# Supreme Court Of Canada Finds Teacher Guilty Of Voyeurism For Camera Pen Recordings

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On February 14, 2019, the Supreme Court of Canada unanimously reversed the Ontario Court of Appeal decision and found the teacher guilty of voyeurism.

In the Fall 2018 Education Law Newsletter, we reported on the Ontario Court of Appeal decision in R. v. Jarvis. In that decision, a high school English teacher was acquitted of voyeurism for using a camera pen to surreptitiously film female students' chests. On February 14, 2019, the Supreme Court of Canada unanimously reversed the Ontario Court of Appeal decision and found the teacher guilty of voyeurism. The Supreme Court found that privacy is "not an all-or-nothing concept" and that students in schools are entitled to a reasonable expectation of privacy, free from covert, close-range recordings.

## Background

The accused in R. v. Jarvis was an English teacher at a high school in Ontario. He used a camera concealed inside a pen to make 19 surreptitious video recordings of 27 female students and three male students while they were engaged in ordinary school-related activities in common areas of the school. Most of the videos focused on the faces and chests of female students. The students were not aware that they were being recorded by the teacher, nor did they consent to the recordings. A school board policy in effect at the relevant time prohibited this type of conduct.

When the principal discovered the camera and turned it over to police, the teacher was charged with voyeurism. Although he admitted that he had surreptitiously recorded the students, the other two elements of the criminal offence remained in issue at trial: whether the recording was made in circumstances giving rise to a reasonable expectation of privacy, and whether the observation or recording was done for a sexual purpose.

## Lower Court Decisions

At trial, Justice Goodman determined that the recordings were made in circumstances that gave rise to a reasonable expectation of privacy. He found, however, that there could be other inferences to be drawn aside from making the recordings for a sexual purpose. The trial judge therefore acquitted the teacher of all charges.

The Ontario Court of Appeal upheld the acquittal, but reversed the lower court's analysis. The majority held that the recordings were made for a sexual purpose but that students do not have a reasonable expectation of privacy at school.

## Supreme Court of Canada Decision

The Supreme Court of Canada found that the recording was done for a sexual purpose in circumstances giving rise to a reasonable expectation of privacy. The majority of the Court adopted a non-exhaustive list of relevant considerations in deciding whether students, or any alleged victim of voyeurism, had a reasonable expectation of privacy at the time of the observation or recording. The factors include:

- the location the person was in when she was observed or recorded;
- the nature of the impugned conduct (whether it consisted of observation or recording);
- awareness of or consent to potential observation or recording;
- the manner in which the observation or recording was done;
- the subject matter or content of the observation or recording;
- any rules, regulations or policies that governed the observation or recording in question;
- the relationship between the person who was observed or recorded and the person who did the observing or recording;
- the purpose for which the observation or recording was done; and
- the personal attributes of the person who was observed or recorded.

Writing for the majority, Chief Justice Wagner stressed that privacy is "not an all-or-nothing-concept" and that "being in a public or semi-public space does not automatically negate all expectations of privacy with respect to observation or recording." Chief Justice Wagner also commented at length on the nature and level of privacy that students can expect at school. He found that "in ordinary circumstances, students in the common areas of a school cannot expect not to be observed by others and may also expect to be subject to certain types of recording". However, he also found that being in a non-private location does not entirely negate a reasonable expectation of privacy: the level of privacy that students can expect at school is lower than can be expected in a fully private space, like a bedroom or a bathroom. Schools, however, are not fully public spaces, and the level of privacy to be expected at school is still higher than would be expected in a fully public space like a sidewalk. The court commented:

"For one thing, access to schools is usually restricted to certain persons, such as students, teachers, staff and guests… More significantly, schools are also subject to formal rules and informal norms of behaviour, including with respect to visual recording, that may not exist in other quasi-public locations."

The teacher had argued that the students could not have had a reasonable expectation not to be recorded, because they knew there were security cameras inside and outside the school. The Supreme Court, however, was unconvinced by this argument, finding

that “not all forms of recording are equally intrusive”. While students could reasonably expect to be captured incidentally by security cameras in the school, “it does not follow that they would also reasonably expect to be recorded at close range with a hidden camera, let alone by a teacher for the teacher’s purely private purposes”. The Chief Justice also said that the students in the recordings were young persons with a reasonable expectation that the adults around them would behave prudently. He stated:

"The fact that all of the students were young persons means that they would have reasonably expected the adults around them to be particularly cautious about not intruding on their privacy, including by not targeting them for visual recording without their permission. Therefore, the fact that all of the students recorded were young persons strengthens the argument that they could reasonably expect not to be recorded in the manner they were."

Chief Justice Wagner also found it relevant that the school in question had policies prohibiting the type of recording taken by the teacher. Although the Chief Justice commented that the absence of such a policy or the presence of a less reasonable policy would not have justified the teacher’s behaviour, the presence of such a policy highlighted the wrongful nature of his conduct.

# Comment

Like many other organizations, schools and school boards often grapple with the interaction between today’s social media and technology age, where educators stand in loco parentis and must exercise care to protect students.

The Supreme Court of Canada’s decision in R. v. Jarvis confirms that students have a reasonable expectation of privacy at school, even in communal spaces. Although a school is not as private as other places, it is more private than fully public spaces. Privacy rights exist on a spectrum and must be balanced in view of all applicable circumstances. However, Chief Justice Wagner’s comments suggest that surreptitious, close-range video recordings of students will never be appropriate, regardless of the body part recorded or the individual doing the recording.

R. v. Jarvis also confirms that surreptitious recordings of students by teachers that are sexual in nature may incur not only employment-related and licensing penalties from the Ontario College of Teachers, but also criminal consequences for the teachers involved.

Schools and school boards should consider adopting and regularly reviewing privacy policies and codes of conduct to prohibit this type of behaviour and set out rules regarding the appropriate use of technology at school.

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