SCC File No. 37833

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

RYAN JARVIS

Respondent

-and-

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PART I – OVERVIEW

1. At issue in this appeal is a question of considerable importance to the future of privacy rights in Canada: to what extent do individuals enjoy a reasonable expectation of privacy while in public settings? In an era where technology increasingly allows for the surreptitious observation and recording of individuals through devices such as drones, body worn cameras, and ever ubiquitous smartphones, the way this Court grapples with the notion of privacy in public spaces will likely have profound implications for the ability of Canadians to protect themselves from harmful and unwanted surveillance.

2. The Privacy Commissioner of Canada takes no position on the disposition of this appeal but wishes to make three points regarding how this Court should approach this important issue. First, while this case arises in the specific context of the offence of voyeurism,[1] this Court should be mindful of the other areas of Canadian law that also define privacy rights by reference to a reasonable expectation of privacy and that will likely be impacted by this Court's decision.

3. Second, in interpreting the phrase "reasonable expectation of privacy" in the context of the voyeurism offence, it is appropriate to consider how the concept is understood under s. 8 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

4. Third, the analysis of whether a reasonable expectation of privacy exists in the context of the voyeurism offence must be based on the "totality of the circumstances", including: the nature of the personal information at issue; the nature of the recording or observation; the purpose of the recording or observation; the place where the recording or observation was made; the attributes of the individual affected and their conduct; and the relationship between the individual affected and the accused. An interpretation that would hinge the analysis exclusively on whether the victim is in a place where he or she can expect to be observed by others is not consistent with the text, context, and purpose of the statute. Such an abstract and rigid interpretation would also be seriously out of step with how the concept of a "reasonable expectation of privacy" is understood in other areas of the law and would leave Canadians vulnerable to the surreptitious recording and distribution of their images for sexual purposes in all manner of contexts.

[1] *Criminal Code*, R.S.C., 1985, c. C-46, s. 162(1) ("*Criminal Code*").

PART II – SUBMISSIONS

1. This Court should be aware of the potential impacts of this case

5. The ramifications of this case will likely extend beyond the confines of s. 162(1) of the *Criminal Code*. First, there are other related *Criminal Code* provisions whose scope will be affected by this Court's decision in the case at bar. In particular, the *Criminal Code* also prohibits the distribution of voyeuristic recordings.[2] This is an important protection for individuals against the harms that can be caused by the widespread dissemination of such recordings.[3] But, importantly, this protection is only engaged if the recordings constitute voyeurism within the meaning of s. 162(1). Similarly, in order for a court to able to seize and order the destruction of voyeuristic recordings posted online, the recordings must constitute voyeurism.[4] Interpreting the voyeurism offence as not applying to recordings made in public places would also mean that these protections would not apply to prevent such recordings from being disseminated.

6. Second, this Court's interpretation of the extent to which individuals may enjoy a reasonable expectation of privacy in public places will likely influence the scope of privacy rights in non-criminal contexts. In provinces that have established a statutory right to privacy,[5] or where one has been recognized at common law,[6] courts use the concept of a reasonable expectation of privacy to delineate the scope of these rights.[7] Rights guaranteed under personal information protection statutes can also be interpreted with reference to a reasonable expectation of privacy.[8] An interpretation that narrows the concept of a reasonable expectation of privacy to focus on location only will likely impact privacy rights in such contexts as well.

[2] *Criminal Code*, *ibid.*, s. 162(4).
[3] Department of Justice Canada, *Voyeurism as a Criminal Offence: A Consultation Paper* (2002), p. 11 ("DOJ Consultation Paper").
[4] *Criminal Code*, *supra*, s. 164.1(5).
[5] See *Privacy Act*, RSBC 1996, c 373; *The Privacy Act*, RSS 1978, c P-24; *Privacy Act*, RSNL 1990, c P-22; *The Privacy Act*, CCSM c P125; *Charter of Human Rights and Freedoms*, CQLR c C-12, s. 5; *Civil Code of Québec*, CQLR c CCQ-1991, arts. 3, 35.
[6] *Jones v. Tsige*, 2012 ONCA 32.
[7] See *e.g. Milner v. Manufacturers Life Insurance*, 2005 BCSC 1661, ¶¶75-94 ("*Milner*"); *Srivastava c. Hindu Mission of Canada (Quebec) Inc.*, 2001 CanLII 27966 (QC CA) at ¶¶68-69; *Powell v Shirley*, 2016 ONSC 3577, ¶83.
[8] See *e.g. Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, at ¶¶71-75, per La Forest JA (dissenting, but not on this point).

2. Jurisprudence under s. 8 of the *Charter* remains relevant and important

7. Lower courts have diverged on the issue of the extent to which this Court's s. 8 *Charter* jurisprudence is relevant to interpreting the voyeurism offence, with some referring to principles developed under s. 8,[9] while others suggesting that this case law is of little relevance.[10]

8. There are, to be sure, important differences in context and courts should be alive to these. In contrast to s. 8 of the *Charter*, the privacy interests at play in the context of voyeurism are not measured vis-à-vis the state, but against a person who is seeking to surreptitiously observe or record others in an intimate setting, in the nude, or for a sexual purpose.[11]

9. While differences in context should not be ignored, it is also not appropriate to disregard jurisprudence under s. 8 of the *Charter* entirely. In referring to a "reasonable expectation of privacy" in s. 162(1) of the *Criminal Code*, Parliament was using a specific legal phrase that this Court had already developed and interpreted under s. 8 of the *Charter*. Absent clear indication to the contrary, it is presumed that by using the same phrase in the context of the voyeurism offence Parliament intended it to have the same meaning.[12] If Parliament had wanted a different conception of privacy to underpin the voyeurism offence, it would have said so clearly.

10. Moreover, a number of principles developed under s. 8 of the *Charter* remain relevant and important. In particular, the well-established maxims that a reasonable expectation of privacy is to be assessed objectively, based on the totality of the circumstances, and that it is a normative standard, are just as pertinent in this context.[13] Parliament clearly indicated the focus must be on what is "reasonable" from an objective standpoint. To paraphrase Binnie J., the fact that a person may fear they are being videoed by unknown third parties using hidden cameras for sexual purposes should not diminish their <u>reasonable</u> expectation of privacy vis-à-vis such conduct.[14]

[9] *R. v. Rudiger*, 2011 BCSC 1397, ¶¶81-102; *R v. Jarvis*, 2015 ONSC 6813, ¶¶30-32; *R. v. Lebenfish*, 2014 ONCJ 130, ¶35-37. See also *Srivastava*, *supra*, ¶¶68-69.
[10] *R. v. Jarvis*, 2017 ONCA 778 ("*Jarvis* (ONCA)"), ¶¶85-86, per Feldman JA, ¶¶118-120, per Huscroft JA, dissenting.
[11] To paraphrase the three types of conduct set out in s. 162(1)(*a*)-(*c*) of the *Criminal Code*.
[12] *R. v. D.L.W.*, 2016 SCC 22, ¶¶20-21.
[13] *R. v. Spencer*, [2014] 2 SCR 212, ¶¶17-18 ("*Spencer*").
[14] *R. v. Tessling*, [2004] 3 SCR 432, ¶42 ("*Tessling*").

11. Similarly, this Court's understanding of the values underlying s. 8 of the *Charter* and the different privacy interests that it protects is equally applicable in the context of voyeurism. Like s. 8 of the *Charter*, the voyeurism offence aims to protect individuals from violations of their "dignity, integrity, and autonomy".[15] This Court has also described privacy interests as falling into three broad categories: territorial, personal, and informational.[16] Voyeurism can potentially engage all three types of interests depending on the circumstances. Identifying these interests helps assess whether a person's privacy has been violated so as to engage the voyeurism offence.

12. By its nature, the reasonable expectation of privacy analysis is a contextual, fact-specific test and therefore adaptable to different circumstances. Over the years, this Court has pointed to a number of factors to assess whether an expectation of privacy is reasonable.[17] While not all of these factors will be relevant in the context of the voyeurism offence, a number will be.

3. A number of factors are relevant to assessing a reasonable expectation of privacy

13. A central issue in this appeal is whether the public nature of a location is determinative of whether a reasonable expectation of privacy exists or whether it is appropriate to have regard to the "totality of the circumstances". For the majority of the court below and the Respondent, the central factor in the analysis is whether the victim is in a place where they can be expected to be observed or watched by others, with the possible exception of "up-skirting".[18] If they are in such a place, and are not "naked or doing a private sexual or toileting act" than they can normally have no reasonable expectation of privacy vis-à-vis voyeuristic conduct.[19]

14. There are several problems with this interpretation. First, it is at odds with the text of s. 162(1) of the *Criminal Code*, which refers to "circumstances" without limitation. There is no express indication in the text that only the nature of the location is relevant and that other circumstances are not. This applies with even greater force in the context of s. 162(1)(*c*), which, unlike s. 162(1)(*a*), is not limited to a particular type of place.

[15] *R. v. Plant*, [1993] 3 SCR 281, p. 293 ("*Plant*"); DOJ Consultation Paper, *supra*, pp. 6-8.
[16] *Spencer*, *supra*, ¶35.
[17] See *e.g.*, *R. v. Marakah*, 2017 SCC 59, ¶24; *Tessling*, *supra*, ¶32.
[18] *Jarvis* (ONCA), *supra*, ¶¶94-96, 104-105, per Feldman JA; Respondent's Factum, ¶19.
[19] *Jarvis* (ONCA), *supra*, ¶108.

15. Second, it inappropriately conflates the "recording" and "observing" elements of the offence, which are different activities and which can give rise to vastly different expectations of privacy. A person may reasonably expect to be casually observed by others but not to be the focus of a permanent recording that can be easily disseminated.[20] Focusing only on whether an individual is in a place where they can expect to be observed fails to give sufficient weight to the privacy interests at stake when recording is at issue.

16. Third, it would lead to absurd results. It would mean, for instance, that the offence would apply to a high-zoom recording of a woman's chest while reading in the living room of her home, but not of the same recording made of her reading in the carrel of a public library. Although the focus of the recording would be the same, and would give rise to similar harm, the offence would apply in one situation but not the other.

17. Finally, it would effectively create a *sui generis* interpretation of a "reasonable expectation of privacy" that is at odds with how that concept is widely understood by Canadian courts. Courts treat the concept of a reasonable expectation of privacy as requiring a contextual analysis. This is true for s. 8 of the *Charter*, where the totality of the circumstances notion is firmly entrenched, but also in cases involving expectations of privacy between private individuals. For instance, in determining whether a person's expectation of privacy is "reasonable in the circumstances" under provincial *Privacy Acts*, courts consider "all of the varying circumstances of each case",[21] including "the nature, incidence and occasion of the act or conduct and … any domestic or other relationship between the parties."[22]

18. This is also how a "reasonable expectation of privacy" is understood in other countries. In *Murray v. Big Pictures (UK) Ltd.*, which involved whether the plaintiff enjoyed a reasonable expectation of privacy in relation to a publishing company that had published photographs of the

[20] *R. v. Wong*, [1990] 3 SCR 36, p. 48 ("*Wong*").
[21] *Heckert v. 5470 Investments Ltd.*, 2008 BCSC 1298, ¶¶76-85 ("*Heckert*"); *Milner*, *supra*, ¶¶88-93. See also *Srivastava*, *supra*, ¶68.
[22] BC *Privacy Act*, *supra*, s. 1(3). See also Sask. *Privacy Act*, *supra*, s. 6(2); Nfld. & Lab. *Privacy Act*, *supra*, s. 3(2).

plaintiff's family taken in a public setting without his knowledge or consent, the Court of Appeal for England and Wales stated that

> … the question of whether there is a reasonable expectation of privacy is a broad one, which takes into account of all of the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.[23] [Emphasis added]

19. Absent clear indication from Parliament to the contrary, the concept of a reasonable expectation of privacy should not be approached differently in the context of the voyeurism offence, particularly since a contextual approach serves to ensure adequate protection of privacy rights, which this Court has recognized as having quasi-constitutional significance.[24]

a. The relevant factors

20. Therefore, in order to properly assess whether it is reasonable for a person to expect privacy in relation to voyeuristic conduct, a range of circumstances should be considered. While it is not possible to set out an exhaustive list, a review of case law from Canada and other countries suggest that the following non-determinative factors are relevant to the analysis.[25]

21. The nature of the personal information: This Court has long recognized that the nature of the information gathered about an individual plays a prominent role in the reasonable expectation of privacy analysis.[26] Voyeurism, by its nature, can involve the recording of individuals' bodies (often of women and children). A recording can impinge on privacy even when an individual is

[23] *Murray v. Big Pictures (UK) Limited*, [2008] EWCA Civ 446, ¶36 ("*Murray*"). See also *R. v. Bassett*, [2008] EWCA Crim 1174 ("*Bassett*"), ¶10; *Sanders v. American Broadcasting Companies*, (1999) 20 Cal. 4th 907, at p. 923.
[24] *Douez v. Facebook, Inc*., [2017] 1 SCR 751, ¶59, per Karakatsanis J.
[25] See also the Australian Law Reform Commission's Report, *Serious Invasions of Privacy in the Digital Era* (June 2014), Chp. 6 "Reasonable Expectation of Privacy" ("ALRC, *Serious Invasions of Privacy*").
[26] See *e.g. Marakah, supra*, ¶31; *Plant, supra*, p. 293.

clothed, particularly when the recordings are taken in close range or with high zoom, and where the individual's body is the focus of the recording rather than part of the background.[27]

22. The nature of the recording or observation of the individual: It is well-recognized that an individual's reasonable expectation of privacy may be very different in relation to a visual recording than to a passing observation, given that a recording is permanent, reproducible, and easily disseminated.[28] Similarly, the intrusiveness of the technology used, and the information it can reveal, will also impact an individual's reasonable expectation of privacy.[29] In other words, the analysis is fact-specific and depends on the nature of the recording or observation being made.[30] As such, finding that a reasonable expectation of privacy may exist for some types of conduct does not mean that any kind of observation, no matter how fleeting or commonplace in the context of an open society, suddenly falls within the scope of the voyeurism offence.

23. The purpose for which the recording or observation was made: As this Court has noted, an individual's reasonable expectations will vary depending on the purpose for which their information is being gathered.[31] A person may reasonably expect, for instance, that they may be captured by an airport's video recording system for security purposes. They would not, however, reasonably expect that an airport employee would use that same video system to take close-up recordings of them for their own private sexual purposes.

24. To consider purpose as a factor in the analysis does not create an inappropriate redundancy in the text of the legislation. Purpose is a non-determinative factor to weigh alongside others when assessing the reasonable expectation of privacy. As such, there may be other circumstances that point away from a reasonable expectation of privacy (for instance, an individual's attendance at a nude beach). The accused's purpose therefore plays a different and separate role than when it is considered as an element of the offence under s. 162(1)(*c*).

[27] *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 SCR 591, ¶59, per L'Heureux-Dubé and Bastarache JJ.; *Vanderveen v Waterbridge Media Inc.*, 2017 CanLII 77435 (ON SCSM).
[28] *Wong*, *supra*, p. 48; *Campbell v. MGN Ltd.*, [2004] UKHL 22, ¶122, per Lord Hope of Craighead ("*Campell*").
[29] *Tessling*, *supra*, ¶32.
[30] *Bassett*, *supra*, ¶¶9-11.
[31] *Dagg*, *supra*, ¶75; *Plant*, *supra*, p. 292, citing *R. v. Dyment*, [1988] 2 SCR 417 at pp. 429-430.

25. The place where the recording or observation was made: The public nature of the location where a recording or observation is made is also relevant. Depending on the circumstances, a person may not have an expectation of privacy in relation to others while in public, particularly from simply being observed by passersby. However, as this Court has noted,

> [i]t goes without saying that by appearing in public, an individual does not automatically forfeit his or her interest in retaining control over the personal information which is thereby exposed. This is especially true given the developments in technology that make it possible for personal information to be recorded with ease, distributed to an almost infinite audience, and stored indefinitely.[32]

26. Authorities from Canada and other countries have reached similar conclusions, finding that the "public" nature of the place, while relevant, is not determinative of a person's reasonable expectation of privacy.[33] In the context of voyeurism specifically, the Court of Appeal for England and Wales has noted that "[i]t is clear that it is perfectly possible to have a reasonable expectation of privacy without being wholly enclosed or wholly sheltered from the possibility of being seen."[34] This reflects the fact that privacy, as this Court has noted on multiple occasions, is not an all or nothing concept; it can exist in varying degrees depending on the circumstances.[35]

27. Not all public places are the same. A black and white dichotomy between "public" and "private" places is too simplistic. For instance, policies and regulations that govern access to, and the conduct that can occur in, a place may reasonably affect an individual's expectation of privacy in that place. For instance, a city bylaw prohibiting photography at a nude beach will likely influence whether beachgoers can reasonably expect not to be photographed there.[36]

[32] *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733, ¶27. See also *Spencer*, *supra*, ¶44; *R. v. Wise*, [1992] 1 SCR 527, p. 558.
[33] See *e.g. Heckert*, *supra*, ¶81; *Campbell*, *supra*, ¶122, per Lord Hope of Craighead; ALRC, *Serious Invasions of Privacy*, *supra*, ¶¶6.45-6.49.
[34] *Bassett*, *supra*, ¶7.
[35] See *e.g. R. v. Quesnelle*, [2014] 2 SCR 390, ¶2.
[36] *Lebenfish*, *supra*, ¶41.

28. The attributes of the individual affected: This Court has previously indicated that children and youth generally have heightened privacy interests deserving of greater legal protections given their inherent vulnerability.[37] This principle should apply with greater force in the context of voyeurism where the conduct at issue can involve the observation and recording of the bodies of children and youth, often by an adult.

29. The conduct of the individual affected: In some cases, the conduct of an individual will suggest that an individual is not in circumstances giving rise to a reasonable expectation of privacy. The Australian Law Reform Commission gives the example of a person who streaks naked on a football field.[38] However, care must also be taken to avoid "victim blaming". For instance, the fact that a woman may wear tight-fitting clothing does not mean she is courting publicity or tacitly encouraging others to surreptitiously video her for sexual purposes.

30. The relationship between the individual affected and the accused: The majority of the court below found that students' expectation "that a teacher will not secretly observe or record them for a sexual purpose at school" did not arise "from an expectation of privacy", but from "the nature of the required relationship between students and teachers".[39] However, this Court has on multiple occasions noted that a person's relationship with another can have a significant impact on their reasonable expectation of privacy.[40] To give but one example, a person has a different expectation of privacy regarding their dealings with their doctor than they do with a journalist interviewing them on the street. Therefore, the suggestion that the nature of the relationship is irrelevant to determining an expectation of privacy is misplaced.

b. Conclusion with respect to the factors

31. The Respondent argues that relying on the above factors risks extending the scope of the voyeurism offence too far. This point rests on the premise that all but a narrow interpretation

[37] *A.B. v. Bragg Communications Inc.*, [2012] 2 SCR 567, ¶¶14-19.
[38] ALRC, *Serious Invasions of Privacy*, ¶6.73.
[39] *Jarvis* (ONCA), *supra*, ¶105, per Feldman JA.
[40] See *e.g. Plant*, *supra*, p. 293; *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 SCR 401, ¶38. See also *Milner*, *supra*, ¶93; ALRC, *Serious Invasions of Privacy*, *supra*, ¶6.81.

would mean that any surreptitious observing of a person in public for a sexual purpose would be criminalized. But, properly applied, the above factors, which are sensitive to context and which among other things, distinguish between observing and recording, would not lead to the criminalization of, to use the Respondent's example, "someone who takes a furtive glance at another person out the 'corner of their eyes'".[41] A context specific analysis guards against such overreach while at the same time ensuring that the voyeurism offence properly considers the privacy interests of victims.

32. The Respondent also argues that considering multiple factors would make a key element of the offence vague and subject to the evolving interpretation of judges. But it is common in the *Criminal Code* for the scope of an offence or defence to hinge, in part, on whether certain conduct was "reasonable" in the circumstances.[42] There is nothing incongruous in requiring courts to be sensitive to the entire factual context when determining whether an expectation of privacy was "reasonable" for the purposes of the voyeurism offence. Courts are well versed in applying the reasonable expectation of privacy analysis. When combined with the other elements of the voyeurism offence, a contextual interpretation of the reasonable expectation of privacy element does not render the scope of the offence vague or overbroad.

PART III - ORDER REQUESTED

33. The Privacy Commissioner takes no position on the disposition of this appeal. He does not seek costs and asks that no costs be awarded against him.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 5th day of April, 2018.

Regan Morris
James Nowlan
Counsel for the Intervener, the Privacy Commissioner of Canada

[41] Respondent's factum, ¶51.
[42] See *e.g., Criminal Code*, ss. 34(1)(c), 45, 79, 86(1), 150.1(4)-(6), 163.1(5), 216, 217.1. See also *R. v. George*, [2017] 1 SCR 1021, ¶9.

PART VI - TABLE OF AUTHORITIES AND STATUTES

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Criminal Code, R.S.C., 1985, c. C-46	34(1)(c), 45, 79, 86(1), 150.1(4)-(6), 162(1), 162(1)(a)-(c), 162(4), 163.1(5), 164.1(5), 216, 217.1	2, 5, 8, 32
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Department of Justice Canada, *Voyeurism as a Criminal Offence: A Consultation Paper* (2002)	Pages 6-8 Page 11	5, 11
Australian Law Reform Commission's Report, *Serious Invasions of Privacy in the Digital Era* (June 2014), Chp. 6 "*Reasonable Expectation of Privacy*"	Sections 6.45 - 6.49, 6.73 and 6.81	20, 26, 29, 30