REASONABLE EXPECTATIONS OF PRIVACY
AFTER THE *JARVIS* CASE

By George S. Takach

In February of this year, the Supreme Court of Canada issued an important decision involving privacy law, particularly as it relates to video recordings in public places. In *R.* v. *Jarvis*, 2019 SCC 10, the SCC considered whether a high school teacher violated Section 162(1) of the *Criminal Code* when he used a "pen camera" to make recordings of students in public places in his school. But the really important parts of the decision relate to the analysis that the majority of the Court undertakes of the concept of the "reasonable expectation of privacy" ("REOP") – a doctrine central to Canadian privacy law.

Voyeurism

Under Section 162(1)(c) of the *Criminal Code*, it is an offence to surreptitiously make a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy if the recording is done for a sexual purpose. In the facts of this case, the teacher had a miniature camera in a pen, such that female students didn't know he was making recordings of them, particularly of their chests.

At trial, the accused was acquitted because the judge held that it was not certain the teacher made the recordings for a sexual purpose. The Ontario Court of Appeal, although it overturned this portion of the trial decision, nevertheless confirmed the acquittal on the basis that students in a school hallway did not have a REOP, given that other students would be able to see them in the same school hallways, and moreover they knew they were being recorded by the school's security cameras.

The SCC disagreed with the trial judge, and found there was a sexual purpose for the recording, and also disagreed with the OCA, finding that the students were entitled to a REOP, hence the SCC found the accused guilty.

Reasonable Expectation of Privacy

In coming to its conclusion, the six member majority of the SCC (in a decision written by the Chief Justice; a concurring decision of three justices was not as expansive as the majority) articulated a sophisticated, non-exhaustive list of considerations that could assist a court in determining whether a person is recorded in circumstances that give rise to a REOP:

1. The location where the person was recorded – clearly if at home, or in a washroom, the location would raise a REOP; but the SCC went on to propose a number of more "public settings" where a REOP could be made out as well – thus, the important threshold point that a public setting does not automatically defeat a finding of a REOP;

2. Recordings are more intrusive than observations – a recording might involve a zoom feature, a close up, in other words more detail – and a recording means there is a capture of the images, from which editing and distribution may follow;

3. Whether the subject is aware of, or indeed consents to, the recording;

4. The manner in which the recording was done – less problematic if fleeting, more so if sustained, and whether enhanced by technology;

5. The subject matter of the recording – for example, did it target a specific person or persons, or was it a general shot of a group, in effect an "incidental recording";

6. Did any specific rules or policies govern the recording – though a set of permissive policies may not, in themselves, be able to override a REOP;

7. The relationship between the person doing the recording, and the person recorded, particularly if there is any relationship of trust between them;

8. The purpose for which the recording was done;

9. The personal attributes of the person who is recorded – for example, are they a child or young person.

Put another way, the SCC makes clear that privacy is not an all-or-nothing concept – but rather the relevant legal response in any particular case will be determined by context. In fleshing out this approach, the SCC usefully draws on the fairly deep jurisprudence coming out of Section 8 of the *Charter of Rights and Freedoms*, where a REOP is determined in the context of the right to be secure against unreasonable search and seizure. And even in the context of the voyeurism offence, the SCC notes that the charging section includes a public good defence, again emphasizing the point that nuance will be required in conducting a REOP analysis in most cases.

In short, context is critical as to whether there exists, in any particular scenario, a REOP, and whether the recording that is made offends that REOP. The SCC states:

> *For example, a person lying on a blanket in a public park would expect to be observed by other users of the park or to be captured incidentally in the background of other park-goers' photographs, but would retain an expectation that no one would use a telephoto lens to take photos up her skirt.*

The nuance that is so important to the SCC in this area of privacy law can also be seen in its response to the accused's argument that the students were recorded by the school's video surveillance system, and therefore had no REOP:

> *This argument ignores the fact that not all forms of recording are equally intrusive. In particular, there are profound differences between the effect on privacy resulting from the school's security cameras and that resulting from Mr. Jarvis' recordings, and the students' expectation that they would be recorded by the school's security cameras tells us little about their privacy expectations with respect to the recording done by Mr. Jarvis.*
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> *The security cameras at the school were mounted to the walls near the ceiling inside the building and also to the outside of the building. They did not record audio; the direction they pointed could not be manipulated by teachers; teachers could not access or copy the recorded footage for their personal use; and the purpose of the cameras was to contribute to a safe and secure learning environment for students. Signs at the school indicated that the school halls and*

> *grounds were under 24-hour camera surveillance: … Given ordinary expectations regarding video surveillance in places such as schools, the students would have reasonably expected that they would be captured incidentally by security cameras in various locations at the school and that this footage of them could be viewed or reviewed by authorized persons for purposes related to safety and the protection of property. It does not follow from this that they would have reasonably expected that they would also be recorded at close range with a hidden camera, let alone by a teacher for the teacher's purely private purposes … In part due to the technology used to make them, the videos made by Mr. Jarvis are far more intrusive than casual observation, security camera surveillance or other types of observation or recording that would reasonably be expected by people in most public places, and in particular, by students in a school environment.*

Put another way, while a number of scenarios could easily be contemplated where a recording interferes with a person's REOP, the SCC also finds that all sorts of situations of incidental recording would not:

> *In today's society, the ubiquity of visual recording technology and its use for a variety of purposes mean that individuals reasonably expect that they may be incidentally photographed or video recorded in many situations in day-to-day life. For example, individuals expect that they will be captured by video surveillance in certain locations, that they may be captured incidentally in the background of someone else's photograph or video, that they may be recorded as part of a cityscape, or that they may be recorded by the news media at the scene of a developing news story. In the school context, a student would expect that she might be captured incidentally in the background of another student's video, photographed by the yearbook photographer in a class setting, or videotaped by a teammate's parent while playing on the rugby team.*

Broad Impact of the Jarvis Decision

The decision in the *Jarvis* case is important because the nine factors discussed above in the context of a REOP analysis will likely apply to all sorts of privacy cases (not just those in the *Criminal Code*). Moreover, what makes *Jarvis* timely is that cameras are being used in so many circumstances now in the public realm beyond the familiar use for security, and more is to come as tiny sensors and ultra miniature cameras proliferate in the "Internet of Things" world brought about by 5G technologies. In many of these non-security applications various types of "edge technologies" are also being deployed – that is, general images of the "public" are being taken in order to determine certain facts (i.e., how many people cross a certain intersection every hour), and then the images are deleted and only the aggregate "conclusions" derived from the images remain (in such applications it is then impossible to re-identify the aggregated data sets with the underlying people from which they are derived). While *Jarvis* does not give "bright line tests" for when, in such circumstances, a REOP exists (and when it does not), the multiple criteria in the case, and their thoughtful application in that decision, give good guidance on how users of these new and useful technologies (and courts and agencies across the country) should approach the privacy questions they raise.