioural problem persists beyond a certain period that experts diagnose it as a paraphilia:

The diagnostic criteria for voyeurism are: (a), recurrent, intense sexually arousing fantasies, sexual urges or behaviours involving voyeuristic activity, and (b), the fantasies, sexual urges, or behaviours cause clinically significant distress or impairment in social, occupational, or other important areas of functioning... Many individuals include voyeuristic fantasy or behaviour in a repertoire of sexual fantasies. It is only when these fantasies become a focus for an extended period of time (six months or more) and cause distress or impairment in one's life that this would be diagnosable as a paraphilia.³

Most voyeurs engage in at least one other sexually deviant behaviour, usually exhibitionism or non-consensual sexual touching or rubbing.⁴ There is also evidence that voyeurism occurs at an early stage along a continuum of sexual disorders that may become progressively more coercive and invasive.⁵ Approximately 20% of voyeurs have committed sexual assault or rape.⁶ In a number of Canadian cases, court have considered it relevant that persons convicted of crimes involving sexual and non-sexual violence have had a behavioural history which included voyeurism.⁷ Moreover, studies have shown that men commit most sex crimes and women and children are almost always the victims.⁸

² R. Karl Hanson and Andrew J.R. Harris, "Voyeurism: Assessment and Treatment" in *Sexual Deviance: Theory, Assessment and Treatment* (New York: The Guilford Press, 1997), pp. 311- 331, at p. 315.

³ Meg S. Kaplan and Richard B. Krueger, "Voyeurism: Psychopathology and Theory" in *Sexual Deviance: Theory, Assessment and Treatment* (New York: The Guilford Press, 1997), pp. 297-310, at p. 297.

⁴ *Supra*, footnote 2, at p. 313.

⁵ *Supra*, footnote 2, at p. 314.

⁶ Hanson, R. Karl, and Andrew J.R. Harris, "Voyeurism: Assessment and Treatment," in *Sexual Deviance: Theory, Assessment and Treatment* (New York: The Guilford Press, 1997), pp. 311 –331, at 314. It should be noted that there is no offence of "rape" in the Canadian *Criminal Code*. Depending upon the facts of the particular instance of sexual assault, a rape may be captured by one of three sections in the *Criminal Code*: sections 271, 272 or 273.

⁷ See *R. v. Dickinson*, [1984] O.J. No. 100 (Ont. C.A.); *R. v. Wilson*, [1996] A.J. No. 731 (Alta. C.A.); *R. v. Deforge*, [1986] B.C.J. No. 648 (B.C.C.A.); Voyeurism was found by the court to be part of a blend of sexual disorders suffered by an accused in a successful dangerous offender application brought for sexual offences in *R. v. Johnson*, [1997] O.J. No. 2535 (Ont. C. J. (Gen. Div.)); Prior voyeuristic behaviour was accepted by the court as part of an agreed statement of facts relevant to sentencing in *R. v. A.D.R.*, [1991] N.J. No. 154 (Nfld. S.C.); *R. v. A.B.C.*, [1991] A.J. No. 1118 (Alta. C. A.) (In the latter case the court found that the voyeurism was opportunistic rather than planned); in *R. v. Currie*, [1997] 2 S.C.R. 260 the Supreme Court of Canada restored a finding that the offender was a dangerous offender. In doing so, the court accepted the evidence of the Crown expert as well as that part of the defence expert's testimony which established "the profound nature of the respondent's sexual problems" which included (in addition to a record of sexual offences) an "impulsive personality disorder and a polymorphous sexual deviation" that "includes voyeurism, heterosexual pedophilia and hebephilia and impulsive sexual aggressiveness."

⁸ *Supra*, footnote 1, at p. 299. See also the comments of Mr. Justice Cory in *R. v. Osolin*, (1993), 86 C.C.C. (3d) 481 (S.C.C.), at p. 521, where his Lordship indicated "It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. The reality of the situation can be

Another characteristic of voyeurism as a paraphilia is a high frequency of deviant acts *per* individual. For example, in one study of 411 men, 13% (62 men) admitted to being voyeurs and self-reported 29,090 voyeuristic acts against 26,648 victims.⁹ Studies suggest that voyeurs justify their behavior with rationalizations or cognitive distortions,¹⁰ convincing themselves, for example, that their actions do not cause any harm or that the victim actually wanted to be observed.¹¹ As with other sexual disorders, voyeurs characteristically have little empathy for the victim and have an impaired capacity for emotional or sexual intimacy.¹² The risk factors for recidivism are similar to those that pertain to other sex offenders.¹³

Voyeurism as a sexual disorder manifests early in life (the average age is 15), is chronic, and tends to last a lifetime, unless treated.¹⁴

Limitations of the Current Law

Recent interest in the creation of a voyeurism offence also has been generated, in part, by occurrences for which there are currently no appropriate responses in the *Criminal Code*. The limitations of the current law are evident in two contexts. The first is that while some other offences in the *Criminal Code* cover particular aspects of voyeurism, there is no comprehensive statutory response to voyeurism. For example, if recorded images that meet the definition of child pornography include voyeuristic activities involving children, they may be captured under section 163.1 of the *Criminal Code*. Similarly, if voyeurism generates records of obscene activities it might be captured by section 163 of the Code. Paragraph 173(1)(a) (indecent acts) would apply only to the voyeur who, while viewing or recording others, was also performing an indecent act in a public place, such as masturbating, at the same time. While voyeurism may be captured by section 177 (trespassing at night), the scope of the offence is quite narrow as it applies only to persons who loiter or prowl at night near a dwelling house on the property of another person. The mischief provisions of paragraphs 430(1)(c) and (d) apply to voyeurism to the extent that the activity interferes with the victim's "lawful use, enjoyment or operation of property." Unfortunately, courts have disagreed about the scope and meaning of "lawful use, enjoyment or operation of property" so section 430 is of limited use as a vehicle for prosecuting voyeurism.¹⁵

seen from the statistics which demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women. See *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* (April 1992), at p. 13."

⁹ Abel, G.G., and J.L. Rouleau, "The Nature and Extent of Sexual Assault," in W.L. Marshall, D. and R. Laws, and H. E. Barbaree (eds.), *Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender* (New York: Plenum Press, 1990), pp. 9-21, at p. 15.

¹⁰ Abel, et. al., *Treatment Manual: The Treatment of Child Molesters* (Atlanta, 1984); Hunter et al., "The reliability and discriminative utility of adolescent cognitions scale for juvenile offenders," *Annals of Sex Research*, 4, 281-286.

¹¹ *Ibid.*

¹² *Supra*, footnote 2, at pp. 317, 318.

¹³ *Ibid.*, at p. 328.

¹⁴ *Supra*, footnote 1, at 298

¹⁵ For example, in *R. v. Maddeaux* (1997), 115 C.C.C. (3d) 122, the Ontario Court of Appeal rejected the notion that "enjoyment" of property should be given its meaning at property law, that is, to hold possession of or title to property without interference. The court held that "enjoyment" of property was broad enough to encompass the right to experience the joy or pleasure associated with the property. This decision was applied in *R. v. Almeida*, [2001] O.J. No. 5179 (Ont. Sup. Ct.), to find an accused guilty of mischief who had mounted a surveillance camera

The limitations of the current *Criminal Code* provisions to deal with surreptitious recording were illustrated by a recent incident in Kingston where a cadet videotaped his consensual sex acts with a woman without her knowledge and the tapes were later shown at parties on a military base. The Crown advised police that the facts of the case did not involve any offences under the *Criminal Code*. Therefore, the only avenue to address the harm suffered by the victim was for the military to bring charges relating to military misconduct pursuant to the *National Defence Act*.¹⁶

Conceptualizing a Voyeurism Offence

Justifying the creation of a voyeurism scheme in the *Criminal Code* involves a consideration of the harm that such a scheme is intended to address. The harm can be assessed as the breach of a right to privacy that citizens enjoy in a free and democratic society; alternatively, voyeurism can be conceptualized as a sexual offence.

(a) As a privacy offence

Other than the electronic surveillance provisions of the *Criminal Code*, there is no criminal offence of breach of privacy *per se*. Concerns about protection of privacy do arise as an element of some specific offences in the Code, but none of the provisions is a complete answer to fact situations where an individual acts as a voyeur by observing or recording the actions of another person without that person's knowledge or consent.

The *Canadian Charter of Rights and Freedoms* considers privacy rights in the context of relationships between the individual citizen and the state. The issue of the circumstances which generate a "reasonable expectation of privacy" by citizens who are subject to search and seizure by the state or state actors has been considered in jurisprudence regarding section 8 of the Charter. In the search and seizure context, the Supreme Court of Canada has held that a determination of whether the individual had a reasonable expectation of privacy is answered by considering whether the person had possession or control of the property; whether he or she had the ability to regulate access to the property; whether there was a *subjective* expectation of privacy; and whether there was an *objective* assessment of the reasonableness of the expectation of privacy.¹⁷

on the second story deck of his house which recorded all activity in his neighbour's yard on a 24 hour basis. The recording was done over the neighbour's written objections. A different approach was taken by the Quebec Court of Appeal in *R. v. Drapeau* (1995), 96 C.C.C. (3d) 554, where the court held that "enjoyment" did not include activities which merely diminish the pleasure derived from the property by its owner, as opposed to a restriction on the entitlement or exercise of a right in relation to property. In *Drapeau* the accused's conduct consisted of watching and staring at his neighbours and making objectionable noises.

¹⁶ Of the three individuals involved in the case, one was acquitted of various offences under the *National Defence Act*. One individual pleaded guilty to two counts of disgraceful conduct and to one count of engaging in conduct to the prejudice of good order and discipline pursuant to sections 93 and 129, respectively, of the *National Defence Act*. He received a severe reprimand and a fine. Prior to trial he was administratively released from the Canadian Forces. The cadet who actually engaged in the sexual activity with the victim was found guilty of two counts of disgraceful conduct, fined and dismissed from the Canadian Forces.

¹⁷ *R. v. Edwards*, [1996] 1 S.C.R. 128.

The privacy rights of complainants have been given constitutional consideration in the context of section 7 of the Charter. In *R. v. Mills*¹⁸ the Supreme Court of Canada upheld the constitutional validity of sections 278.1 to 278.91 of the *Criminal Code* concerning the production of a complainant's personal records in sexual assault trials. The Court held that the scheme did not offend section 7 of the Charter. In doing so, the Court acknowledged that there were conflicting rights at play. The accused's right to make full answer and defence was to be balanced against the complainant's privacy and equality rights.

With regard to accused persons, the section 7 liberty interest has been held to include a right to privacy. As Justice La Forest commented in *R. v. Dyment*,¹⁹ "privacy is at the heart of liberty in a modern state." From a constitutional perspective, it can be said that privacy surfaces as a constitutionally protected right in the context of both sections 7 and 8 of the Charter regarding accused persons. With regard to complainants and private individuals generally, there appears to be a constitutionally inspired recognition that a basic right to privacy is an element of living in a free and democratic society. Nonetheless, it cannot be said that the Charter provides citizens with a general, constitutionally protected right to privacy.

The right to privacy is expressly recognized by various international instruments²⁰ which extend to all persons the right to be protected from arbitrary or abusive interference with their privacy. The rights enshrined in these international instruments are expected to inform policy choices regarding the right to privacy in the domestic context.

In relationships between individuals, privacy rights are protected in the civil context in some jurisdictions through provincial legislation. To date, privacy legislation exists in British Columbia, Saskatchewan, Manitoba and Newfoundland. The privacy rights of Quebec residents are protected through the *Civil Code of Quebec* and also by section 5 of the *Quebec Charter of Human Rights and Freedoms*.

It is also interesting to note that "An Act to guarantee the human right to privacy" (Bill S-21) was introduced by Senator Finestone as a Private Member's Bill on March 13, 2001, and was given First Reading. The Bill was referred to the Standing Committee on Social Affairs, Science and Technology on April 26, 2001. It was last debated at Second Reading on February 5, 2002, at which time the debate was adjourned.

The proposed provisions of the "Privacy Rights Charter," as the Act would be called, seem to indicate that it is to operate in both civil and criminal spheres of federal jurisdiction²¹ At the

¹⁸[1999] 3 S.C.R. 668.

¹⁹[1988] 2 S.C.R. 417, at p. 427.

²⁰ See, for example, the *International Covenant on Civil and Political Rights*, Article 17 (Date of accession by Canada: May 19, 1976); *American Declaration of the Rights and Duties of Man*, Article V (Canada has been a member of the Organization of American States since 1990); *American Convention on Human Rights*, Article 11; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 8 (the privacy rights protected in the latter are in respect of the individual vis-à-vis the state).

²¹ Section 9 of the proposed Act states that it "applies to all persons and matters coming within the legislative authority of Parliament." Section 3 would confer privacy rights on individuals; it states that every individual's

very least, it is an indication that there is interest in some quarters for formally recognizing a privacy right for individual citizens.

(b) As a sexual offence

The sexual aspect of the offence arises from one or two sources (and in any given case, both may be operative): the *purpose* for which the observation is made (e.g. sexual arousal of the voyeur) or, alternatively, the *nature* of the subject observed (e.g. viewing or recording the victim's sexual organs or the victim engaged in explicit sexual activity). The policy justification for prohibiting voyeurism in this context is that it prevents a private citizen from sexually exploiting another private citizen. The sexual exploitation occurs the moment that the voyeur observes or records the victim, even if the victim is not aware of it.

(c) Common ground: Intersection of a privacy offence and a sexual offence

The harm to be addressed by a voyeurism offence can be assessed from two perspectives. From a policy perspective, it can be argued that the state's interest in protecting the privacy of individual citizens and its interest in preventing sexual exploitation of its citizens coalesce where the breach of privacy also involves a breach of the citizen's sexual or physical integrity.

Second, harm is also assessed from the perspective of how frequently a particular offence occurs. Because of the surreptitious nature of voyeurism, victims usually do not know that they have been viewed or recorded which, in turn, leads to under-reporting of voyeuristic behaviour.²² It is not known what percentage of voyeuristic behaviour is the result of voyeurs with a personality disorder. As noted above, though, there is evidence that voyeurs who suffer from a paraphilia tend to have a high incidence of voyeuristic activity *per individual*.²³

PART TWO: PROPOSALS FOR VOYEURISM OFFENCES

Criminal Voyeurism

The Elements

There are two ways in which a voyeurism scheme can deal with violations of physical or sexual integrity. One is to provide a specific intent offence of committing voyeurism for a sexual purpose. The other option is to criminalize viewing or recording that is done specifically for the

right to privacy includes physical privacy, freedom from surveillance, freedom from monitoring or interception of their private communication, and freedom from the collection, use and disclosure of their personal information. The policy underpinning the Privacy Rights Charter is set out in the preamble. The Act recognizes privacy as "a basic human right of every individual and a fundamental value reflected in international human rights instruments to which Canada is a signatory." Privacy is also defined as "an interest in the public good that underpins the relations of mutual trust and confidence that are fundamental to the Canadian social fabric." Finally, privacy is recognized in the preamble as "essential to the preservation of democracy and the full and meaningful enjoyment and exercise of many of the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*."

²² Statistics Canada reports that for 1999 there were 4,538 incidents of trespass at night, 582 offences against public morals (which includes section 163.1 offences concerning child pornography), 3,346 cases of mischief over \$5,000 and 309,217 cases of mischief under \$5,000. There is no breakdown indicating which of these offences involved voyeuristic activity. Canadian Centre for Justice Statistics, Statistics Canada, 1999.

²³ *Supra*, footnote 10.

purpose of violating the physical or sexual integrity of the victim and is achieved by viewing or recording specified sexual organs, body parts or explicit sexual activities.

These two alternative ways of committing a voyeurism offence are set out in the description of the elements of the offence given below. Please note that this description is concerned with the relevant *concepts*; it is not proposed as legislative drafting.

Elements - first branch of the offence:

- for a sexual purpose
- surreptitiously and intentionally
- views or records, by any means
- a person in a place and in circumstances that give rise to a reasonable expectation of privacy.

or

Elements - second branch of the offence:

- surreptitiously and intentionally
- views or records, by any means
- a person while that person is in a state of nudity, in a state of undress exposing the breast, sexual organs or anal region, or engaged in explicit sexual activity
- in a place and in circumstances that give rise to a reasonable expectation of privacy
- for the purpose of viewing or recording a person while that person is in a state of nudity, in a state of undress exposing the breast, sexual organs or anal region, or engaged in explicit sexual activity.

Rationale

The policy intent is to create two alternative ways in which a criminal voyeurism offence could be committed. The first branch of the offence would involve surreptitious viewing or recording of another person for a sexual purpose while that person is in a place and in circumstances where there is a reasonable expectation of privacy. By this formulation of the offence, as long as the viewing or recording is done for a sexual purpose, it does not matter whether or not the victim was naked, engaged in explicit sexual activity, etc. when the viewing or recording took place. The second branch of the offence would recognize that it may be difficult to establish that the viewing or recording was done “for a sexual purpose” in circumstances where the victim and the offender do not have physical contact. This formulation recognizes that the viewing or recording may be done for other purposes, such as to generate visual representations for commercial sale, to harass or intimidate the victim, or to amuse others at the victim’s expense. If the policy rationale for the creation of an offence is to protect persons from sexual exploitation, it can be argued that this rationale is relevant whether the accused committed the offence for a sexual purpose or for some other purpose. As with the first branch of the voyeurism offence, the Crown would have to prove beyond a reasonable doubt that the viewing or recording was done surreptitiously, in circumstances where the victim had a reasonable expectation of privacy. In the second branch of the criminal voyeurism offence the mental element and the physical element of the offence would “match up” in the sense that the viewing or recording would have

to have been done for the purpose of viewing the victim in a state of nudity, or undress where the breast, sexual organs or anal region are exposed, or while the victim is engaged in explicit sexual activity. Furthermore, the actual observations or recordings of the victim must also have captured the victim in one of the physical states mentioned in the offence or engaged in explicit sexual activity. Both branches of the criminal voyeurism offence, therefore, would create specific intent offences.

Should both branches of a criminal voyeurism offence be proven beyond a reasonable doubt, the Crown would likely ask for a conviction to be registered in respect of only one branch because of the common law protections against being convicted twice for the same criminal activity.²⁴

It should be pointed out that the voyeurism offence is not intended to capture the activities of persons who simply consume voyeuristic images. A person who produces voyeuristic images for personal use could be charged under the voyeurism scheme. Similarly, a person who receives voyeuristic images and then sends those images to others would be subject to prosecution, along with the original producer and distributor of the material. However, a person who is sent voyeuristic images and views or records them for his or her own use would not meet the actus reus of “views or records.” In other words, the proposed scheme would not criminalize possession or the viewing or recording of previously recorded material for the purpose of personal use.

The reference to “views or records, by any means” is intended to capture voyeuristic visual representations that are conveyed through a variety of modern technologies, including live transmission over the Internet. It would be a question of fact whether the technology used to convey the visual representation involved both viewing and recording, or viewing alone, or recording alone. An additional provision would clarify that audio records are included only to the extent that they are integrated with visual records. The wilful interception of private communications is currently governed by section 184 of the *Criminal Code*. The provision would clarify the relationship between the proposed voyeurism offence and the current Code offences that deal with invasion of privacy.

Question:

- *How should the criminal voyeurism offence be defined?*

Distribution

The scheme would include a related offence of distributing, selling, etc. of material obtained as a result of voyeurism. The offence proposed below sets out concepts rather than legislative text.

²⁴ The common law doctrine of *res judicata* precludes multiple convictions for the same criminal act, even when the matter is the basis of two separate offences. See also *R. v. Kienapple*, [1975] 1 S.C.R. 729. A related concept is found in section 12 of the *Criminal Code* in respect of an offence which is punishable under more than one Act of Parliament.

Elements

- intentionally
- publishes, exports, distributes, sells, transmits, makes available, or possesses for the purpose of publication, exportation, distribution, sale, transmission or making available
- a visual representation
- knowing that the visual representation was obtained by commission of the offence of criminal voyeurism.

Rationale

The harm generated by criminal voyeurism is amplified when the visual representations are transmitted or distributed to other persons. The distribution of visual recordings encompasses both the live transmission of images and the transmission of previously recorded visual representations.

Question:

- *Would the range of activity proposed for the distribution scheme be appropriate?*

Police Surveillance

One question for consideration is whether the creation of *Criminal Code* offences to deal with voyeurism might affect the ability of the police to conduct surveillance of suspects for law-enforcement purposes. Section 487.01 of the *Criminal Code* allows a peace officer to obtain a warrant in circumstances where a search or seizure without one would violate section 8 of the Charter. The Supreme Court of Canada had held²⁵ that in the absence of a warrant, there was a violation of section 8 of the Charter where agents of the state engaged in surreptitious video surveillance of a person where that person had a reasonable expectation of privacy (in this case, a hotel room). Subsection 487.01(2) provides that the warrant for such surveillance may be issued for any device or investigative technique or procedure or “any thing” unless it would interfere with the bodily integrity of any person. Subsection 487.01(4) provides for video surveillance in any circumstances where the subject has a reasonable expectation of privacy. The subsection requires that a warrant be issued only in respect of the same offences listed in section 183 of the *Criminal Code* and in the circumstances specified in section 487.01. Currently, therefore, peace officers may conduct surreptitious video surveillance where the subject has a reasonable expectation of privacy only in respect of certain, specified offences and only with a warrant issued under section 487.01.

Lawful police surveillance for law-enforcement purposes would not be captured by the criminal voyeurism offence if the offence specifies for example that the viewing or recording must have been done intentionally for a “sexual purpose.” Police surveillance that was done for the purpose

²⁵ In *R. v. Wong* [1990] 3 S.C.R. 36.

of viewing a person while that person was nude, etc. might be captured by the second branch of the definition of the voyeurism offence. For example, the police might wish to conduct surveillance with a view to capturing activities with prostitutes occurring within particular premises in order to gather evidence to establish that common bawdy houses were being run by organized crime. As long as the surveillance was conducted under the authority of a warrant issued pursuant to section 487.01 of the *Criminal Code*, however, it would be lawful and would not make the officers involved liable.

With respect to surveillance which met the definition of voyeurism but was not authorized by section 487.01, or police investigative activity that involved distribution of voyeuristic visual representations, a further question is whether or not such activity would be authorized pursuant to section 25.1 of the *Criminal Code* (recently enacted pursuant to Bill C-24 *An Act to Amend the Criminal Code, organized crime and law enforcement and to make consequential amendments to other Acts*). It is interesting to note that section 25.1, while permitting designated senior officials to authorize otherwise illegal police activity in particular circumstances, is subject to the restriction that police may not engage in conduct that would “violate the sexual integrity of an individual.” The scope of “sexual integrity” in the context of section 25.1 has yet to be determined by the courts, so it is difficult to predict whether or not voyeurism committed by police in the course of law enforcement would be authorized. Police activity would also be measured against the requirement, set out in paragraph 25.1(8)(c), that the police have reasonable grounds to believe “that commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer’s law enforcement duties.”

Defences

The discussion that follows considers the question of whether or not particular defences should be set out in a voyeurism scheme. These defences would apply in addition to any other relevant defences currently available either at common law or pursuant to the *Criminal Code*.

Rationale

Some common activities in society involve visual surveillance of others. Security cameras are currently used in public and private facilities, as well as by commercial establishments, such as retailers and restaurants. It can be argued that including a mental element of intentionally committing the offence “for a sexual purpose” would prevent individuals who use surveillance for a legitimate purpose, such as to protect property, from being convicted of a voyeurism offence. This is not to suggest, of course, that surveillance for security purposes is justified in any and all circumstances.

The question for discussion, however, is whether or not there should be a defence for the commission of voyeurism offences, such as a public good defence. Such a defence has been used in other contexts, and may or may not be appropriate for both branches of the voyeurism offence and/or for the distribution of voyeuristic materials. A public good defence is set out in subsections 163(3), (4) and (5) of the *Criminal Code* in relation to the obscenity provisions.²⁶

In *R. v. Sharpe*, Chief Justice McLachlin suggested that a “purposive” interpretation to a public good defence would be appropriate and gave the following examples of situations in which possession of child pornography might serve the public good: possession by persons “in the justice system for the purposes associated with prosecution, by researchers studying the effects of exposure to child pornography, and by those in possession of works addressing the political or philosophical aspects of child pornography.”²⁷ The Chief Justice acknowledged that the public good defence acted as a limitation on the law’s breadth.²⁸

Questions:

- ***Should a defence or defences be created for a criminal voyeurism offence?***
- ***Should a defence or defences be created for the distribution offence?***
- ***Should the defence or defences be limited in any way, and if so, how?***

that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section, the motives of an accused are irrelevant.

²⁷ *R. v. Sharpe* (2001), 150 C.C.C. (3d) 321 (S.C.C.), at p. 357.

²⁸ *Ibid*, at p. 358.

Penalties

Determining appropriate penalties for a voyeurism scheme raises a number of questions. One option would be to treat the offences for voyeuristic activity as dual procedure (or hybrid) offences. For a hybrid offence, the prosecutor may proceed either by way of summary conviction or by indictment. Section 787 of the *Criminal Code* provides that unless otherwise specified, the maximum penalty for a summary conviction offence is six months and/or a fine of \$2,000. The maximum term of imprisonment for an indictable offence is set out in the penalty provision for the offence while the size of fine is in the discretion of the court. The decision to impose a fine is subject to the considerations set out in section 734 of the *Criminal Code* and, as with all punishments, must be consistent with the purpose and principles of sentencing.

If the Crown elects to proceed by summary conviction, the trial will be held before a provincial court judge (in Nunavut, before a designated justice of the peace or before a judge of the Nunavut Court of Justice). If the Crown elects to proceed by way of indictment, the accused person chooses the mode of trial. Specifically, the accused will be given a choice of a lower court judge alone, a superior court judge alone or a superior court judge and jury (in Nunavut the choice is between a judge of the Nunavut Court of Justice sitting alone (with or without a preliminary inquiry) or a judge of the Nunavut Court of Justice sitting with a jury).

The advantage of a hybrid offence is that it provides flexibility for an adequate and appropriate response to the gravity of the offence and the culpability of the offender. Among the factors which may be relevant to the decision to proceed by either indictment or by summary conviction are: whether the offence involves viewing as opposed to recording; the nature of the activities observed; the number of victims involved; the duration of the viewing or recording; the age or vulnerability of the victim; and other aggravating or mitigating factors.

Another issue for consideration is whether the penalty scheme should distinguish between criminal voyeurism committed by viewing and that committed by recording. For example, because recording produces a permanent record of the voyeuristic activity and may involve more planning and deliberation than simply viewing, should it be subject to higher penalties? A further question is whether distribution of voyeuristic images should be subject to a higher penalty than the criminal voyeurism offence given the potential to further violate the victim's privacy and thereby cause greater harm? Alternatively, should the penalty for all offences be the same?

As a point of reference, the penalties for the following (arguably comparable) offences may be of interest:

Section	Indictment	Summary Conviction
Section 163/169 (makes, distributes obscene materials)	Two years	Six months

Subsections 163.1(2)(3) (makes, distributes child pornography)	Ten years	Six months
Subsection 163.1(3) (possession for the purpose of distributing or selling child pornography)	Ten years	Six months
Section 168/169 (mailing obscene materials)	Two years	Six months
Section 177 (trespass by night)	--	Six months
Section 298/300 (defamatory libel known to be false)	Five years	--
Section 301 (defamatory libel)	Two years	--
Section 430 (mischief under \$5,000)	Two years	Six months

Questions:

- *Should proposed legislation establish hybrid offences for each of the offences?*
- *Should the penalty for committing the offence of criminal voyeurism by recording be higher than that for viewing?*
- *Should the penalty for distribution of voyeuristic materials be higher than the penalty available for the viewing or recording of voyeuristic materials?*
- *What would be appropriate penalty ranges for the various offences?*

CONCLUSION

We thank you once more for taking the time to address the questions raised in this consultation paper. The issues raised by voyeurism have important implications for Canadian society, and your input will assist the Department in developing the best possible policies and legislation.

We remind you that your response must be sent by mail, fax or e-mail by **September 30, 2002**, so we will have time to take your contribution into consideration. Short responses may be submitted in letter format. Lengthier comments should be submitted in a format that clearly indicates the legal issue or question in the consultation paper to which the submission relates.

SUMMARY OF QUESTIONS

- How should the criminal voyeurism offence be defined?
- Is the activity captured in the distribution scheme appropriate?
- Should a defence or defences be created for a criminal voyeurism offence?
- Should a defence or defences be created for the distribution offence?
- Should the defence or defences be limited in any way? If so, how should it/they be limited?
- Should the offence provisions establish hybrid offences for each of the offences?
- Should the penalty for committing the offence of criminal voyeurism by *recording* be higher than that for *viewing*?
- Should the penalty for *distribution* of voyeuristic materials be higher than the penalty available for the viewing or recording of voyeuristic materials?
- Do you have any suggestions for appropriate penalty ranges for the various offences?
- Do you have any other suggestions about the voyeurism scheme?