

## Jarvis – Privacy and Its Interpretation in the Modern World

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Imagine finding out that your teacher has been secretly taking photos your breasts through a camera pen during the course of your daily school activities. Now imagine going to court a few months later hoping for a conviction but finding out that the teacher must be acquitted for his actions. This was the true-life scenario for a group of female students in the case of *R v Jarvis*; a case that ultimately led to justice while dramatically altering how courts view one's reasonable expectation of privacy.

Mr. Jarvis was charged with voyeurism under section 162(1) of the Criminal Code.<sup>1</sup> At trial, the court concluded that the female students had a reasonable expectation of privacy but could not charge the accused because it was unknown whether the recordings were used for a sexual purpose. On appeal, the court unanimously concluded that the recordings were made for a sexual purpose but upheld the acquittal as the females did not have a reasonable expectation of privacy. At the Supreme Court, it was unanimously determined that the females had an expectation of privacy, and a conviction ensued for Mr. Jarvis.<sup>2</sup>

The court, in its reasoning, stated that the females had a privacy interest in the recording as it was a situation where one would not reasonably expect to be the subject of observation or recording.<sup>3</sup> The Supreme Court justices also laid out a new framework for assessing privacy claims including;

1. “the location the person was in when she was observed or recorded,
2. the nature of the impugned conduct (whether it consisted of observation or recording),
3. awareness of or consent to potential observation or recording,
4. the manner in which the observation or recording was done,
5. the subject matter or content of the observation or recording,
6. any rules, regulations or policies that governed the observation or recording in question,
7. the relationship between the person who was observed or recorded and the person who did the observing or recording,
8. the purpose for which the observation or recording was done, and
9. the personal attributes of the person who was observed or recorded”<sup>4</sup>

Although the list was created in relation to voyeurism, this case is significant as it is foreseeable that this contextual approach could be applied to future cases regarding one's privacy rights.

In addition to the non-exhaustive list, an interesting aspect of the case is the court's interpretation of section 8. The majority stated that the term reasonable expectation of privacy must continue to “be informed by our fundamental shared ideals about privacy and our everyday experiences”.<sup>5</sup> On the contrary, the minority contended that section 8 jurisprudence should not inform the interpretation of section 162(1) and that the Charter framework should remain distinct from the Criminal Code.

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<sup>1</sup> *Criminal Code*, RSC 1985, c C-46, s 162(1) [CC].

<sup>2</sup> *R v Jarvis*, 2019 SCC 10 [Jarvis].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid* at para 29.

<sup>5</sup> *Ibid* at Headnote.

Ultimately, privacy cannot be understood as an all or nothing concept; just because one is in a public space does not mean their privacy rights are automatically negated.<sup>6</sup>

Adopting the principle that one has reasonable expectation of privacy in a public space raises many potential issues. First, if the majority's reasoning is accepted, it can be argued that individuals have a reasonable expectation of privacy in their social media that is publicly available. For example, one has a reasonable expectation of privacy in their Facebook account that has maximum privacy settings as it can only be viewed by select "friends" upon the individual's acceptance. One could argue that individuals without these privacy settings, with information that can be accessed by anyone at any time may still have a reasonable expectation of privacy in their photos and status. Ultimately, adopting the majorities contention raises important questions of what spaces are deemed public, both digitally and in reality.

Second, what does the court mean by the personal attributes of the person who was observed? The court stated that these indicia insinuate that vulnerable individuals such as children may have a higher degree of privacy. However, due to the vagueness of the provision, it opens the door to alternate interpretations. Does this mean that courts will consider what individuals were wearing, if they were deemed "attractive" to the reasonable person and what body part was displayed in the image or recording? This subjective approach could perpetuate rape myths, especially in relation to information obtained for sexual purposes.

Lastly, one could argue that if one adopted the minority's conclusion that the Charter framework must remain distinct from the Criminal Code, justice would be in disrepute. As stated in the case, it is important to look at why parliament chose the words "reasonable expectation of privacy" in section 162(1). When there is overlap in language, the interpretation and analysis of language from one piece of legislation can inform the meaning of what might seem like vague term in other legislation. The Charter has shaped the criminal law since its enactment in 1982 and it is evident that one cannot be analyzed without the other. As our expectations of privacy continue to change and the digital world makes privacy more complicated, it is important to maintain the overlap and ensure the two legal documents continue to complement one another.

Upon reading the facts, it is hard to fathom how this case made it all the way to the Supreme Court of Canada. Although justice was served, there are clearly important lessons to be learned such as the complicated nature, interpretation and context of one's reasonable expectation of privacy. In addition, *R v Jarvis* stresses the importance of the ongoing relationship between the Canadian Charter of Rights and Freedoms and the Criminal Code. As a landmark case in the interpretation of privacy, it will be interesting to see how *R v Jarvis* will inform future jurisprudence.

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<sup>6</sup> *Ibid.*