A New Approach to the Reasonable Expectation of Privacy: R v Jarvis, 2019 SCC 10

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Though it emerges in a criminal law context, the new decision of the Supreme Court of Canada in ***R v Jarvis*, 2019 SCC 10** is likely to have an impact on future cases that consider the scope of an individual's privacy interest, whether in the criminal or civil sphere. Articulating a sophisticated understanding of how privacy may remain a reasonable expectation even in a public or semi-public space, the case will no doubt be of interest to employers and other parties whose operations bring into question the line between that information which is personal – to a worker or customer, for example – and that which, in the circumstances, may properly be examined or observed.

The accused was a high school English teacher in Ontario who used a kind of spy camera concealed within a pen to make surreptitious video records of female students at his school. The videos focused on the faces, breasts, and upper bodies of the students, and were made while the students were engaged in ordinary tasks in common areas of the school. Importantly, the students were unaware they were being recorded. The teacher's conduct was prohibited by a school policy in effect at the time.

His conduct was also prohibited by s. 162(1)(c) of the *Criminal Code*, which addresses the crime of voyeurism. That section makes it an offence to surreptitiously observe or make a visual recording of another person who is in circumstances that give rise to a reasonable expectation of privacy, if the observation is done or the recording is made for a sexual purpose. At trial, the accused admitted that he had made the recordings surreptitiously (a fact that could hardly be denied). It remained for the trial judge to determine whether the circumstances gave rise to a reasonable expectation of privacy, and whether the records were made for a sexual purpose. While the court answered the first question in the affirmative, it concluded that the Crown had failed to prove that the recordings were made for a sexual purpose.

The Crown appealed. The Court of Appeal for Ontario found that the trial judge had erred in law by failing to find that the teacher had made the surreptitious recordings for a sexual purpose. At the same time, however, a majority of the Court chose to uphold the acquittal, reasoning that the trial judge had also erred by finding that the students were in circumstances that gave rise to a reasonable expectation or privacy. The Crown therefore appealed the latter issue to the Supreme Court.

A six-member majority of the Court overturned the judgment of the Court of Appeal, substituted a conviction, and remitted the matter back to the trial judge for sentencing. Of particular interest in their judgment – written by the Chief Justice – is the approach they take to the concept of privacy, not only for the purposes of s. 162(1)(c) of the Criminal Code, but also as that concept is applied more generally. "Privacy", Wagner C.J. writes, "as ordinarily understood, is not an all-or-nothing concept." This observation is arguably at the core of the

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Court's understanding of privacy, which sees the "reasonable expectation or privacy" as something that may be validly preserved by an individual even in a public or semi-public place. Put another way, privacy is not something that subsists only behind the door of one's house or the firewall of one's computer. Privacy has a more mobile quality: it depends upon the circumstances one finds oneself in at any time.

From this observation, the Court develops a non-exhaustive list of considerations to assess when determining whether a person who was observed or recorded was in circumstances that gave rise to a reasonable expectation or privacy.

1. **The location the person was in when observed or recorded.** The location may be one from which the person sought to exclude all others, or expected to be observed only by a select few.

2. **The nature of the impugned conduct; that is, whether it consisted of observing or recording.** Since a recording is more intrusive, and potentially more damaging, a person's expectations with respect to recording versus observation may well be different.

3. **Awareness of or consent to potential observation.** Where, for example, a workplace deploys overt surveillance cameras, the expectation of privacy may well be diminished.

4. **The manner in which the observation or recording was done.** Here the Court puts emphasis on the length of the observation or recording, and how emerging technologies can be used to erode privacy interests.

5. **The subject matter or content of the observation or recording.** Obviously, the nature and quality of the information gathered by any sort of surveillance is a relevant consideration, and the more intimate and sensitive the information, the higher the privacy expectation will be.

6. **Any rules, regulations, or policies that governed the observation or recording in question.** Rules specific to a place (such as workplace policies) will typically be relevant, though not necessarily determinative, and their weight will vary with the context.

7. **The relationship between the person who was observed or recorded and the person who did the observing or recording.** A relationship of trust or authority will generate a higher expectation of privacy, since such relationships generate a concomitant expectation that they will not be abused.

8. **The purpose for which the observation or recording was done.** This is essentially a reiteration of an older principle, that the expectation of privacy in personal information will vary depending upon the purpose for its collection. A person disrobing for a medical examination or procedure, for example, abandons the expectation of privacy for that purpose. If, however, the information disclosed is used for a different purpose, the reasonable expectations of the patient have arguably been violated.

9. **The personal attributes of the person who was observed or recorded.** Vulnerable individuals such as children are likely in a position to expect a higher degree of privacy in many situations.

These factors (which may vary or be added to, depending upon the context) are expressly applied to the question whether the circumstances in the Jarvis case gave rise to a reasonable expectation of privacy for the students affected, as contemplated by the voyeurism offence under s. 162(1)(c) of the *Criminal Code*; however, given their source and the depth of analysis found in the case on the nature of privacy interests in contemporary society generally, it is not difficult to anticipate that other decision-making bodies will apply this test to future disputes where a breach of privacy interests is at issue. The relevance of the factors to the balance between employer interests and employee privacy in the workplace is particularly obvious, and they may well alter existing tests for measuring that balance. Since interests of this sort are being litigated at an accelerating pace, we will not have to wait long for further decisions, both in the civil courts and the arbitral jurisprudence, analyzing and applying these principles to privacy disputes in the workplace.

If you have any questions about privacy in your workplace, please contact a member of Field Law's **Privacy + Data Management Group**.