Court File No. 37833

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

- and -

RYAN JARVIS

Respondent
(Respondent)

FACTUM OF THE INTERVENER,
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

1. The Information and Privacy Commissioner of Ontario (IPC) intervenes to assist the Court in determining whether the relevant recordings were made "in circumstances that give rise to a reasonable expectation of privacy" pursuant to section 162(1)(c) of the *Criminal Code*.

2. The IPC accepts the facts as stated by the Appellant, distilled as follows. The voyeurism charges relate to the recording of 27 female students at Beal Secondary School (the "school"), a part of the Thames Valley District School Board. Using a "pen camera," the Respondent "took advantage of his position as a teacher" to make audio-visual recordings of students engaged in everyday activities in the common areas of this coed school (i.e. its classrooms, cafeteria, hallways and exterior grounds). Shot over 18 months, the recordings were made without students' knowledge or consent, without the school's permission, and in breach of board policy.[1]

3. While his pen camera lacked sophisticated controls, the teacher's approach allowed him to record from directly beside or above students, often while conversing with them. Female students wearing low cut tank tops and t-shirts appear to have been targeted. Five students were the subject of two or more recordings. One student was filmed six times in three locations, sometimes while crouching or bending down. By these means, the camera was able to focus closely on students' breasts "for an extended period of time," including by filming down their tops.[2]

4. During this period, the school was equipped with wall-mounted surveillance cameras whose purpose was to contribute to a safe and secure learning environment. Signs indicated that the exterior grounds and hallways were under this form of surveillance 24-hours a day. The camera system came with strict controls. No audio was recorded and teachers were not permitted to: (i) manipulate the cameras (e.g. pan, tilt or zoom in on someone or something in particular); or (ii) access or copy any of the recordings for their own personal use.[3]

5. How did a majority of the Ontario Court of Appeal conclude, as it did, that none of the recordings were made in circumstances that gave rise to a reasonable expectation of privacy? It

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[1] *R. v. Jarvis*, 2015 ONSC 6813, at paras. 4-5, 7-8 ("*Jarvis ONSC*"); *R. v. Jarvis*, 2017 ONCA 778, at paras. 6-9, 46 ("*Jarvis ONCA*"); Factum of the Attorney General of Ontario ("*Appellant's Factum*"), at paras. 10, 11, 15.
[2] *Jarvis ONSC*, *supra note 1*, at paras. 6, 9; *Jarvis ONCA*, *supra note 1*, at para. 7; *Appellant's Factum*, *supra note 1*, at para. 15, pp. 6-12.
[3] *Jarvis ONSC*, *supra note 1*, at paras. 6, 10; *Appellant's Factum*, *supra note 1*, at para. 12.

determined that the voyeurism offence does not protect the privacy of personal information, held that the privacy analysis must not consider the surreptitious aspect of recording, and characterized "privacy" as a right that can only reasonably be expected with respect to places like washrooms and areas of the body that are "covered or hidden." It then suggested that its narrow interpretation of a "reasonable expectation of privacy" reflected Parliament's recognition that the value given to taking and sharing pictures in today's society limits the law's ability to protect people's sexual integrity. Turning to the school setting, it characterized classrooms and other common areas where students congregate as public places and observed that those present in these areas are not prohibited from looking at each other. It then gave weight to the fact that there were security cameras in plain sight in the hallways and on the exterior walls of the school and concluded that "[n]o one believed they were not being observed and recorded."[4]

6. The challenge in this appeal is to discern the contours of a reasonable expectation of privacy in the dynamic environment of a school. An "all-or-nothing" approach is inconsistent with the privacy interests at stake and the requisite reasonableness analysis. Section 162(1)(c) was no more intended to criminalize every furtive glance on "Main Street" than it was to leave students exposed to extensive, intensive, surreptitious sexualized scrutiny by teachers entrusted with their care and education. The applicable privacy legislation, which prohibits the unauthorized collection and use of personal information in Ontario schools, provides a clear and compelling foundation for the conclusion that students have an objective expectation that teachers will respect their statutory obligations and refrain from filming students for unauthorized and improper purposes.

PART II – POSITION WITH RESPECT TO APPELLANT'S QUESTION

7. The IPC's submissions address the question stated at paragraph 19 of the Appellant's factum, with an emphasis on the objective component of the expectation of privacy issue.

PART III – STATEMENT OF ARGUMENT

8. In view of relevant section 8 *Charter* principles, the privacy interests at stake, and the explicit privacy protections in effect, students have a section 162(1)(c)-related expectation of privacy while at school. This expectation of privacy applies throughout the common areas of a school, including in areas subject to authorized video surveillance and regardless of how students

[4] *Jarvis ONCA*, *supra note 1*, at paras. 86-96, 103, 104 108, 108-111.

dress, and may be characterized as follows. Students have a right to be free of intensive – as well as extensive – visual scrutiny, for an improper purpose in contravention of privacy legislation.

A. Section 8 *Charter* principles are relevant to the section 162(1)(c) privacy analysis

9. Identifying the appropriate contours of the "reasonable expectation of privacy" under section 162(1)(c) of the *Criminal Code* in the open, dynamic setting of a school requires a contextual analysis akin to, but nonetheless distinct from, the "reasonable expectation of privacy" test in section 8 of the *Charter*. Neither the wholesale adoption nor the mechanistic rejection of section 8 principles is appropriate. The section 162(1)(c) analysis should align with section 8 *Charter* jurisprudence on matters common to them. This Court's identification of the appropriate alignment will help ensure a fair and predictable result for all members of the public, including accused persons and officials tasked with public safety duties.

10. Where a surreptitious "recording is done for a sexual purpose," a 162(1)(c) offence is committed when someone "makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy." A court should consider all the relevant circumstances surrounding a complainant during the making of the recording. It is not necessary to determine whether there was a search or seizure or to weigh the interests of any investigators against the rights of an accused. The balancing of any competing interests that might otherwise resemble voyeuristic activity, including any associated with freedom of expression, are addressed under section 162(6) which provides for a complete defence for activities that "serve the public good."

B. There are substantial privacy interests at stake

11. The school at issue is a part of the Thames Valley District School Board which, as a "school board," is an "institution" subject to the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*").[5] The privacy interests at stake in this appeal overlap significantly with the privacy interests protected under *MFIPPA* and section 8 of the *Charter*.

12. The privacy interests of students are territorial. The recordings were made by an on-duty teacher, on school property, over an extended period of time, in circumstances directly associated with school activities. A school is not a "privacy-free zone." As discussed below, *MFIPPA*

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[5] *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c. M.56 ("*MFIPPA*"), s. 2(1); Order MO-1570, *Thames Valley District School Board*, 2002 CanLII 46350 (ON IPC), ("*Thames Valley District School Board*"; as discussed further below at paras. 25-27).

carefully regulates the use of video cameras by on-duty school employees. The presence of security cameras does not reduce students' reasonable expectation of privacy, nor do people automatically waive or lose their privacy rights upon entering a public or quasi-public area, even when surveillance cameras are deployed and other people are present.

13. The privacy interests of students are informational. Recordings that capture a student's face, tank top clad torso, and cleavage without her knowledge or consent are sensitive by nature. They also contain "personal information" (i.e. information about an identifiable individual). This is true even where recordings preserve what can, however briefly, "be readily seen from the naked eye without effort." *MFIPPA* applies to all personal information collected by or on behalf of a school official, not simply information that has been kept secret from others.[6]

14. The privacy interests of students are personal. Recordings of the kind at issue have a direct impact on the sexual and bodily integrity of girls and young women, as well as their rights to dignity, autonomy, and equality. Without touching their persons or employing a camera with pan-tilt-zoom functions, a teacher using a mobile camera can follow, angle in, focus down on and create a permanent record of students' breasts. Such consentless, intensive, and extensive scrutiny is intrusive, regardless of whether a student's chest is obscured, in whole or only in part, by her clothing.[7] Here, opportunity, mobility, proximity, and positioning permitted prolonged and close focus on and filming of students' bodies. Once recorded for an improper and unauthorized purpose, such images may be retained in perpetuity and used and disclosed to others at will. Under *MFIPPA*, the unauthorized collection, use or disclosure of such "highly sensitive" personal information "constitutes an unjustified invasion of personal privacy."[8]

15. In view of the interests at stake, students generally have an objective expectation of privacy in the circumstances at issue in this appeal. In the circumstances, the concept of privacy that ties all three privacy interests together is rooted in the "wider notion of control over, access to and use of information."[9] This concept of privacy also animates *MFIPPA*.

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[6] *Jarvis ONSC*, *supra note 1*, at para. 75; *Jarvis ONCA*, *supra note 1*, at para. 36.
[7] *Appellant's Factum*, *supra note 1*, at para. 15, pp. 6-11 (see, in particular, Active Files 016, 009, 010, 014, 017 and Unallocated Clusters 1, 7, 10, 11, 12, 15).
[8] *MFIPPA*, *supra note 5*, ss. 14(2)(f), 28, 31, 32, 33.
[9] *R. v. Spencer*, 2014 SCC 43, at para. 40 ("*Spencer*").

C. Privacy legislation protects and affirms students' objective expectation of privacy

16. Having to choose between withdrawing into one's self and openly engaging with others in the face of an unmanageable risk of intrusive surveillance is not a meaningful choice.[10] This is true regardless of whether the risk comes from intrusive information gathering by overzealous state actors or self-interested individuals. In answer to the dilemma presented by such a choice, this Court has affirmed that simply because we expose our personal information to others does not mean we have no *Charter* right to privacy in that information; the controls in privacy legislation may clarify and give shape to those rights.

17. In *Spencer*, this Court observed that a person in a public space does not abandon all their privacy rights even if "as a practical matter, such a person may not be able to control who observes" them. The Court also noted that "there is no doubt" that privacy legislation can be relevant to determining whether there is an objective basis underlying individuals' expectations of privacy with respect to their personal information, including when individuals "cannot fully control or even necessarily be aware of who may observe" their online activity.[11]

18. More recently, in *Jones*, a majority of this Court concluded that "Canadians are not required to become digital recluses in order to maintain some semblance of privacy in their lives." It did so on the strength of contemporary social norms, federal private sector privacy legislation, and a purposive approach to section 8 of the *Charter*. Contemporaneously, in *Marakah*, Justice Moldaver stated, "even a qualified obligation on professional and commercial entities to maintain confidentiality over personal information provides a measure of constructive control which can support a reasonable expectation of privacy."[12]

19. The support privacy legislation provides for the recognition of a section 8 *Charter* right to privacy grows in the face of clear requirements that bind an organization and its agents and employees to carefully control their handling of personal information.[13] The IPC submits that this is equally true with respect to the "offline" section 162(1) privacy rights at issue here.

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[10] *R. v. Jones*, 2017 SCC 60, at para. 45 ("*Jones*").
[11] *Spencer*, *supra note 9*, at paras. 44, 46, 54.
[12] *Jones*, *supra note 10*, at para. 45; *R. v. Marakah*, 2017 SCC 59, at paras. 141-143.
[13] *Spencer*, *supra note 9*, at paras. 54-61, 62, 63, 65, 66; *Jones*, *supra note 10*, at paras. 42-45, 90*; Marakah*, *supra note 12*, at paras. 137-143; and *R. v. Orlandis-Habsburgo*, 2017 ONCA 649, at paras. 98-115.

20. The explicit statutory requirements in *MFIPPA* provide students with a significant degree of control over information collected about them. As recognized by the Ontario Court of Appeal, the purpose of the privacy protective policy underlining *MFIPPA* is to:

> "[R]estrict personal data gathering activity to that which appears to be necessary to meet legitimate social objectives and [] maximize the control individuals are able to exert over subsequent use and dissemination of information surrendered to institutional record keepers." [14]

21. *MFIPPA* regulates "personal information" handling activities conducted by or on behalf of an "institution," including collecting, recording, retaining, accessing, using, and disclosing this information. *MFIPPA* defines "personal information" as "recorded information about an identifiable individual." If there is a reasonable expectation that an individual can be identified from the information in a personal capacity, the information is "personal information." Information collected about identifiable individuals using a camera qualifies as "personal information." Employees or agents of institutions who handle personal information made available to them in the course of their duties for improper and unauthorized purposes are in breach of *MFIPPA*, including when their information handling activities are facilitated using a personal device. As such, *MFIPPA* limits and controls the recording and retention of, access to, and use, and disclosure of images of students by school boards and their employees and agents.[15]

22. Of particular relevance is section 28(2) of *MFIPPA*, which provides that:

> "No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity."

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[14] *Cash Converters Canada Inc. v Oshawa (City)*, 2007 ONCA 502, at paras. 30-31 (quoting the Williams Commission Report) ("*Cash Converters*").

[15] *MFIPPA*, *supra note 5*, ss. 2(1), 2(2.1), 2(2.2), 27-38 (note: ss. 27-38 constitute "Part II: Protection of Personal Privacy" of *MFIPPA*); Order MO-3358, *Ottawa (City) (Re)*, 2016 CanLII 68086 (ON IPC), at paras. 38-39 ("*Ottawa*"); Privacy Complaint Report No. PC-020036-1, *Ministry of Consumer and Business Services*, 2003 CanLII 53837 (ON IPC); Privacy Complaint Report No. PC11-34, *Ontario (Ministry of Community Safety and Correctional Services) (Re)*, 2012 CanLII 37748 (ON IPC); Privacy Complaint Report PI16-3, *Ministry of Community Safety and Correctional Services*, 2017 CanLII 62933 (ON IPC); PHIPA Decision 64, *Public Hospital (Re)*, 2017 CanLII 88475 (ON IPC); *Order HO-002* (27 July 2006), online: IPC, <found here>; *Order HO-010* (31 December 2010), online: IPC <found here>; *Order HO-013* (16 December 2014), online: IPC <found here>; and Order MO-3281, *Oshawa (City) (Re)*, 2016 CanLII 4767 (ON IPC).

23. Of the three exceptions to the prohibition against the collection of personal information, the only one available with respect to a school's use of video surveillance is the third one. To comply with section 28(2) of *MFIPPA*, video surveillance must be "necessary to the proper administration of a lawfully authorized activity." Where the resulting collection of personal information is not for a lawfully authorized activity or "would merely be helpful" to that activity, it is not "necessary" within the meaning of section 28(2) of *MFIPPA*.[16] A school employee or agent who records a student for a sexual purpose would be in clear breach of *MFIPPA*.

D. The right to privacy and the need for safety align

24. The privacy controls in *MFIPPA* protect students' reasonable expectation of privacy and do not undermine school safety. *MFIPPA* compliant surveillance cameras contribute to a safe and secure learning environment without depriving students of their right to be left alone, including while they are openly engaging with each other. At the same time, students' right to privacy co-exists with their own interests in safe, secure school environments. Even where vital public safety-related duties of police, principals and teachers are at stake, students suspected of wrongdoing still have a reasonable expectation of privacy. A student's diminished but significant section 8 *Charter* right to privacy at school only gives way where there are specific and objective concerns about criminality, the breach of a school rule, or a compelling health or safety concern.[17]

25. This alignment between privacy rights and safety interests is reflected in access to information decisions involving requests for video recordings of students in the common areas of a school in the Thames Valley District School Board.[18] It is also reflected in privacy investigation

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[16] *Cash Converters*, *supra note 14*, at paras. 40, 45.
[17] *R. v. M. (M.R.)*, [1998] 3 SCR 393, at paras. 32-34, 48-50, 55-56; *R. v. A.M.*, 2008 SCC 19, at paras. 1, 8, 13, 44-47, 53-55.
[18] *Thames Valley District School Board*, *supra note 5*, p. 4. and see Order PO-3248, *University of Ottawa (Re)*, 2013 CanLII 54710 (ON IPC); Order PO-3510, *Joseph Brant Memorial Hospital (Re)*, 2015 CanLII 44171 (ON IPC); Order MO-2709, *Ottawa Police Services Board*, 2012 CanLII 16861 (ON IPC); Order MO-3238, *Toronto Transit Commission (Re)*, 2015 CanLII 57766 (ON IPC); and *Ottawa*, *supra note 15*: video recordings captured in other public/quasi-public areas properly withheld or severed on the basis that disclosure of peoples' images would constitute an unjustified invasion of privacy.

reports on the use of video surveillance in quasi-public areas, such as at a school, and in public areas, such as may be found throughout a mass public transit system.[19]

26. In the Thames Valley District School Board case, the requester sought access to recorded images of a serious assault his son had endured at the hands of another student convicted of that assault. The images were captured by one of the school's hallway surveillance cameras. In considering whether to order disclosure, the IPC observed that other students captured on tape:

> "Have a reasonable expectation that the tape recordings in which they appear will not be used for any purpose beyond school safety and security. I accept that people may be aware of the existence of the cameras, and that they are located in areas people would consider 'quasi-public.' Despite this, in my view, people have a reasonable expectation that the tape recordings will only be used for the limited purpose for which they were installed. I do not accept that persons automatically waive or lose their privacy rights upon entering a public area, even if they are aware of the existence of surveillance cameras. As stated in this office's 'Guidelines for Using Video Surveillance Cameras in Public Places' [], 'Pervasive, routine and random surveillance of ordinary, lawful public activities interferes with an individual's privacy.' I find that the privacy expectation of the affected persons is a significant factor weighing against disclosure."[20]

27. While the IPC ultimately ordered disclosure, it only did so with respect to a portion of the recording and in view of three countervailing considerations. First, the requestor was seeking to enforce a legal right related to a contemplated proceeding for damages suffered due to the assault. Second, the request was limited in scope to the critical times. The requester was not embarking on a "fishing expedition." Finally, the requester's purpose in seeking access was "closely related to the health and safety purpose for which the cameras were installed."[21]

28. In its investigations of the use of security cameras in the common areas of secondary schools, the IPC determined that the cameras collected "personal information" in connection with the "lawfully authorized activity" of providing for the safety and security of students and school property. Where evidence of a demonstrative safety or security issue was lacking, the IPC

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[19] Privacy Investigation Report MC13-46, *Halton Catholic District School Board (Re)*, 2015 CanLII 13372 (ON IPC) ("*Halton Catholic District School Board*"); Privacy Investigation Report MC13-60, *Toronto Catholic District School Board (Re)*, 2015 CanLII 46164 (ON IPC) ("*Toronto Catholic District School Board*"); Privacy Investigation Report MC07-68, *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report*, March 3, 2008 <found here> ("*TTC Special Investigation Report;*" the TTC is the Toronto Transit Commission).

[20] *Thames Valley District School Board, supra note 5*, p. 1, 5, 6.

[21] *Thames Valley District School Board, supra note 5*, p. 6.

recommended and the school boards agreed to: (i) carefully assess the cameras and, following that assessment, de-commission the system in whole or part to the extent evidence showed that cameras were no longer necessary; and (ii) limit camera capacity so that they would not capture images of public areas outside school property (e.g. by restricting the use of pan-tilt-zoom functions).[22]

29. Finally, in its TTC privacy investigation report, the IPC addressed the argument that the public's reasonable expectation of privacy is eliminated on a mass public transit system on the basis that passengers are subject to video surveillance and are readily observed by each other:

> "While the expectation of privacy in public spaces may be lower than in private spaces, it is not entirely eliminated. People do have a right to expect the following: that their personal information will only be collected for legitimate, limited and specific purposes; that the collection of their personal information will be limited to the minimum necessary for the specified purposes; and that their personal information will only be used and disclosed for the specified purposes. These general principles should apply to all video surveillance systems. [] While TTC passengers may accept a certain degree of surveillance, they should not expect that their images or personal information will be improperly recorded or misused for purposes that are secondary to safety and security."[23]

E. Students have a right to be free from intensive and extensive scrutiny

30. Like travelers on public roadways, students engaged in everyday school activities "expect to be casually observed, but may be justifiably outraged by intensive scrutiny" or "extensive surveillance." *MFIPPA* provides strong support for the proposition that students have an objective expectation that they will not be "subject to extensive surveillance," but may "seek to merge into the 'situational landscape,'" including at a school with a video surveillance system.[24]

31. In particular, under *MFIPPA*, students reasonably expect that: (i) they will not be subject to excessive or unauthorized video surveillance by a school employee or agent, including through the use of pan, tilt, or zoom like functions; (ii) they will generally be notified where video surveillance is taking place and what its purposes are; (iii) their personal information will only be recorded, collected, retained, accessed, used or disclosed by such individuals for legitimate and limited, primarily safety and security-related, purposes; and (iv) unless a safety or security incident

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[22] *Halton Catholic District School Board, supra note 19,* pp. 2-14, 25-27; *Toronto Catholic District School Board, supra note 19,* pp. 2-5, 13-14.
[23] *TTC Special Investigation Report, supra note 19,* pp. 2, 31-32.
[24] *Spencer, supra note 9,* at para. 44 (quoting Justice La Forest in *R. v. Wise*).

necessitates otherwise or a school board receives a timely access request, any video recordings in which they may have appeared will be routinely overwritten or destroyed in accordance with a reasonably short retention period (e.g. one month), typically, without ever having been reviewed.[25]

32. The IPC submits that just as students have a right to be free of intensive, as well as extensive video surveillance under *MFIPPA*, such a right should be recognized under section 162(1)(c) of the *Criminal Code*. The character of the privacy interests at stake and the applicable privacy legislation favour recognition of this right. Recognition of this right to privacy will not impair the proper functioning of school video surveillance systems or other reasonable measures directed at ensuring a safe and secure learning environment, including those employed by criminal and regulatory investigators. A criminal prohibition against both intensive and extensive sexualized surreptitious visual scrutiny in the common areas of a school will provide a fair and predictable result for all members of the public.

PART IV – SUBMISSIONS CONCERNING COSTS

33. The IPC seeks no costs and asks that none be awarded against it.

PART V – ORDER REQUESTED

34. The IPC takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day of , 2018

Original signed by:
STEPHEN McCAMMON
Lawyer for the Intervener, the Information and Privacy Commissioner of Ontario

[25] *Toronto Catholic District School Board*, *supra note 19*, pp. 2-8,10-12, 13-14; *Halton Catholic District School Board*, *supra note 19*, pp. 2-17, 19-24, 25-27; Privacy Investigation Report MC10-2, *Mississauga (City)*, 2010 CanLII 65790 (ON IPC), pp. 3-4, 11; *MFIPPA*, *supra note 5*, s. 29; *Ontario*, RRO 1990, Regulation 823, s. 3(2), 3(3); *Guidelines for the Use of Video Surveillance* (Guidance Document) (Toronto: Information and Privacy Commissioner of Ontario, 2015) <found here>; and *Video Surveillance Technology Fact Sheet* (Fact Sheet) (Toronto: Information and Privacy Commissioner of Ontario, 2016) <found here>.

-PART VI –

TABLE OF AUTHORITIES AND LEGISLATION

Para(s)

Jurisprudence

Secondary Sources

Legislation