SHIBLEY RIGHTON LLP
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Education Law eBulletin

A newsletter for educators | Issue No. 12 February 2019

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Supreme Court of Canada decision results in teacher's conviction for the offence of voyeurism – *R v. Jarvis*, 2019 SCC 10

In 2015, an Ontario high school teacher was acquitted of the offence of voyeurism, contrary to the *Criminal Code* (s. 162(1)).[1] The teacher used a camera pen to make secret recordings of female high school students while conversing with them at school. The video recordings generally focused on the female students' cleavage and chest areas and the girls ranged in age from 14 to 18 years old.

The trial judge found that while the students enjoyed a reasonable expectation of privacy at school, he was not convinced beyond a reasonable doubt that the video recordings were done for a sexual purpose. Therefore, the teacher was acquitted as not all elements of the offence of voyeurism were proven in Court.

The Crown appealed the decision and in 2017, the Ontario Court of Appeal upheld the teacher's acquittal.[2] The Court found that the trial judge incorrectly concluded that the video recordings were not made for a sexual purpose. However, the Court concluded that in the circumstances, the students **did not** enjoy a reasonable expectation of privacy while at school. The majority for the Court acknowledged that the female students had a subjective expectation of privacy, as they did not provide consent to be recorded and they would not have expected to be secretly recorded. In addition, the majority recognized that a school is deemed a safe and protected environment with restricted access to students, teachers, staff and designated visitors.

However, the school also had various security cameras and the areas of the school in question were public areas where students regularly congregate and where classes are held. The majority found that one's location is determinative when assessing whether there is a reasonable expectation of privacy. For instance, a student might have a reasonable expectation of privacy in a washroom stall within the school, but that might not be the case when a student is walking the halls and sitting in classrooms of the school – areas where students know that they can be observed.

The Crown appealed the finding of the Court of Appeal that the students did not have a reasonable expectation of privacy in the circumstances. The decision of the Supreme Court of Canada ("SCC")[3] sets out a non-exhaustive list of considerations to assist in determining whether there is a reasonable expectation of privacy. It includes a consideration of the person's location; the form of the alleged invasion of privacy, i.e., whether it involves observation or a recording; the nature of the observation or recording; the activity in which a person is

[1] *R v. Jarvis*, 2015 ONSC 6813
[2] *R v. Jarvis*, 2017 ONCA 778
[3] *R. v. Jarvis*, 2019 SCC 10

engaged when observed or recorded; the relationship between the individuals; any relevant rules or regulations; and the part of a person's body that is the focus of the recording.[4] In other words, one must look at and consider the entire context of the conduct.

The Court noted that a high school is not entirely a public place and a student's expectation of privacy with respect to observations and recordings are different and lower in the common areas of a school vs. a traditionally private location (i.e., a washroom stall).[5] The Court accepted that the students could not have expected not to be *observed* by others in the circumstances but they would not have expected to be the focus of a permanent visual recording, which the Court acknowledged has a greater potential impact on privacy than just observation.[6]

The Court also considered the tool used to make the recordings; the fact that hidden camera technology was used was relevant. This is different from security cameras that were located throughout the school, which purpose was to maintain a safe and secure learning environment, did not record audio and were not manipulated or otherwise accessible by teachers. The Court considered the content of the recordings; while large parts were general recordings of students in classrooms or in the hallways, there were parts that focused on particular students and contained close-ups of those students' faces and breasts. There was also the formal school board policy in effect regarding recordings and the Court acknowledged the young ages of the students (some being minors) and the fact that the recordings were made without their consent.

Lastly, the Court reviewed the relationship of trust that exists between a teacher and a student:

> It is inherent in this relationship that students can reasonably expect teachers not to abuse their position of authority over them, and the access they have to them, by making recordings of them for personal, unauthorized purposes. *A fortiori,* students should be able to reasonably expect their teachers not to use their authority over and access to them to make recordings that objectify them for the teachers' own sexual gratification.[7]

Although there may be circumstances where students in a school have a reduced reasonable expectation of privacy, for example, against searches by school administrators, this is distinguished from the circumstances at bar. In fact, the Court noted that given a teacher's role, a student may reasonably have an *enhanced* expectation that a teacher will respect their privacy, especially in the course of conduct that is not necessary to maintain a safe school environment. In this case, there was no legitimate education or safety-related purpose for the teacher's recordings.[8]

As a result of the SCC's ruling, the teacher was convicted and the matter will be set for sentencing.

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[4] at paras. 29 and 41.
[5] at para. 73.
[6] at para. 74.
[7] at para. 84.
[8] at para. 85.