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*R v Jarvis - Location, equality, technology: What is the future of Privacy?*
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INTRODUCTION

In the era of smart phones, creepshots, and sexual photos taken and shared without consent, the Supreme Court of Canada's decision in *R v Jarvis*[i] will be sure to shape the cultural landscape of what is now known as image-based abuse. The Court's upcoming decision will determine when and where a person will be criminally liable for taking pictures of women and girls without their knowledge, for his or her sexual gratification.

In this three-part blog post, we discuss three central issues that arose in this case, and provide commentary on the potential impact of the upcoming decision on these issues.

The circumstances that brought this case to the Supreme Court involved a high school teacher, Ryan Jarvis, who used a camera pen to secretly take pictures of the cleavage of several female students and a colleague while he was talking with them in the school hallways. Another teacher reported Jarvis' unusual behavior and Jarvis was subsequently charged with voyeurism,[ii] which makes it a crime to secretly take photographs of another person for a sexual purpose when that person is in a "circumstances that give rise to a reasonable expectation of privacy".

The lower courts' decisions conflicted on whether the students had a reasonable expectation of privacy. At the trial level,[iii] the court held that the young women did have a reasonable expectation of privacy in the high school, and that Jarvis' recordings of the young women while they were in the hallways at school breached their privacy rights, but acquitted Jarvis on another element of the offence. The Crown appealed, and the majority at the Ontario Court of Appeal[iv] upheld the acquittal, this time on the basis that the girls did not have a reasonable expectation of privacy. The Supreme Court heard the appeal from the ONCA decision on April 20, 2018, and we expect the Court will render its decision soon. This decision will resolve whether these young women had a reasonable expectation of privacy in the circumstances.

The Supreme Court decision will be important for many reasons. It will hopefully provide some much-needed clarity to the voyeurism offence, which was added to the *Criminal Code* in 2005 and has been in front of the courts relatively few[v] times since it was introduced. The decision will hopefully also address some important questions around technology, gender, power, and privacy, which were sources of debate in the appeal.

In part one of this post we discuss how a location-based privacy analysis of Jarvis' recordings risks mis-understanding expectations and experiences of privacy. In part two, we examine some of the power and equality issues that arose: the fact that women and girls are the predominant targets of sexualized recording and that Jarvis was in a position of authority over the students when he took the photos. In part three, we address why fact that Jarvis made recordings of the young women, as opposed to merely observing them, should be treated as significant.

Before discussing some of these issues, and how we hope the Court will resolve them, we need to emphasize that the criminal justice system is not necessarily an effective mechanism for addressing sexual and gender-based violence, from the perspective of survivors, offenders, and society as a

whole. Nevertheless, what the Supreme Court has to say about the issues arising in this case will be norm setting, and we think it is important to engage with these questions while simultaneously thinking about how we as a society can better respond to sexual violence.

## PART ONE: LOCATION OF THE RECORDING

In this blog post, we address why a location-driven privacy analysis in *R v Jarvis* would misunderstand expectations and experiences of privacy.

Jarvis made his secret recordings of students in the hallways of the school - a public or semi-public place. He recorded students who were in plain sight of other people in the hallway, who knew they were being recorded by the school's security system cameras, and who, in some of the photos, were wearing clothing that revealed their cleavage. A central question in this case asks whether these circumstances meant that the students could no longer reasonably expect privacy vis-à-vis a teacher taking secret photographs of their cleavage for his sexual gratification.

According to the majority in the Court of Appeal, these facts were sufficient to find that Jarvis' behaviour was not voyeurism. In the decision, the majority focused on the location of the young women as a determining factor. As a result of where they were standing at the time the photos were taken, the court found that the students had no reasonable expectation of privacy. It was completely legal to secretly take photos of any parts of their bodies that were visible to anyone in the hallways of the school. Jarvis' actions might have been creepy, but they were not criminal. The students had exposed themselves to this risk; they could not expect privacy in this public place.

We don't believe this location-driven analysis of the students' reasonable expectation of privacy is sufficient, and we hope that the Supreme Court will provide a more nuanced approach, as it has in other recent privacy-related cases. As noted by LEAF,[vi] this decision may also impact other *Criminal Code* offences involving image-based abuse, including section 162.1[vii] which criminalizes the non-consensual distribution of intimate images, where the person had a reasonable expectation of privacy when the image was taken. If all images taken in public lose their privacy interest, sexualized images taken in public may not be considered private under this standard and could potentially be shared without consent legally. It also has the potential impact the Court's reasoning in s. 8 challenges arising in public or semi-public spaces, including *R v Le*,[viii] which is on reserve right now.

On the surface, a location-based analysis may seem to create a predictable division between when the voyeurism offence does and does not apply. If someone is in a public space where she can be seen by others, she is not 'private' and therefore not protected. If she is in a private space where she cannot be seen by others, she is 'private' and is protected. It seems simple. But even the question of whether a location is public or private can become muddled. How exclusive does a space have to be to be considered truly private? Would a private event in someone's home be considered private enough to create a reasonable expectation of privacy? Would a backyard be private enough? What if someone is in their backyard – concealed from pedestrians but visible to anyone in a higher-rise building, or with access to a drone? Does a person have to be completely out of view of *all* people in order to be truly considered out of the public eye? If so, would that reduce a reasonable expectation of privacy if a person was in a crowded public change room? Questions similar to these were raised

by the bench at the Supreme Court hearing,[ix] and highlight the fact that location is not the most helpful variable in assessing someone's expectation of privacy.

We believe that if the Supreme Court applies a location based privacy analysis of a reasonable expectation of privacy it would undermine one of the very purposes[x] the voyeurism provision was introduced: to protect individuals from sexually invasive images taken using new technology such as hidden cameras. Technology that can be hidden with little effort makes it easy to invade someone's privacy, even (or especially) in public spaces. We believe that while individuals can reasonably expect privacy in private places such as bathrooms, they also can, and do, reasonably expect that people are not using hidden cameras to take secret images of them while in public.

A location-based interpretation puts the burden on individuals to protect themselves from sexual intrusions in public spaces by this form of technology. As noted by Information and Privacy Commissioner of Ontario,[xi] individuals shouldn't have to choose between withdrawing from public spaces and being intrusively sexually surveilled. Particularly if the only protection from this form of sexual invasiveness in public is to cover all of one's body with concealing clothing when in public. A contextual approach that considers more than just location is both preferable and in line with existing privacy jurisprudence.

The voyeurism provision does not require that a complainant be in a private space, but rather that she be in "circumstances giving rise to" a reasonable expectation of privacy. A plain reading of this, in our eyes, requires a fulsome consideration of the context and circumstances of the incident(s). We hope to see in the Supreme Court's decision an analysis that considers a multitude of factors when assessing the reasonableness of the students' expectations of privacy. Rather than focusing only on the fact they were in an accessible hallway, a robust privacy analysis would consider factors such as the relationship between the parties, the nature of the images, the rules and regulations of the space where the recordings are made, the length and frequency of the recordings, the vulnerability of the complainant, the nature of the intrusion, what the image allows the perpetrator to scrutinize, the subsequent control and use of the images by the perpetrator, the disempowering impact of this on the complainants, the impact on equality, among other relevant factors. It should be almost trite to say that a person should not lose her reasonable expectation of privacy for merely stepping out of the house. If the Court considers the complexity of the circumstances in which these students find themselves then, we hope, the ultimate focus will be on protecting the bodily autonomy, sexual integrity and dignity of the complainants – values that inhabit the concept of privacy.

## PART TWO: POWER AND EQUALITY

Building on the discussion in Part One, in this section we discuss some of the power and equality issues that arose in *R v Jarvis* more specifically. In particular, we emphasize the significance of the fact that women and girls are the predominant targets of sexualized recordings, and that Jarvis was in a position of authority over the students when he took the secret images. We hope the Court considers these equality factors as a part of a nuanced privacy analysis.

Whatever decision is made by the Supreme Court, it will directly impact the equality concerns of women and girls. At the Supreme Court, interveners LEAF[xii] and CIPPIC[xiii] emphasized that a

location-based interpretation of a reasonable expectation of privacy could lead to inequalities specifically for

women and girls. Women and girls are disproportionately affected by sexual invasions like these and will face greater restrictions in public if the Court's expectation is that they ought to protect their bodies from invasive photography. It has been said by anti-violence advocates[xiv] that failing to recognize a woman's reasonable expectation of privacy in public spaces creates an "open season" on women's bodies in public. It is unjust to suggest that women and girls must accept the risk that their bodily autonomy could be invaded whenever they are observable by another individual. This undermines women's and girls' equality by constraining their ability to freely participate in public life in the clothing in which they feel most comfortable, and to experiment with their identity through clothing choices. We believe that the Supreme Court should include women's and girls' equal opportunities to access and experiment in public and semi-public space as factors when assessing their reasonable expectations of privacy.

We also believe that the power relationship between the accused and the complainants is an important element that the Court must consider in a reasonable expectation of privacy analysis. When the voyeur is in a position of power, it should strengthen the victim's reasonable expectation of privacy. Students, employees, and children should expect that those who have power over them will respect their privacy interests and not use those positions of power, including their special access to these individuals, to abuse them. The facts of *Jarvis* point to a clear abuse of the student/teacher relationship, the restrictive policies within the school system, and the privacy legislation that protects students from having their private information collected without their consent while at school. However, while recognizing the heightened privacy interests of vulnerable populations like the students in *Jarvis*, we hope the Court does not restrict its analysis too narrowly to cases where there is a relationship of trust between the accused and the complainants, or where there are clear policies limiting photographs in a given location. A limited decision such as that would prove to be problematic.

As noted by multiple interveners at the Supreme Court, high school girls are not the only individuals targeted by voyeurism and individuals in positions of power are not the only perpetrators of this type of offence. In Canada, we've recently seen cases like Calgary Creeps,[xv] where a man pleaded guilty to voyeurism for surreptitiously taking photos of girls' and women's bodies and up their skirts while they were in public places and then sharing the images on a public Twitter page along with sexual commentary. In high schools, students have also engaged in voyeuristic behaviors, taking and sharing sexual images of their female classmates. Other reported voyeurism cases involve secretly filming people in various semi-public and public locations. Several of these locations were not subject to particular rules or policies around photography, and many of the voyeurs were not in positions of power over their targets. It is critical that the Court provide an analysis of reasonable expectation of privacy that could be applied to the broad range of circumstances in which voyeurism occurs, not only those in which there is a power imbalance, while also recognizing how a power imbalance can heighten a privacy interest.

It is well documented that women and girls face unacceptable levels of sexual harassment both in public and private spaces, and are excessively targeted by voyeuristic behaviour and certain forms of image-based abuse. We hope the Court takes the historical and ongoing patterns of sexual harassment of women and girls (which underscored Parliament's decision to enact this provision)

into account when considering reasonable expectations of privacy from sexually invasive photographs.

PART THREE: RECORDING VS OBSERVATION

In this section, we consider what weight the Court should give to the fact that Jarvis made recordings, as opposed to just physical observations. This issue is complicated by the wording of the offence itself.

The voyeurism provision criminalizes both observations and recordings of a person for a sexual purpose where the person has a reasonable expectation of privacy. Prior to the introduction of the voyeurism offence, individuals who secretly observed people for a sexual purpose (i.e. "peeping Toms") were typically charged with trespassing or loitering. When digital cameras became available, this provision didn't always apply it was no longer necessary to trespass on someone's property in order to spy. With an uptick in reported cases of people using digital cameras to take secret sexual images of others, calls for the voyeurism offence grew. Since the introduction of the offence, with few exceptions,[xvi] nearly all cases have involved the use of technology to view and record individuals.

Permanent recording should be considered significant to a person's expectation of privacy because the fact of recording allows the voyeur to take control over an image of a person's body, and to scrutinize it and use it for a sexual purpose both at their will and in perpetuity. In other words, the fact of permanent recording disempowers the complainant to determine how and when she may be viewed in a sexual context. As argued in CIPPIC's[xvii] factum, a permanent recording without a doubt deepens the impact of the intrusion of the offence, allowing for "more invasive access than originally possible". This is especially true given that new technologies and software – including miniature cameras, smart (Internet connected) devices, drones, social media, and websites dedicated to sharing sexual images of women – can make surreptitious recording and sharing of sexual images easier. Modern technologies allow for images to be stored digitally and shared across social networks, on livestream videos, and onto pornographic websites with little effort. Even those images where a person is fully clothed[xviii] have been sought after and posted on pornography websites for people to use for sexual purposes. It is not unreasonable for a person to have a privacy expectation in these images.

These technologies, along with the abhorrent reality that it can be impossible for a complainant to regain control over such images shared for sexual purposes, deepen the importance of one's expectation of privacy in these circumstances. The Information and Privacy Commissioner of Ontario[xix] questioned why the use of a zoom camera from a faraway location to secretly take images of a woman's breasts for a sexual purpose should be criminalized if that woman is sitting in her living room, but not if she is sitting in a public library. Her expectations of not being secretly recorded in this way are the same. IPC also noted that the risk of dissemination and loss of control over the images heightens the privacy interests at stake.

Modern expectations of privacy around recorded images are quickly evolving. As exemplified by the non-consensual distribution of intimate images, mis-used images can result in a lifelong privacy invasion. With child pornography, it has been noted[xx] that every time an image is viewed, the child is revictimized. The same can be said of voyeuristic images. A recorded image changes the context and heightens the privacy interests of the person in that image. Accordingly, the fact of recording (as

opposed to observation) should be considered as a circumstance in the privacy analysis. While observations can certainly cause harm to the complainant, a recorded image creates an ongoing disenfranchisement that the courts should recognize.

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[i] https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=37833
[ii] https://laws-lois.justice.gc.ca/eng/acts/c-46/section-162.html
[iii] https://www.canlii.org/en/on/onsc/doc/2015/2015onsc6813/2015onsc6813.html
[iv] https://www.canlii.org/en/on/onca/doc/2017/2017onca778/2017onca778.html
[v] http://www.equalityproject.ca/cyberviolence-criminal-case-law/cyberviolence-criminal-case-law-offences-against-adults/cyberviolence-criminal-case-law-voyeurism/
[vi] https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37833/FM050_Intervener_Women's-Legal-Education-and-Action-Fund-Inc..pdf
[vii] https://laws-lois.justice.gc.ca/eng/acts/C-46/section-162.1.html
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[xx] https://www.canlii.org/t/523f%3e