SUPREME COURT OF CANADA

CITATION: R. *v.* Jarvis, 2019 SCC 10

APPEAL HEARD: April 20, 2018
JUDGMENT RENDERED: February 14, 2019
DOCKET: 37833

BETWEEN:

Her Majesty The Queen
Appellant

and

Ryan Jarvis
Respondent

- and -

Attorney General of British Columbia, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Privacy Commissioner of Canada, Canadian Civil Liberties Association, Ontario College of Teachers, Information and Privacy Commissioner of Ontario, Women's Legal Education and Action Fund Inc. and Criminal Lawyers' Association (Ontario)
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 92)	Wagner C.J. (Abella, Moldaver, Karakatsanis, Gascon and Martin JJ. concurring)
CONCURRING REASONS: (paras. 93 to 148)	Rowe J. (Côté and Brown JJ. concurring)

Her Majesty The Queen *Appellant*

v.

Ryan Jarvis *Respondent*

and

Attorney General of British Columbia,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Privacy Commissioner of Canada,
Canadian Civil Liberties Association,
Ontario College of Teachers,
Information and Privacy Commissioner of Ontario,
Women's Legal Education and Action Fund Inc. and
Criminal Lawyers' Association (Ontario) *Interveners*

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2019 SCC 10

File No.: 37833.

2018: April 20; 2019: February 14.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Voyeurism — Elements of the offence — Circumstances that give rise to reasonable expectation of privacy — Accused teacher using concealed camera to make surreptitious video recordings of female high school students engaging in ordinary school-related activities in common areas of school — Most video recordings focusing on faces, upper bodies and breasts of students — Students not aware of recording — Accused charged with voyeurism — Whether students recorded by accused were in circumstances giving rise to reasonable expectation of privacy — Criminal Code, R.S.C. 1985, c. C-46, s. 162(1).

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

The accused was charged with voyeurism under s. 162(1)(c) of the *Criminal Code*. That offence is committed where a person surreptitiously observes or makes a visual recording of another person who is in circumstances that give rise to a reasonable expectation of privacy, if the observation or recording is done for a sexual purpose. At trial, the accused admitted he had surreptitiously made the video

recordings. As a result, only two questions remained: whether the students the accused had recorded were in circumstances that give rise to a reasonable expectation of privacy, and whether the accused made the recordings for a sexual purpose. While the trial judge answered the first question in the affirmative, he acquitted the accused because he was not satisfied that the recordings were made for a sexual purpose. The Court of Appeal unanimously concluded that the trial judge had erred in law in failing to find that the accused made the recordings for a sexual purpose. Nevertheless, a majority of the Court of Appeal upheld the accused's acquittal on the basis that the trial judge had also erred in finding that the students were in circumstances that give rise to a reasonable expectation of privacy. The Crown appeals to the Court as of right on the issue of whether the students recorded by the accused were in circumstances that give rise to a reasonable expectation of privacy.

Held: The appeal should be allowed and a conviction entered.

Per **Wagner** C.J. and Abella, Moldaver, Karakatsanis, Gascon and Martin JJ.: The students recorded by the accused were in circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) of the *Criminal Code*.

Circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) of the *Criminal Code* are circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred. The inquiry should take into account the entire context in which

the impugned observation or recording took place. Relevant considerations may include (1) the location the person was in when she was observed or recorded, (2) the nature of the impugned conduct (whether it consisted of observation or recording), (3) awareness of or consent to potential observation or recording, (4) the manner in which the observation or recording was done, (5) the subject matter or content of the observation or recording, (6) any rules, regulations or policies that governed the observation or recording in question, (7) the relationship between the person who was observed or recorded and the person who did the observing or recording, (8) the purpose for which the observation or recording was done, and (9) the personal attributes of the person who was observed or recorded. This list of considerations is not exhaustive and not every consideration will be relevant in every case.

The fact that it is an element of the offence in s. 162(1)(c) that observation or recording be done for a sexual purpose does not make it inappropriate to consider the purpose of the observation or recording in assessing whether it was done in breach of a reasonable expectation of privacy. In some cases, observation or recording may not breach expectations of privacy despite having a sexual purpose. In other cases, observation or recording may be an obvious breach of privacy regardless of its purpose and it can ground a conviction under s. 162(1) if the other elements of the offence are made out. Similarly, although the surreptitiousness of the observation or recording is an element of the offence in s. 162(1), this does not mean that it can never be considered in assessing whether the person who was observed or recorded had a reasonable expectation of privacy.

"Privacy", as ordinarily understood, is not an all-or-nothing concept, and being in a public or semi-public space does not automatically negate all expectations of privacy with respect to observation or recording. Rather, whether observation or recording would generally be regarded as an invasion of privacy depends on a variety of factors, which may include a person's location, the form of the alleged invasion of privacy, the nature of the observation or recording, the activity in which a person is engaged when observed or recorded and the part of a person's body that is the focus of the recording. The fact that a variety of factors may influence whether a person would expect not to be observed or recorded is also consistent with Parliament's choice to express the element of the offence by reference to the "circumstances" that give rise to a reasonable expectation of privacy. Had Parliament intended to limit the types of circumstances that can be considered, it would have done so expressly.

The immediate statutory context of the words "circumstances that give rise to a reasonable expectation of privacy" lends further support to the view that this element of the offence is not governed solely or primarily by a person's physical location and does not limit the commission of the offence to traditionally private spaces. Paragraph (a) of s. 162(1) expressly circumscribes the scope of the prohibited observation or recording by reference to location and it would be incongruous with that paragraph to read the requirement that the person who is observed or recorded be in circumstances that give rise to a reasonable expectation of privacy as also being governed by location. Furthermore, the inclusion of paragraphs (b) and (c) in s. 162(1) indicates that Parliament understood that a person could have a reasonable

expectation of privacy somewhere other than in a place where nudity or explicit sexual activity can reasonably be expected or is in fact taking place.

Parliament's object in enacting the voyeurism offence was to protect individuals' privacy and sexual integrity, particularly from new threats posed by the abuse of evolving technologies. Reading the expression "circumstances that give rise to a reasonable expectation of privacy" narrowly would undermine Parliament's intention that the offence prohibit surreptitious observation or visual recording that amounts to sexual exploitation or that represents the most egregious breaches of privacy.

The jurisprudence pertaining to s. 8 of the *Canadian Charter of Rights and Freedoms* is also instructive in interpreting s. 162(1). Parliament must be understood has having chosen the words "reasonable expectation of privacy" in s. 162(1) purposefully and with the intention that the existing jurisprudence on this concept would inform the content and meaning of those words. In addition, the s. 8 case law represents a rich body of judicial thought on the meaning of privacy in our society. Far from being unmoored from our ordinary perceptions of when privacy can be expected, judgments about privacy expectations in the s. 8 context are informed by our fundamental shared ideals about privacy as well as our everyday experiences.

In this case, when the entire context is considered, there can be no doubt that the students' circumstances give rise to a reasonable expectation that they would not be recorded in the manner they were. In particular, the subjects of the video

recordings were teenage students at a high school. They were recorded by their teacher in breach of the relationship of trust that exists between teachers and students as well as in contravention of a formal school board policy that prohibited such recording. Significantly, the videos had as their predominant focus the bodies of students, particularly their breasts. In recording these videos, the accused acted contrary to the reasonable expectations of privacy that would be held by persons in the circumstances of the students when they were recorded.

Per Côté, Brown and **Rowe** JJ.: There is agreement that the students in this case were in circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) of the *Criminal Code*.

However, s. 8 *Charter* jurisprudence should not inform the interpretation of s. 162(1). First, the conceptual framework for defining *Charter* rights should remain distinct from that used to define the scope of *Criminal Code* offences. To interpret the wording in s. 162(1) by reference to the s. 8 jurisprudence would put the judiciary in the position of creating new common law offences, despite their abolition by s. 9(a) of the *Criminal Code*. Section 8 *Charter* jurisprudence evolves but the meaning in s. 162(1) is intended to remain fixed as of the time of its enactment. Second, the purpose and function of s. 8 and s. 162(1) are fundamentally at odds. The power imbalance of the police as agents of the state vis-à-vis a citizen that is at the heart of the preoccupation under s. 8 is not present under s. 162(1), as that provision protects invasions of privacy perpetrated by one individual against another. Third, the

interests protected by s. 8 of the *Charter* include personal privacy, territorial privacy and informational privacy, whereas the reasonable expectation of privacy under s. 162(1) relates only to the protection of one's physical image. Finally, *Charter* values are a legitimate interpretive aid only in cases of ambiguity, and in this case, s. 162(1) is not legally ambiguous.

A multi-factored test to decide whether there is a reasonable expectation of privacy in the context of s. 162(1) should not be adopted. The offence of voyeurism is an extension of the criminal law to protect well-established interests of privacy, autonomy and sexual integrity in light of threats posed by new technologies that encroach upon them. Because voyeurism is a sexual offence, a reasonable expectation of privacy in the context of s. 162(1) should be interpreted in light of the harms contemplated in related provisions in the scheme for sexual offences in Part V of the *Criminal Code*. In the context of the voyeurism offence, "privacy" should be interpreted with regard to personal autonomy and sexual integrity.

An individual's privacy interest under s. 162(1) can only be infringed if they are recorded or observed in a way that both causes them to lose control over their image and also infringes their sexual integrity. This conjunctive test accords with what Parliament sought to protect by creating the offence. The ability to maintain control over what personal visual information is shared, and with whom, is a facet of privacy linked to personal autonomy. While the surreptitiousness of the observation or recording may signal circumstances that give rise to a reasonable expectation of

privacy, the two elements remain distinct. The surreptitiousness of the observation or recording improperly removes the individual's ability to maintain control over how they are observed, and, because of its permanence, a recording compounds the denial of the subject's autonomy by giving the voyeur repeated access to the observations.

Whether the observation or recording is sexual in nature such that it infringes the sexual integrity of the subject should be decided on an objective standard and considered in light of all the circumstances. While the intent of the perpetrator may be relevant, it is not determinative. The sexual purpose inquiry under para. (c) of s. 162(1) is distinct from the determination of a violation of sexual integrity under the reasonable expectation of privacy analysis. An observation or recording will be done for a sexual purpose where the subject of the observation or recording is reasonably perceived as intended to cause sexual stimulation in the observer. An interpretation of sexual purpose that includes sexual gratification is consistent with the interpretation of the same phrase in other sections of the *Criminal Code*.

In this case, the students had a reasonable expectation of privacy regarding how their bodies would be observed in the classrooms and hallways of their school. The visual information was subject to their limitation and control, and the technology used by the accused allowed him to take videos of the clothed breasts of his students — for extended periods of time — in angles and in proximity that went beyond the access that the students allowed in this setting, thus infringing their

autonomy. The recordings were also objectively sexual in nature. The focus of the recordings was on the young women's intimate body parts, at close range. In addition, and while not determinative, the recordings were made for a sexual purpose. The combination of these factors leads to the conclusion that by surreptitiously recording images of their breasts, the accused infringed the sexual integrity of the students.

Cases Cited

By Wagner C.J.

Referred to: *R. v. Rudiger*, 2011 BCSC 1397, 244 C.R.R. (2d) 69; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Srivastava v. Hindu Mission of Canada (Quebec) Inc.*, [2001] R.J.Q. 1111; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Edwards*, [1996] 1 S.C.R. 128; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Sandhu*, 2018 ABQB 112, 404 C.R.R. (2d) 216; *R. v.*

Sharpe, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. S.A.B*, 2003 SCC 60, [2003] 2 S.C.R. 678; *R. v. Taylor*, 2015 ONCJ 449; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *R. v. Audet*, [1996] 2 S.C.R. 171; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 255 C.R.R. (2d) 207.

By Rowe J.

Referred to: *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Frey v. Fedoruk*, [1950] S.C.R. 517; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *University Health Network v. Ontario (Minister of Finance)* (2001), 208 D.L.R. (4th) 459; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Rudiger*, 2011 BCSC 1397, 244 C.R.R. (2d) 69; *Willick v. Willick*, [1994] 3 S.C.R. 670; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236; *R. v. Drapeau* (1995), 96 C.C.C. (3d) 554; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. S (P.L.)*, [1991] 1 S.C.R. 909; *R. v. V. (K.B.)*, [1993] 2 S.C.R. 857; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *R. v. Ewanchuk*,

[1999] 1 S.C.R. 330; *R. v. A. G.*, 2000 SCC 17, [2000] 1 S.C.R. 439; *R. v. Larue*, 2003 SCC 22, [2003] 1 S.C.R. 277; *R. v. Lutoslawski*, 2010 SCC 49, [2010] 3 S.C.R. 60; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Hewlett*, 2002 ABCA 179, 167 C.C.C. (3d) 425; *R. v. L.A.C.*, 2005 ABPC 217, 286 A.R. 102; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Landry*, [1986] 1 S.C.R. 145; *Semayne's Case* (1604), 5 Co. Rep. 91 a, 77 E.R. 194; *R. v. Morrisey*, 2011 ABCA 150; *R. v. Colley (J.B.)*, 2009 BCCA 289, 273 B.C.A.C. 107; *R. v. M.B.*, 2014 QCCA 1643.

Statutes and Regulations Cited

An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, preamble.

Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004-2005 (assented to 20 July 2005).

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Criminal Code, R.S.C. 1985, c. C-46, Parts V, XI, ss. 9(a), 151, 152, 153 ,153.1, 162, 177, 276.3, 278.1, 278.5, 430, 486, 486.4, 486.5.

Youth Criminal Justice Act, S.C. 2002, c. 1, s. 110.

Authors Cited

Canada. Department of Justice. *Voyeurism as a Criminal Offence: A Consultation Paper*. Ottawa, 2002.

Canada. Department of Justice. *Voyeurism As A Criminal Offence: Summary of the Submissions*, October 28, 2002 (online:

http://www.justice.gc.ca/eng/cons/voy/final.html; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC10_1_eng.pdf).

Canada. House of Commons Debates. *House of Commons Debates*, vol. 138, No. 46, 2nd Sess., 37th Parl., January 27, 2003, p. 2692.

Craig, Elaine. *Troubling Sex: Towards a Legal Theory of Sexual Integrity*. Vancouver/Toronto: UBC Press, 2012.

Gavison, Ruth. "Privacy and the Limits of the Law" (1980), 89 *Yale L.J.* 421.

Gavison, Ruth. "Feminism and the Public/Private Distinction" (1992), 45 *Stan L. Rev.* 1.

Jones, Brock. "*Jarvis*: Surely Schoolchildren Have A Reasonable Expectation of Privacy Against Videotaping for a Sexual Purpose?" (2017), 41 C.R. (7th) 71.

LaFave, Wayne R. and Austin W. Scott, Jr. *Substantive Criminal Law*, vol. 1, 2nd ed. St-Paul, Minn.: West Publishing Co., 1986.

Library of Parliament. Parliamentary Information and Research Service. *Bill C-2: An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*. Last updated June 16, 2005.

Mewett, Alan W. and Morris Manning. *Mewett & Manning on Criminal Law*, 2nd ed. Toronto: Butterworths, 1985.

Parker, Richard B. "A Definition of Privacy" (1974), 27 *Rutgers L. Rev.* 275.

Paton-Simpson, Elizabeth. "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305.

Stewart, Hamish C. *Sexual Offences in Canadian Law*, Aurora, Ont.: Canada Law Book, 2004 (loose-leaf updated October 2018, release 31).

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

Westin, Alan F. *Privacy and Freedom*. Atheneum: New York, 1970.

APPEAL from a judgment of the Ontario Court of Appeal (Feldman, Watt and Huscroft JJ.A.), 2017 ONCA 778, 139 O.R. (3d) 754, 41 C.R. (7th) 36, 356 C.C.C. (3d) 1, 396 C.R.R. (2d) 348, [2017] O.J. No. 5261 (QL), 2017 CarswellOnt

15528 (WL Can.), affirming a decision of Goodman J., 2015 ONSC 6813, 345 C.R.R. (2d) 103, 25 C.R. (7th) 330, [2015] O.J. No. 5847 (QL), 2015 CarswellOnt 17226 (WL Can.). Appeal allowed.

Christine Bartlett-Hughes and *Jennifer Epstein*, for the appellant.

Zachary Kerbel, *Saman Wickramasinghe* and *Jennifer Micallef*, for the respondent.

Written submissions only by *Lara Vizsolyi*, for the intervener Attorney General of British Columbia.

Jane Bailey and *David Fewer*, for the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Written submissions only by *Regan Morris* and *James Nowlan*, for the intervener Privacy Commissioner of Canada.

Jonathan C. Lisus and *Zain Naqi*, for the intervener Canadian Civil Liberties Association.

Caroline R. Zayid, *Adam Goldenberg* and *Caroline H. Humphrey*, for the intervener Ontario College of Teachers.

Stephen McCammon, for the intervener Information and Privacy Commissioner of Ontario.

Gillian Hnatiw, *Karen Segal* and *Alex Fidler-Wener*, for the intervener Women's Legal Education and Action Fund Inc.

Matthew Gourlay and *Kate Robertson*, for the intervener Criminal Lawyers' Association (Ontario).

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon and Martin JJ. was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] In 2005, Parliament enacted a new criminal offence called voyeurism in s. 162(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. This offence is committed when a person surreptitiously observes or makes a visual recording of another person who is in "circumstances that give rise to a reasonable expectation of privacy", if the observation or recording is done in one of the three situations described in paras. (a) through (c) of s. 162(1). Section 162(1)(c), in particular, applies when the observation or recording is done for a sexual purpose.

[2] Mr. Ryan Jarvis, the respondent in this appeal, was charged with voyeurism contrary to s. 162(1)(c) of the *Criminal Code* after he used a camera concealed inside a pen to make video recordings of female students at the high school where he was a teacher. Mr. Jarvis recorded students while they were engaged in ordinary school-related activities in common areas of the school, including classrooms and hallways. Most of the videos focused on the faces and upper bodies of female students, particularly their chests. The students did not know that they were being recorded.

[3] Mr. Jarvis was acquitted at trial because the trial judge was not satisfied beyond a reasonable doubt that he had made the recordings for a sexual purpose. The acquittal was upheld by a majority of the Ontario Court of Appeal. While the Court of Appeal was of the unanimous opinion that Mr. Jarvis *had* made the videos for a sexual purpose, the majority held that the students recorded by him were not in circumstances that give rise to a reasonable expectation of privacy, as required for a conviction under s. 162(1). A dissenting judge was satisfied that the students recorded by Mr. Jarvis were in circumstances that give rise to a reasonable expectation of privacy and would have entered a conviction on that basis.

[4] The Crown now appeals to this Court as of right. The only issue in the appeal is whether the Court of Appeal erred in finding that the students recorded by Mr. Jarvis were not in circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) of the *Criminal Code*.

[5] In my view, circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) of the *Criminal Code* are circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred. To determine whether a person had a reasonable expectation of privacy in this sense, a court must consider the entire context in which the observation or recording took place. The list of considerations that may be relevant to this inquiry is not closed. However, in any given case, these considerations may include the location where the observation or recording occurred; the nature of the impugned conduct, that is, whether it consisted of observation or recording; the awareness or consent of the person who was observed or recorded; 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 parties; the purpose for which the observation or recording was done; and the personal attributes of the person who was observed or recorded.

[6] As I will explain, there can be no doubt in the case at bar that the students recorded by Mr. Jarvis were in circumstances in which they would reasonably have expected not to be the subject of videos predominantly focused on their bodies, particularly their breasts — and *a fortiori* not to be the subject of such videos recorded for a sexual purpose by a teacher. I therefore conclude that the students recorded by Mr. Jarvis were in circumstances that give rise to a reasonable

expectation of privacy for the purposes of s. 162(1) of the *Criminal Code*. I would allow the appeal and enter a conviction.

II. Background

[7] At the times relevant to the charge in the case at bar, Mr. Jarvis was an English teacher at a high school in London, Ontario. In June 2011, a fellow teacher informed the principal of the school that he believed Mr. Jarvis was surreptitiously recording female students at the school using a camera hidden inside a pen. The principal became concerned for the safety of the students. The following day, the principal twice observed Mr. Jarvis standing near a female student while holding up a pen that emitted a red light from the top, non-writing end. On the second occasion, the principal secured the pen from Mr. Jarvis and gave it to the police.

[8] The pen seized from Mr. Jarvis performs a number of functions. It can be used to write. It is also outfitted with a camera that can be used to record videos with audio. The pen does not have a screen on which the user can see what is being or has been recorded. The camera does not have the ability to zoom in and out while recording. Videos recorded with the camera can be downloaded to a computer for viewing and editing. In these reasons, I will refer to this device as a "pen camera".

[9] The electronic contents of the pen camera, which were eventually entered into evidence, consisted of 35 video files: 17 "active" videos, 2 deleted videos and 16 recovered video files (2 of which could not be played). Mr. Jarvis admitted that he

had recorded all of these videos using the pen camera between January 2010 and June 2011, while teaching at the high school.

[10] The videos recorded by Mr. Jarvis range in length from a few seconds to several minutes. They were shot in locations in and around the school, including hallways, classrooms, the cafeteria and the school grounds. Most of the videos focus on female students at the school. At the time the videos were recorded, these students ranged in age from 14 to 18 years old. The videos show them engaged in common school activities. The videos have an audio component and, in some of them, Mr. Jarvis can be heard speaking with students on various topics. Students wearing low-cut or close-fitting tops make up the vast majority of subjects. It is also striking that a number of the videos are shot from above or beside female students who are seated in classrooms or computer labs, or who are in the hallways of the school, at angles that capture more of their breasts than would be visible if the students were recorded head on.

[11] None of the students were aware that they were being recorded, and none of them consented to being recorded. Nor did Mr. Jarvis have the school's permission to video or audio record students. Indeed, a school board policy in effect at the time Mr. Jarvis made the videos prohibited his conduct in making the videos in the manner that he did: Agreed Statement of Facts, A.R., vol. 1, at p. 147.

[12] The police identified 27 of the individuals in the videos as female students at the high school and charged Mr. Jarvis with 27 counts of voyeurism

contrary to s. 162(1)(c) of the *Criminal Code*. At the commencement of the trial, those charges were replaced with one global charge under s. 162(1)(c).

III. Judicial History

A. *Ontario Superior Court of Justice (Goodman J.), 2015 ONSC 6813, 345 C.R.R. (2d) 103*

[13] The evidence at trial consisted of the videos recovered from the pen camera,[1] an agreed statement of facts and a photo exhibit entered on consent. In the agreed statement of facts, Mr. Jarvis admitted that he had recorded the videos recovered from the pen camera and that he had done so surreptitiously. In light of those admissions, there remained only two questions at trial: first, whether the Crown had established that the students Mr. Jarvis recorded were in circumstances that give rise to a reasonable expectation of privacy; and second, whether the Crown had proven that Mr. Jarvis made the recordings for a sexual purpose.

[14] The trial judge answered the first question in the affirmative. He concluded that, in the context of the offence in s. 162(1), whether a person who is observed or recorded is in circumstances that give rise to a reasonable expectation of privacy does not depend solely on the physical location where the observation or recording occurs. Location is only one circumstance to be considered. In the case at bar, although the students captured in the videos had a lower and different expectation

[1] Mr. Jarvis' application to have the videos excluded from evidence on the basis of ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms* was denied by the trial judge. That ruling was upheld by the Court of Appeal and is not at issue in this Court.

of privacy at the school than they would have had at home, they nonetheless had a reasonable expectation that they would not be surreptitiously recorded by Mr. Jarvis.

[15] However, the trial judge was not satisfied that Mr. Jarvis had made the recordings for a sexual purpose. Based on his review of the videos, he determined that Mr. Jarvis had positioned the pen camera to focus "for the most part, on the female students' faces, bodies and cleavage or breasts, and on several occasions, exclusively so": para. 72. However, in the trial judge's view, although the "most likely" conclusion based on the evidence was that Mr. Jarvis had recorded the students for a sexual purpose, "there may be other inferences to be drawn": para. 77. He acquitted Mr. Jarvis.

B. *Court of Appeal for Ontario (Feldman J.A., Watt J.A. Concurring; Huscroft J.A. Dissenting), 2017 ONCA 778, 139 O.R. (3d) 754*

[16] On the Crown's appeal from the acquittal, the Court of Appeal for Ontario was unanimously of the view that the trial judge had erred in law in failing to find that Mr. Jarvis had made the recordings at issue for a sexual purpose. According to the Court of Appeal, this was an "overwhelming case of videos focused on young women's breasts and cleavage", and no inference other than that the videos had been made for a sexual purpose was available on the record: paras. 53-54.

[17] Nevertheless, a majority of the Court of Appeal upheld Mr. Jarvis' acquittal on the basis that the trial judge had also erred in finding that the students

recorded by Mr. Jarvis were in circumstances that give rise to a reasonable expectation of privacy when they were recorded. The majority was of the view that a person typically expects privacy when she is in a place where she can exclude others and feel confident that she is not being observed. The majority did accept that a person could arguably retain a limited expectation of privacy in a public place in certain circumstances. However, in the majority's opinion, no such reasonable expectations could have arisen in the case at bar because the students recorded by Mr. Jarvis were engaged in normal school activities and interactions in common areas of the school where they would expect that others could see them and where they knew they would be recorded by the school's security cameras.

[18] Huscroft J.A. dissented. In his view, whether a person is in circumstances that give rise to a reasonable expectation of privacy, within the meaning of s. 162(1), should not depend solely on a person's location and ability to exclude others from that location. He stated that, to ascertain whether a person is in circumstances that give rise to reasonable expectation of privacy, a court must determine whether the person's interest in privacy should be given priority over competing interests. In the case at bar, according to Huscroft J.A., the students recorded by Mr. Jarvis should be found to have had a reasonable expectation of privacy because their interest in privacy was entitled to priority over the interests "of anyone who would seek to compromise their personal and sexual integrity while they are at school": para. 133. He would have allowed the Crown's appeal on this basis.

[19] The Crown now appeals to this Court as of right on the issue of whether the majority of the Court of Appeal erred in finding that the students recorded by Mr. Jarvis were not in circumstances that give rise to a reasonable expectation of privacy.

IV. Analysis

[20] This appeal requires the Court to consider, for the first time, the elements of the offence created by s. 162(1) of the *Criminal Code*. That provision reads as follows:

> **Voyeurism**
>
> **162 (1)** Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
>
> **(a)** the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
>
> **(b)** the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
>
> **(c)** the observation or recording is done for a sexual purpose.

[21] Mr. Jarvis is charged with committing the offence of voyeurism contrary to s. 162(1)(c) of the *Criminal Code*. That offence is committed where a person surreptitiously observes or makes a visual recording of another person who is in

circumstances that give rise to a reasonable expectation of privacy, if the observation or recording is done for a sexual purpose: see *R. v. Rudiger*, 2011 BCSC 1397, 244 C.R.R. (2d) 69, at para. 75. A "visual recording" is defined, for the purposes of s. 162, as including "a photographic, film or video recording made by any means": *Criminal Code*, s. 162(2).

[22] It is no longer in dispute that Mr. Jarvis surreptitiously made video recordings of female students at the high school and that he did so for a sexual purpose. Thus, there remains a single question in this appeal: were the students recorded by Mr. Jarvis in "circumstances that give rise to a reasonable expectation of privacy"?

[23] In order to answer this question, I will first consider what it means for a person who is observed or recorded to be in "circumstances that give rise to a reasonable expectation of privacy" as that expression is used in s. 162(1) of the *Criminal Code*. I will then consider the facts of the case at bar to determine whether the Crown has proven this element of the offence beyond a reasonable doubt.

A. *When Is a Person Who Is Observed or Recorded in "Circumstances That Give Rise to a Reasonable Expectation of Privacy" for the Purposes of Section 162(1) of the Criminal Code?*

[24] What does it mean, in the context of s. 162(1) of the *Criminal Code*, for a person who is observed or recorded to be in "circumstances that give rise to a reasonable expectation of privacy"? The parties agree that this question of statutory

interpretation must be answered by reading the words of s. 162(1) "'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. The parties disagree, however, on the interpretation that results from this approach.

(1) Positions of the Parties

[25] In his factum in this Court, Mr. Jarvis argued that this interpretive approach leads to the conclusion that circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) are circumstances in which a person has a reasonable expectation that she, or a part of her body, will not be observed by others. On this understanding of s. 162(1), the offence of voyeurism would be committed when the person who is observed or recorded is in a place where she does not expect to be observed by others (such as when she is alone in her own home) or when the observation or recording is of a part of a person's body that she does not expect to be observed by others (such as a part covered by a skirt). In oral argument, counsel for Mr. Jarvis qualified this proposed interpretation somewhat by submitting that a person may also have a reasonable expectation of privacy for the purposes of s. 162(1) when she expects to be observed by certain other persons but *not* by the person doing the observation or recording at issue.

[26] According to Mr. Jarvis, the circumstances relevant to whether a reasonable expectation of privacy arises in a particular context may include the physical features of the space in which a person is located and the degree of control the person has over who may obtain visual access to her in the space. However, considerations such as the nature of the impugned conduct, that is, whether it consists of recording as opposed to mere observation, the "sexual nature" of the parts of a person's body that are being observed or recorded, and the relationship between the observer and the observed person are never relevant to the inquiry: R.F. at para. 19. Applying this approach to the case at bar, Mr. Jarvis submits that because the students recorded by him were in common areas of the school where they knew they could be observed by others, they could not have had a reasonable expectation of privacy and the offence in s. 162(1) is not made out.

[27] The Crown, by contrast, argues that the majority of the Court of Appeal erred by adopting an unduly narrow, location-based understanding of privacy. The Crown submits that whether a reasonable expectation of privacy arises in a given situation should be determined on the basis of the totality of the circumstances, with location being only one factor to be considered. In light of the full constellation of circumstances in the case at bar — including the fact that the impugned conduct consisted of visual recording and not merely observation, the nature of the recordings made, the trust relationship between Mr. Jarvis and the students, and the existence of a school board policy that prohibited Mr. Jarvis from recording students in the

manner he did — it must be concluded that the students filmed by Mr. Jarvis had a reasonable expectation of privacy for the purposes of s. 162(1).

(2) Meaning of the Expression "Circumstances that Give Rise to a Reasonable Expectation of Privacy" in Section 162(1)

[28] In my view, circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) are circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred. The inquiry into whether a person who was observed or recorded was in such circumstances should take into account the entire context in which the impugned observation or recording took place.

[29] The following non-exhaustive list of considerations may assist a court in determining whether a person who was observed or recorded was in circumstances that give rise to a reasonable expectation of privacy:

> **(1) The location the person was in when she was observed or recorded.** The fact that the location was one from which the person had sought to exclude all others, in which she felt confident that she was not being observed, or in which she expected to be observed only by a select group of people may inform whether there was a reasonable expectation of privacy in a particular case.

(2) The nature of the impugned conduct, that is, whether it consisted of observation or recording. Given that recording is more intrusive on privacy than mere observation, a person's expectation regarding whether she will be observed may reasonably be different than her expectation regarding whether she will be recorded in any particular situation. The heightened impact of recording on privacy has been recognized by this Court in other contexts, as will be discussed further at para. 62 of these reasons.

(3) Awareness of or consent to potential observation or recording. I will discuss further how awareness of observation or recording may inform the reasonable expectation of privacy inquiry at para. 33 of these reasons.

(4) The manner in which the observation or recording was done. Relevant considerations may include whether the observation or recording was fleeting or sustained, whether it was aided or enhanced by technology and, if so, what type of technology was used. The potential impact of evolving technologies on privacy has been recognized by the courts, as I will discuss further at para. 63 of these reasons.

(5) The subject matter or content of the observation or recording. Relevant considerations may include whether the observation or

recording targeted a specific person or persons, what activity the person who was observed or recorded was engaged in at the relevant time, and whether the focus of the observation or recording was on intimate parts of a person's body. This Court has recognized, in other contexts, that the nature and quality of the information at issue are relevant to assessing reasonable expectations of privacy in that information. As I will discuss further at paras. 65-67 of these reasons, this principle is relevant in the present context as well.

(6) Any rules, regulations or policies that governed the observation or recording in question. However, formal rules, regulations or policies will not necessarily be determinative, and the weight they are to be accorded 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. Relevant considerations may include whether the relationship was one of trust or authority and whether the observation or recording constituted a breach or abuse of the trust or authority that characterized the relationship. This circumstance is relevant because it would be reasonable for a person to expect that another person who is in a position of trust or authority toward her will not abuse this position by engaging in

unconsented, unauthorized, unwanted or otherwise inappropriate observation or recording.

(8) The purpose for which the observation or recording was done. I will explain why this may be a relevant consideration at paras. 31-32 of these reasons.

(9) The personal attributes of the person who was observed or recorded. Considerations such as whether the person was a child or a young person may be relevant in some contexts.

[30] I emphasize that the list of considerations that can reasonably inform the inquiry into whether a person who was observed or recorded had a reasonable expectation of privacy is not exhaustive. Nor will every consideration listed above be relevant in every case. For example, recordings made using a camera hidden inside a washroom will breach reasonable expectations of privacy regardless of the purpose for which they are made, the age of the person recorded, or the relationship between the person recorded and the person who did the recording. In another context, however, these latter considerations may play a more significant role. The inquiry is a contextual one, and the question in each case is whether there was a reasonable expectation of privacy in the totality of the circumstances.

[31] I pause here to note that there is nothing incongruous about considering the purpose of observation or recording in determining whether it was done in breach of a reasonable expectation of privacy. This Court has recognized, in other contexts, that a person's reasonable expectation of privacy with respect to information about the person will vary depending on the purpose for which the information is collected: see *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 429-32, per La Forest J.; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 75. This conclusion also flows from a common sense understanding of privacy expectations. For example, if a patient disrobes to allow a physician to view her breasts or other sexualized parts of her body for the purpose of receiving a medical diagnosis, the patient cannot complain that the physician has breached any reasonably held expectation of privacy by performing the diagnostic procedure. However, if the diagnostic procedure turns out to be a pretext on which the physician relies in order to view the patient for a non-medical purpose — whether sexual or otherwise — the patient's privacy will undeniably be violated.

[32] The fact that it is an element of the offence in s. 162(1)(c) that observation or recording be done for a sexual purpose does not make it inappropriate to consider the purpose of the observation or recording in assessing whether it was done in breach of a reasonable expectation of privacy, as required by s. 162(1). In the context of this latter inquiry, purpose is only one non-determinative factor to be taken into account along with other relevant circumstances. By contrast, sexual purpose, as an element of the offence in s. 162(1)(c), must be established beyond a reasonable

doubt for the offence to be proven. In some cases, depending on the entire context, observation or recording may not breach expectations of privacy despite having a sexual purpose. In such cases, the offence in s. 162(1) will not be made out. In other cases, observation or recording may be an obvious breach of privacy regardless of its purpose, and it can ground a conviction under s. 162(1) if the other elements of the offence are made out.

[33] Similarly, although the surreptitiousness of the observation or recording is an element of the offence in s. 162(1), this does not mean that it can never be considered in assessing whether the person who was observed or recorded had a reasonable expectation of privacy. For example, the fact that a person chose to be secretive about recording another person in a particular situation may support the conclusion that the recording was contrary to the norms regarding privacy and visual recording that exist in that context. However, as with the purpose of the observation or recording, surreptitiousness will only ever be one consideration, among many, to be taken into account in assessing reasonable expectations of privacy; it cannot be allowed to overwhelm the reasonable expectation of privacy analysis. It is possible under s. 162(1) for observation or recording to be done surreptitiously but not in breach of a reasonable expectation of privacy. Conversely, observation or recording that is done openly may breach reasonable expectations of privacy, though because it is not surreptitious, it will not constitute an offence under s. 162(1).

[34] As I will now explain, the above interpretation of the requirement in s. 162(1) that a person who is observed or recorded be in "circumstances that give rise to a reasonable expectation of privacy" is the interpretation that best accords with the language, context and purpose of that provision.

(3) This Interpretation of the Expression "Circumstances That Give Rise to a Reasonable Expectation of Privacy" Best Accords With the Language, Context and Purpose of Section 162(1)

(a) *Opening Words of Section 162(1)*

[35] I will begin by considering the words chosen by Parliament to express the element of s. 162(1) with which we are concerned in this appeal and the "ordinary" or "natural" meaning that appears when these words are read in their immediate context: see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 30. In my view, the ordinary and grammatical sense of the words "circumstances that give rise to a reasonable expectation of privacy", when read in the context of the opening words of s. 162(1), is consistent with the understanding of this element that I have set out above, for a number of reasons.

[36] The concept of "privacy" defies easy definition, and I do not propose to offer a comprehensive definition here. However, in a general sense and as ordinarily used, the word "privacy" includes the concept of freedom from unwanted scrutiny, intrusion or attention. Section 162(1) is specifically directed at two types of attention: observation and visual recording. The opening words of s. 162(1) therefore suggest

that the "reasonable expectation of privacy" with which the provision is concerned is an expectation that one will not be observed or visually recorded.

[37] One question raised by the present appeal is whether a person can ever retain such an expectation when she knows she can be observed by others or when she is in a place from which she cannot exclude others — what may be described as a "public" place. In my view, on an ordinary understanding of the concept of privacy, this question must be answered in the affirmative. I readily accept that expectations of privacy with respect to observation or recording will generally be at their highest when a person is in a traditionally "private" place from which she has chosen to exclude all others. For example, a person alone at home, or in a washroom with the door closed, would typically expect near absolute privacy — and certainly would expect not to be observed or recorded without her knowledge. But a person does not lose all expectations of privacy, as that concept is ordinarily understood, simply because she is in a place where she knows she can be observed by others or from which she cannot exclude others.

[38] In my view, a typical or ordinary understanding of the concept of privacy recognizes that a person may be in circumstances where she can expect to be the subject of certain types of observation or recording but not to be the subject of other types. An obvious example is that of a person who chooses to disrobe and engage in sexual activity with another person and who necessarily expects to be observed by that other person while she is nude and engaging in that activity. Her privacy would

nonetheless be violated if that other person, without her knowledge, video recorded the two of them engaging in the activity. And a couple who choose to film themselves engaged in sexual activity do not thereby waive their expectation that third parties will not secretly observe or record them engaging in that activity.

[39] Similarly, a woman changing in a communal women's change room at a public pool would expect to be observed incidentally in various states of undress by other users of the change room. However, there can be no debate that she would retain some expectation of privacy with respect to observation or recording. For one thing, she would expect to be observed *only* by the other women in the change room and not by the general public. She would also expect not to be photographed or video recorded while undressing, either by other change room users or by anyone else. If it turned out that a mirror in the change room was actually a one-way glass that allowed pool staff to view change room occupants or that someone had concealed a camera in a vent and was video recording persons while they were changing, surely this would be viewed as an invasion of "privacy", on any ordinary understanding of that word.

[40] One can think of other examples where a person would continue to expect some degree of privacy, as that concept is ordinarily understood, while knowing that she could be viewed or even recorded by others in a public place. 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 (a hypothetical scenario discussed in *Rudiger*, at para. 91). The use of a cell phone to capture upskirt images of women on public transit, the use of a drone to take high-resolution photographs of unsuspecting sunbathers at a public swimming pool, and the surreptitious video recording of a woman breastfeeding in a quiet corner of a coffee shop would all raise similar privacy concerns.

[41] These examples illustrate that "privacy," as ordinarily understood, is not an all-or-nothing concept. Furthermore, being in a public or semi-public space does not automatically negate all expectations of privacy with respect to observation or recording. Rather, these examples indicate that whether observation or recording would generally be regarded as an invasion of privacy depends on a variety of factors, which may include a person's location; the form of the alleged invasion of privacy, that is, whether it involves observation or recording; the nature of the observation or recording; the activity in which a person is engaged when observed or recorded; and the part of a person's body that is the focus of the recording.

[42] The fact that a variety of factors may influence whether a person would expect not to be observed or recorded is also consistent with Parliament's choice to express the element of the offence in s. 162(1) with which we are concerned by reference to the "circumstances" that give rise to a reasonable expectation of privacy. The word "circumstances", in the sense in which it is used in s. 162(1), connotes a

range of factors or considerations — which are not limited to a person's location or physical surroundings.

[43] I recognize that expressing this element by reference to the circumstances in which a person is observed or recorded is also a way to make it clear that this element relates to privacy expectations that would reasonably arise from the context in which observation or recording takes place, not to the subjective, and potentially idiosyncratic, privacy expectations of the particular person who is observed or recorded. Nonetheless, had Parliament intended to limit the types of circumstances that can be considered in determining whether such an expectation may reasonably arise, it could have done so expressly in s. 162(1), for example by defining "circumstances that give rise to a reasonable expectation of privacy" as including only certain types of circumstances or by providing a list of circumstances or factors to be taken into account in determining whether such an expectation could reasonably arise. Indeed, if Parliament's intention in using the phrase "circumstances that give rise to a reasonable expectation of privacy" was to limit the scope of the conduct prohibited by s. 162(1) to observing or recording a person who does not believe she can be observed, Parliament could have made this explicit, for example by prohibiting surreptitious recording or observation of "a person who does not believe he or she can be observed" where the elements in para. (a), (b) or (c) of s. 162(1) are present. But Parliament did not do this; instead, it used the word "circumstances", without limitation.

(b) *Statutory Context*

[44] The immediate statutory context of the words "circumstances that give rise to a reasonable expectation of privacy" lends further support to the view that this element is not governed solely or primarily by a person's physical location and does not limit the commission of the offence to traditionally "private" spaces, such as bedrooms and bathrooms. Section 162(1) prohibits the surreptitious observation or recording of a person who is in "circumstances that give rise to a reasonable expectation of privacy" in three situations, set out in paras. (a), (b) and (c) as follows:

> **(a)** the person [who is observed or recorded] is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
>
> **(b)** the person [who is observed or recorded] is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
>
> **(c)** the observation or recording is done for a sexual purpose.

[45] Notably, para. (a) expressly circumscribes the scope of the prohibited observation or recording by reference to location — that is, it prohibits observation or recording in *places* where nudity or sexual activity may reasonably be expected. It would therefore be incongruous with para. (a) to read the requirement that the person who is observed or recorded be in circumstances that give rise to a reasonable expectation of privacy as *also* being governed by location, because this would mean

that two separate elements of the offence in s. 162(1)(a) would both be concerned primarily with the location of the observation or recording.

[46] Furthermore, if the reference to "circumstances that give rise to a reasonable expectation of privacy" in s. 162(1) is understood as limiting the scope of the prohibited conduct to surreptitious observation or recording in traditionally "private" places, it is difficult to conceive of situations that would fall outside the scope of s. 162(1)(a) but within the scope of s. 162(1)(b) or (c). In other words, if a reasonable expectation of privacy can arise only in traditionally "private" or "quasi-private" places from which others can be excluded — such as a home, bathroom or change room — then a person who can reasonably expect privacy will almost always be in a place where she can also reasonably be expected to be nude or partially nude — the type of place contemplated in para. (a) of s. 162(1). But the inclusion of paras. (b) and (c) in s. 162(1) indicates that Parliament understood that a person *could* have a reasonable expectation of privacy somewhere other than in a place where nudity or explicit sexual activity can reasonably be expected or is in fact taking place — otherwise, paras. (b) and (c) would have no application. A narrow reading of "circumstances that give rise to a reasonable expectation of privacy", then, would run contrary to the principle that a legislative provision should not be interpreted so as to render it, or parts of it, "mere surplusage": *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28; see generally Sullivan, at p. 211.

[47] An argument that can be made against this line of reasoning is that there are locations from which a person can exclude others but where nudity or sexual activity would not reasonably be expected — for example, a private office in a workplace — and that it is observation and recording in places such as this with which paras. (b) and (c) of s. 162(1) are concerned. However, given the limited range of locations of this type and given that there is no reason to think that sexually exploitative observation or recording in such places poses a particular concern, it is difficult to accept that these paragraphs were enacted to protect against observation or recording of nudity or sexual activity, or observation or recording for a sexual purpose, specifically in such places. Rather, it is clear that s. 162(1) contemplates that, in some circumstances, a person may retain an expectation that she will not be observed or recorded even when she is not in an exclusively or traditionally "private" space.

(c) *Purpose and Object of Section 162(1)*

[48] This understanding of when a reasonable expectation of privacy arises in this context also best accords with Parliament's object in enacting the offence in s. 162(1): to protect individuals' privacy and sexual integrity, particularly from new threats posed by the abuse of evolving technologies. As I will explain below, reading the expression "circumstances that give rise to a reasonable expectation of privacy" narrowly, as urged by Mr. Jarvis, would undermine Parliament's intention that s.

162(1) prohibit surreptitious observation or visual recording that amounts to sexual exploitation or that represents the most egregious breaches of privacy.

[49] Section 162(1) was introduced into the *Criminal Code* as part of Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004-2005 (assented to 20 July 2005). The legislative process leading to this enactment, as well as the language of Bill C-2 itself, confirm that the purpose of s. 162 is to protect individuals' privacy and sexual integrity. A 2002 consultation paper prepared by the federal government for the purpose of a public consultation on the introduction of a new voyeurism offence sheds light on the impetus for the legislative reform that eventually resulted in the enactment of s. 162 in 2005. The paper confirms that the reform was motivated by concerns about the potential for rapidly evolving technology to be abused for the secret viewing or recording of individuals for sexual purposes and in ways that involve a serious breach of privacy: Department of Justice, *Voyeurism as a Criminal Offence: A Consultation Paper* (2002), at p. 1. At that time, there was no criminal offence that specifically addressed voyeurism or the distribution of voyeuristic materials. Although some instances of such behaviour could be caught incidentally by existing offences, the law could not deal with other instances of objectionable surreptitious recording. As an example of such behaviour, the paper referred to an incident where a person videotaped his consensual sex acts with a woman without her knowledge and the tapes were later shown at parties: pp. 5-6.

[50] The consultation paper explained that the harm that potential new voyeurism offences would address could be conceptualized in one of two ways: as "the breach of a right to privacy that citizens enjoy in a free and democratic society" or as the sexual exploitation of individuals: pp. 6-8. Sexual exploitation, it was suggested, would occur *either* when the observation or recording was done for a sexual purpose or when the observation or recording was of sexual subject matter, such as a person's sexual organs or breasts. Two general versions of a voyeurism offence were therefore proposed: one concerned with observation or recording for a sexual purpose and the other with observation or recording for the purpose of capturing a person who was in a state of undress exposing sexualized parts of the body or who was engaged in sexual activity: pp. 8-10.

[51] According to a summary of the responses the government received to the consultation paper, the majority of respondents were in favour of conceptualizing voyeurism as *both* a sexual and a privacy-based offence: Department of Justice, *Voyeurism As A Criminal Offence: Summary of the Submissions*, October 28, 2002, (online). Indeed, the circumstances surrounding its enactment confirm that the voyeurism offence eventually incorporated into the *Criminal Code* was meant to deal with both of these related harms. The offence was enacted as part of Bill C-2, an overarching purpose of which was to "protect children and other vulnerable persons from sexual exploitation, violence, abuse and neglect": Library of Parliament, Parliamentary Information and Research Service, *Bill C-2: An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada*

Evidence Act, last update June 16, 2005, at p. 1, quoting Department of Justice, *Media Advisory*, Ottawa, October 8, 2004. And, in relevant part, the preamble to the Bill indicates that it was meant to address concerns raised by the fact that "continuing advancements in the development of new technologies, while having social and economic benefits, facilitate sexual exploitation and breaches of privacy": *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Evidence Act*, S.C. 2005, c. 32.

[52] The fact that an important aspect of the purpose of s. 162(1) is to protect individuals, especially vulnerable individuals, from sexual exploitation militates against the narrow reading of the phrase "circumstances that give rise to a reasonable expectation of privacy" urged by Mr. Jarvis, and the one adopted by the majority of the Court of Appeal. As I have explained above, concluding that a reasonable expectation of privacy can arise only when a person is in a traditionally private or quasi-private place from which she can exclude others would leave a vanishingly small role for para. (b) and entirely negate para. (c) of s. 162(1) — the paragraphs that are most explicitly concerned with behaviours that impact on sexual integrity. And if Mr. Jarvis' reading of "reasonable expectation of privacy" — which makes no distinction between observation and recording — were accepted, s. 162 would fail to capture conduct such as the non-consensual recording of a sexual partner engaged in sexual activity and the subsequent distribution of the recording: see s. 162(1) and (4). Any person who allows her partner to *observe* her during sexual activity would, on Mr. Jarvis' proposed interpretation, no longer hold a reasonable expectation of

privacy against her partner's surreptitious *recording* of the activity — conduct that not only has an obvious and profound impact on sexual integrity, but that is also the type of conduct that initially spurred the legislative reform leading to the enactment of s. 162: see *Voyeurism as a Criminal Offence: A Consultation Paper*, at p. 6. Furthermore, understanding expectations of privacy as arising only in places from which one can exclude others would undermine the protection that s. 162(1) affords to vulnerable members of society, including children, who are least likely to have absolute control over their surroundings in this sense but who are the persons Bill C-2 was principally concerned with protecting.

[53] I pause here to note that other aspects of the legislative history of s. 162(1) further support the interpretation of the expression "circumstances that give rise to a reasonable expectation of privacy" that I have set out above. For example, the 2002 consultation paper contemplated versions of a voyeurism offence that circumscribed the scope of the offence by reference to the place where observation or recording occurred. First, the paper referred to a 2000 Uniform Law Conference motion to create an offence that would prohibit surreptitious observation or recording for a sexual purpose "of another person in a dwelling house or business premises where there is an expectation of privacy": p. 3 (emphasis added). Second, the paper proposed a general formulation of a voyeurism offence that would require the person being observed or recorded to be "in a place and in circumstances that give rise to a reasonable expectation of privacy": p. 9 (emphasis added). The fact that, by contrast, the opening words of s. 162(1), as enacted, do *not* make specific reference to the

location of observation or recording indicates that Parliament did not intend these words to limit the commission of the offence to certain locations. The consultation paper, at p. 13, also discussed a public good defence (a version of which was eventually enacted in s. 162(6) of the *Criminal Code*) that could be relied on where video surveillance of public or private facilities fell afoul of the prohibition on voyeurism. This indicates that, even at that stage, it was contemplated that voyeurism could be committed in public or semi-public places — i.e., public or private facilities that were under video surveillance. And the acknowledgement in the consultation paper, at p. 11, of the greater threat to privacy and sexual integrity posed by recording, as opposed to mere observation, supports the view that whether the behaviour in question is observation or recording is relevant to whether it breaches reasonable expectations of privacy.

(d) *Broader Legal Context*

[54] The interpretation of a statutory provision may be informed by the broader legal context. Because Parliament chose to describe the element of the offence with which we are concerned using the expression "reasonable expectation of privacy", one aspect of the broader legal context is of particular importance in the case at bar: the jurisprudence interpreting the right to be secure against unreasonable search and seizure guaranteed in s. 8 of the *Charter*, along with closely related jurisprudence.

[55] The concept of "reasonable expectation of privacy" has played a central role in the jurisprudence on s. 8 of the *Charter* since this Court's earliest decisions interpreting that provision: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. Since that time, the concept has also been employed by courts, including this Court, in delineating the scope of privacy rights outside the context of s. 8 of the *Charter* and has been used in other provisions of the *Criminal Code*: see *Dagg*, at paras. 71-75, per La Forest J., dissenting but not on this point; *Srivastava v. Hindu Mission of Canada (Quebec) Inc.*, [2001] R.J.Q. 1111 (Que. C.A.), at paras. 68-69; *Criminal Code*, ss. 278.1 and 278.5.

[56] A legislature is presumed to have a mastery of existing law: Sullivan, at p. 205. When a legislature uses a common law term or concept in legislation, that term or concept is presumed to retain its common law meaning: Sullivan, at p. 543. Therefore, Parliament must be understood as having chosen the words "reasonable expectation of privacy" in s. 162(1) purposefully and with the intention that the existing jurisprudence on this concept would inform the content and meaning of these words in this section.

[57] Of course, the relevant differences between the context of s. 8 of the *Charter* and the context of the offence in s. 162(1) must be kept in mind. While one purpose of s. 162(1) of the *Criminal Code* is to protect individuals' privacy interests from intrusions by other individuals, the purpose of s. 8 of the *Charter* is to protect individuals' privacy interests from *state* intrusion: see *Hunter v. Southam*, at pp. 159-

60; *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 291. The s. 8 case law has developed in relation to this latter purpose. The "reasonable expectation of privacy" that is decisive in the s. 8 context is therefore an individual's reasonable expectation of privacy vis-à-vis the state, or more specifically, vis-à-vis the instrumentality of the state that is said to have intruded on the individual's privacy: see *R. v. Duarte*, [1990] 1 S.C.R. 30, at pp. 44-49; *Plant*, at pp. 291-93; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 2-3 and 66-73; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at paras. 40-41.

[58] However, the s. 8 jurisprudence recognizes that the inquiry into whether an individual has a reasonable expectation of privacy vis-à-vis the state with respect to a certain subject matter may be informed, in part, by considering the individual's privacy expectations vis-à-vis other individuals: see *Duarte*, at p. 47; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at paras. 19-24 and 33-34; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 32, 38-41 and 46-49. Thus, while the ultimate concern in the s. 8 context is whether there is a reasonable expectation of privacy vis-à-vis the state, the s. 8 case law contemplates that individuals may have reasonable expectations of privacy against other private individuals and that these expectations may be informed by some of the same circumstances that inform expectations of privacy in relation to state agents. This lends support to the view that the jurisprudence on s. 8 of the *Charter* may be useful in resolving the question raised in the case at bar.

[59] The s. 8 jurisprudence is instructive in interpreting s. 162(1) of the *Criminal Code* for another reason besides the fact that s. 162(1) uses the phrase "reasonable expectation of privacy". The express terms of s. 162(1), as well as its legislative history, demonstrate that this provision is concerned with protecting individuals' privacy interests in specific contexts. Because this Court and other courts in Canada have most frequently had occasion to consider the concept of privacy in the context of s. 8 of the *Charter*, the s. 8 case law represents a rich body of judicial thought on the meaning of privacy in our society. And far from being unmoored from our ordinary perceptions of when privacy can be expected, as Mr. Jarvis suggests, judgments about privacy expectations in the s. 8 context are informed by our fundamental shared ideals about privacy as well as our everyday experiences.

[60] I therefore turn now to a number of principles established in the jurisprudence on s. 8 of the *Charter*, and the broader privacy jurisprudence, that I consider relevant to interpreting the meaning of "reasonable expectation of privacy" in s. 162(1) of the *Criminal Code*. The first of these principles is that determining whether a person can reasonably expect privacy in a particular situation requires a contextual assessment that takes into account the totality of the circumstances: see *Plant*, at p. 293; *R. v. Edwards*, [1996] 1 S.C.R. 128, at paras. 31 and 45; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, at para. 19; *Buhay*, at para. 18; *Tessling*, at para. 19. As I have explained above, the idea that a variety of circumstances may reasonably inform a person's expectation of privacy is consistent with a common sense understanding of the concept of privacy. The fact that this is a

well-established principle in our jurisprudence lends further support to the view that Parliament intended it to apply in the s. 162(1) context.

[61] The second principle from the jurisprudence on s. 8 of the *Charter* and the broader privacy jurisprudence that is applicable in the s. 162(1) context is that privacy is not an "all-or-nothing" concept. In other words, simply because a person is in circumstances where she does not expect complete privacy does not mean that she waives all reasonable expectations of privacy: see *Duarte*; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 108; *Buhay*, at para. 22; see also *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at paras. 41-44; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at paras. 28-29 and 37-43; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at paras. 27 and 38 ("*Alberta v. UFCW, Local 401*"). Thus, the fact that a person knows she will be observed by others, including by strangers, does not in itself mean that she forfeits all reasonable expectations of privacy in relation to observation or visual recording.

[62] An example of this broader principle that is recognized in the jurisprudence is that the intrusion into our privacy that occurs when a person hears our words or observes us in passing is fundamentally different than the intrusion that occurs when the same person simultaneously makes a permanent recording of us and our activities: see *Duarte*, at p. 48; *Wong*, at pp. 44 and 48-53; see also *Alberta v. UFCW, Local 401*, at para. 27. A visual recording may be able to capture a level of

detail that the human eye cannot. A visual recording can also capture this detail in a permanent form that can be accessed, edited, manipulated and studied by the person who created the recording and that can be shared with others: see *R. v. Sandhu*, 2018 ABQB 112, 404 C.R.R. (2d) 216, at para. 45; see also *Alberta v. UFCW, Local 41*, at para. 27. As this Court has recognized in the context of child pornography, where a photo or video represents sexual exploitation of a person, that person may be harmed for years following its creation by the knowledge that it "may still exist, and may at any moment be being watched and enjoyed by someone": *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 92, per McLachlin C.J.; see also paras. 164, 189-90 and 241, per L'Heureux-Dubé, Gonthier and Bastarache JJ. This is not to say that any person who appears in any public place retains a reasonable expectation that she will not be recorded by anyone for any reason: some types of visual recording in public places are to be expected. Rather, it is to emphasize that there is a fundamental difference between mere observation and recording and that this difference is part of the context that must be considered in analyzing reasonable expectations of privacy.

[63] Relatedly, the privacy jurisprudence recognizes the potential threat to privacy occasioned by new and evolving technologies more generally and the need to consider the capabilities of a technology in assessing whether reasonable expectations of privacy were breached by its use: see *Wise*, at pp. 534-35; *Tessling*, at para. 16; see also *Alberta v. UFCW, Local 401*, at paras. 20 and 27. As Voith J. observed in *Rudiger*, even where a permanent recording is not made, technology may allow a person to see or hear more acutely, thereby transforming what is "reasonably

expected and intended to be a private setting" into a setting that is not: para. 98, see generally paras. 93-98. While evolving technologies may make it easier, as a matter of fact, for state agents or private individuals to glean, store and disseminate information about us, this does not necessarily mean that our reasonable expectations of privacy will correspondingly shrink.

[64] The next principle established by the jurisprudence on s. 8 of the *Charter* that is instructive in the case at bar is that the concept of privacy encompasses a number of related types of privacy interests. These include not only territorial privacy interests — "involving varying expectations of privacy in the places we occupy" (*R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 19) — but, significant to the case at bar, personal and informational privacy interests: *Dyment*, at p. 428, per La Forest J.; *Tessling*, at paras. 20-24.

[65] As this Court has recognized, our society places a high value on personal privacy — that is, privacy with respect to our bodies, including visual access to our bodies: see *Tessling*, at para. 21; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 32; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at paras. 83, 89-90, 98-99 and 106. While all aspects of privacy — both from the state and from other individuals — serve to foster the values of dignity, integrity and autonomy in our society, the connection between personal privacy and human dignity is especially palpable: see *Dyment*, at pp. 427-29, per La Forest J.

[66] In considering the concept of informational privacy, this Court has accepted that individuals have a valid claim "'to determine for themselves when, how, and to what extent information about them is communicated to others'": *Tessling*, at para. 23, quoting A. F. Westin, *Privacy and Freedom* (1970), at p. 7; see also *Dyment*, at p. 429, per La Forest J.; *Alberta v. UFCW, Local 401*, at para. 21. The safeguarding of information about oneself, which is also closely tied to the dignity and integrity of the individual, is of paramount importance in modern society: *Dyment*, at p. 429. When a court is considering whether there is a reasonable expectation of privacy in information, the nature and quality of the information at issue are relevant: see *Plant*, at p. 293; *Tessling*, at paras. 59-62; *R. v. Gomboc*, at paras. 27-40.

[67] Section 162(1)(a) implicates territorial privacy, as it is concerned with protecting privacy in particular places. More fundamentally, however, s. 162(1) as a whole is concerned with protecting personal and informational privacy by prohibiting the observation and visual recording of persons. The jurisprudence on s. 8 of the *Charter* reminds us that we should be attentive to the ways in which these privacy interests may be affected, even where territorial privacy is not necessarily engaged. It also recognizes the particularly pernicious threat to individual dignity and autonomy that may be posed by violations of these types of privacy expectations. Bearing in mind the high value that our society places on personal — and particularly bodily and sexual — privacy and informational privacy may also be useful in determining

whether observation or recording breaches reasonable expectations of privacy in a particular case.

[68] This leads me to an important point about the reasonable expectation of privacy inquiry in the contexts of s. 8 the *Charter* and s. 162(1) of the *Criminal Code*. The s. 8 jurisprudence makes it clear that "reasonable expectation of privacy" is a normative rather than a descriptive standard: see *Tessling*, at para. 42. This Court has also found that the question of whether a person claiming the protection of s. 8 had such an expectation cannot be answered by falling back on a "risk analysis" — that is, by reducing the inquiry to whether the person put themselves at risk of the intrusion they experienced: *Duarte*, at pp. 47-48; *Wong*, at p. 45. Both of these propositions apply in the s. 162(1) context. Whether a person *reasonably* expects privacy is necessarily a normative question that is to be answered in light of the norms of conduct in our society. And whether a person can *reasonably* expect not to be the subject of a particular type of observation or recording cannot be determined simply on the basis of whether there was a risk that the person would be observed or recorded. The development of new recording technology, and its increasing availability on the retail market, may mean that individuals come to fear that they are being recorded by hidden cameras in situations where such recording was previously impossible; however, it does not follow that individuals thereby waive expectations of privacy in relation to such recording or that retaining such an expectation becomes unreasonable: see *Tessling*, at para. 42. Indeed, to accept such an approach would

make the "reasonable expectation of privacy" a "meaningless standard" and would undermine Parliament's very purpose in enacting s. 162(1): see *Wong*, at p. 45.

[69] That being said, determining whether a reasonable expectation of privacy arises in a particular set of circumstances does *not* involve an *ad hoc* balancing of the value of the accused's interest in observation or recording against the value of the observed or recorded person's interest in being left alone. Accordingly, I respectfully disagree with the approach taken by the dissenting judge in the Court of Appeal. The question he posed — whether "high school students expect that their personal and sexual integrity will be protected while they are at school" — is not the appropriate question: para. 131.

[70] Parliament has already weighed society's interests in allowing individuals to observe and record others and in protecting individuals from surreptitious observation and recording. In the result, Parliament has enacted s. 162(1), which prohibits surreptitious observation and recording that breaches reasonable expectations of privacy in the three situations described in paras. (a) through (c) of that provision. It is inherent in the public good defence in s. 162(6) that the value of observation or recording to society might, in a particular case, outweigh the value of individual privacy interests, even where the observation or recording would otherwise ground a conviction under s. 162(1) of the *Criminal Code*. Thus, the only question to be asked in determining whether a person who is observed or recorded was in circumstances that give rise to a reasonable expectation of privacy is whether that

person was in circumstances in which she would reasonably have expected not to be the subject of the observation or recording at issue.

B. *Were the Students Recorded by Mr. Jarvis in "Circumstances That Give Rise to a Reasonable Expectation of Privacy"?*

[71] As I have explained above, determining whether a person who was observed or recorded was in circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) of the *Criminal Code* requires determining whether the person was in circumstances in which she would have reasonably expected to be free from the type of intrusion — that is, observation or recording — that she experienced. This determination is to be made in light of the entire context in which the observation or recording took place. Because it is an element of the offence in s. 162(1) that the person who is recorded or observed be in circumstances that give rise to a reasonable expectation of privacy, this must be proven beyond a reasonable doubt.

[72] The trial judge in the case at bar was satisfied beyond a reasonable doubt that Mr. Jarvis had recorded students who were in circumstances that give rise to a reasonable expectation of privacy. In my view, based on the understanding of this element of the offence that I have set out above, no other finding is available on the record. When the entire context is considered, there can be no doubt that the students' circumstances give rise to a reasonable expectation that they would *not* be recorded in the manner they were. The considerations that lead to this conclusion include the

location where the videos were recorded; the fact that the impugned conduct consisted of recording rather than mere observation; the manner in which the videos were recorded, including the fact that the students were not aware they were being recorded; the content of the videos, particularly their focus on intimate parts of the students' bodies; the existence of a school board policy prohibiting such recording; the fact that the videos were recorded in breach of a relationship of trust between Mr. Jarvis and the students; Mr. Jarvis' purpose in making the recordings; and the fact that the persons who were recorded were young persons.

[73] I begin by considering the location where the videos were recorded. Mr. Jarvis made the recordings while the students were in various locations in and around their high school, including classrooms, hallways, the cafeteria and immediately outside the school. There is no dispute that students' expectations of privacy with respect to observation and recording are different and must be lower in the common areas of a school than when they are in traditionally private locations, such as their bedrooms. 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, as I have explained above, the fact that the students were not in an exclusively or traditionally "private" location, such as a home or bathroom, does not in itself lead to the conclusion that they could not have had a reasonable expectation of privacy. I also note that a high school is not an entirely "public" place. For one thing, access to schools is usually restricted to certain persons, such as students, teachers, staff and guests: see trial reasons, at para. 34.

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 — an issue to which I will return later in these reasons.

[74] I will now consider the significance to the reasonable expectation of privacy inquiry of the fact that the impugned conduct in the case at bar consisted of recording rather than mere observation. Because the impugned conduct consisted of recording, it cannot be determinative of the reasonable expectation of privacy issue that none of the students could have expected not to be *observed* by others, or by Mr. Jarvis in particular, at the time the videos were recorded. There is no dispute that the students were unaware that they were being *recorded* by Mr. Jarvis. As discussed above, it is undeniable that a person in a particular situation may reasonably expect to be casually observed or even stared at by others but not expect to be the focus of a permanent visual recording. Recording has a greater potential impact on privacy than does mere observation, as a recording can be saved for long periods of time, replayed and studied at will, dramatically transformed with editing software, and shared with others — including others whom the subject of the recording would not have willingly allowed to observe her in the circumstances in which the recording was made. Indeed, in the case at bar, the recordings would have allowed Mr. Jarvis, by watching the videos he had made, to "observe" students in a manner that would otherwise be unimaginable. If Mr. Jarvis had attempted to stare at students' breasts while standing directly beside them for long stretches of time, as he effectively could do by watching the recordings he made, it is inconceivable that the students would

not have taken evasive action or that school authorities would not have been alerted to this behaviour earlier.

[75] The manner in which the videos were recorded — using hidden camera technology that allowed for sustained recording at close range without the subject being aware of it — is also a relevant factor in the case at bar. It undermines Mr. Jarvis' argument that the students could not have had a reasonable expectation that he would not record them at school because they were aware that there were security cameras in various locations inside and outside the school. 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.

[76] 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: Agreed Statement of Facts, A.R., vol. 7, at p. 148. 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 (an issue to which I will return later in these reasons). 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.

[77] A closely related consideration, the content of the recordings, weighs heavily in favour of my conclusion that Mr. Jarvis made the recordings in breach of reasonable expectations of privacy. As noted above, the existence of a reasonable expectation of privacy in the context of s. 8 of the *Charter* may be informed by the quality and nature of the information at issue. So, too, in the s. 162(1) context, what is recorded, and how it is recorded, may inform whether the recording was made in breach of the privacy expectations that would reasonably arise.

[78] For example, in *Rudiger*, Voith J. considered the content of the video recording at issue in that case relevant to his determination that the recording was made in breach of reasonable expectations of privacy. In that case, the accused had

hidden in a van and used a camera to record children in a public park. He had recorded sequential short segments of video that focused on the midsections, buttocks and genital regions of young female children and infants as they played or were changed by their caregivers. Though filming from a distance, the accused had used a zoom lens so that the video depicted the children as if they were a mere two or three feet away. In considering whether the children had been in circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) of the *Criminal Code*, Voith J. explained that the effect of the camera work and zoom feature was that the resulting video was "not about children playing in a park" but was one whose explicit focus was the depiction of the genital areas and buttocks of young girls: para. 77. This focus on the children's bodies, particularly their genital and buttocks areas, as well as the prolonged nature of the recording and the use of the camera's zoom function contributed to Voith J.'s conclusion that the recording breached reasonable expectations of privacy.

[79] The content of the recordings is a telling aspect of the contextual inquiry in the case at bar as well. In my view, the content of the videos recorded by Mr. Jarvis leaves no doubt that they were recorded in breach of the privacy expectations the students recorded would reasonably have had. The students shown in the videos are engaged in the ordinary activities of students at school during school hours: arriving in classrooms, talking to other students, silently reading, waiting in line at the cafeteria, and so on. However, the videos focus on particular students, show them in close-up and in detail, and focus on their faces and upper bodies, including their

breasts. Each of these features of the videos is significant and militates in favour of a conclusion that the videos were made in breach of the reasonable expectations of privacy that would arise in such circumstances.

[80] First, it is significant that particular students were targeted for recording. Some individual students and small groups of students were the subject of multiple videos and, in one case, Mr. Jarvis recorded the same student in multiple locations around the school. This was not a case of Mr. Jarvis accidentally capturing in the frame a student who happened to walk by while he was recording a video of himself, the school building or a chemistry experiment in progress. This was not even a case of Mr. Jarvis recording, for example, a school play or a track meet — with the focus on larger groups of students rather than an individual student. As in *Rudiger*, because of Mr. Jarvis' choice of subjects and camera work, the resulting videos are not about daily life at a high school; rather, and especially when they are viewed as a whole, the explicit focus of the videos is the particular female students Mr. Jarvis targeted for recording. In other words, the videos do not show students merging into the "situational landscape"; rather, they single out these students, make them personally identifiable, and allow them to be subjected to intensive scrutiny: see *Spencer*, at para. 44, quoting *Wise*, at p. 558.

[81] Second, and on a related point, it is also significant that, since they were recorded at close range, the videos show students in close-up. Because of this, and also because they include students' faces in some frames, the videos make the

students easily identifiable and reveal more information about them than videos recorded from farther away would reveal. I note that, while the evidence in this case was that Mr. Jarvis could not zoom in and out while recording a video with the pen camera, he did not need to zoom in to create videos in which the students' faces and bodies appeared in close-up and were rendered in detail. As a teacher, he could simply walk up to the students he wished to record. In a different case, the use of technology such as a zoom function may be a relevant circumstance to be considered: see *Rudiger*, at paras. 77 and 93-95.

[82] Finally, an aspect of the content of the videos that is particularly significant to my conclusion that Mr. Jarvis breached the students' reasonable expectations of privacy in recording them is that the videos focus on the students' bodies, particularly their breasts. While our society places a high value on all forms of personal and informational privacy, privacy with respect to intimate parts of our bodies and information about our sexual selves is particularly sacrosanct. Individuals are understood to have heightened privacy expectations with respect to intimate or sexualized parts of the body, including genital areas and breasts: see *Golden*, at paras. 89-90 and 99; *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, at paras. 38-47 and 55; *Rudiger*, at para. 111; *R. v. Taylor*, 2015 ONCJ 449, at paras. 31-32 (Can LII). Our law also recognizes that intrusion, interference or unwanted attention that has a sexual aspect is particularly pernicious: see *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 14. Laws prohibiting child pornography and providing for publication bans in sexual assault prosecutions are just some of the

manifestations of our societal consensus that there is a sphere of privacy regarding information about our sexual selves that is particularly worthy of respect: see *Criminal Code*, ss. 276.3, 486.4 and 486.5.

[83] It is also relevant to the students' reasonable expectations of privacy that there was a formal school board policy in effect at the time Mr. Jarvis made the video recordings at issue that "prohibited [his] conduct in making the recordings in the manner that he did": Agreed Statement of Facts, A.R. vol. 7, at p. 147. By-laws, regulations, policies or other formal rules that govern behaviour in a certain location or by certain persons may inform reasonable expectations of privacy: see *Gomboc*, at paras. 31-33; *Cole*, at paras. 52-53. The existence of formal rules or policies may not be determinative, and the weight to be accorded to them will vary with the context. Where a policy, though technically applicable, is not well known or does not align with established norms of behaviour, it may not shed much light on the reasonable expectations of privacy that would arise in the context in question. However, that is not the situation in the case at bar. While there is little detail in the record about the particular school board policy that was applicable to Mr. Jarvis, a policy that prohibits a teacher from making recordings of students of the type he made cannot be said to be at odds with the expected norms of behaviour for a teacher at school. Moreover, there can be no doubt that students at a school would reasonably expect teachers to abide by the applicable rules governing the recording of students.

[84] This brings me to another relevant circumstance surrounding the making of the recordings at issue in the case at bar: the fact that Mr. Jarvis was a teacher at the school and that his surreptitious recording betrayed the trust invested in him by his students. Teachers are presumed to be in a relationship of trust and authority with their students: *R. v. Audet*, [1996] 2 S.C.R. 171, at paras. 41-43. Indeed, this Court has expressed the view that it is difficult to imagine a trust or duty more important than the care and education of students by teachers: *R. v. M. (M.R.)*, at para. 1. 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.

[85] The purpose for which Mr. Jarvis made the recordings at issue is thus also a relevant circumstance in the case at bar. Although it has been recognized that the need to ensure a safe and orderly school environment reduces students' reasonable expectations of privacy as against searches of their persons by school administrators for the purpose of maintaining such an environment (*R. v. M. (M.R.)*, at paras. 1, 33 and 35-36), it would be absurd to suggest that students consequently have a reduced expectation of privacy as against being touched or searched by administrators seeking to satisfy their idle curiosity or prurient interests. Rather, the understanding that school will be a safe environment and that teachers will work to keep it that way,

while limiting students' privacy expectations with respect to safety-related searches by teachers, *enhances* students' expectations that teachers will scrupulously respect their privacy — and *a fortiori*, their bodily and sexual integrity — when invading that privacy is not necessary to maintain a safe school environment. In the case at bar, the fact that Mr. Jarvis recorded students for reasons totally unrelated to any legitimate education- or safety-related purpose contributes to my conclusion that, in making the recordings, he breached the students' reasonable expectations of privacy.

[86] The fact that all of the students were young persons, and that some of them were minors, is a circumstance that further supports the finding of a reasonable expectation of privacy. As has been acknowledged by this Court, the values that underlie privacy "apply equally if not more strongly in the case of young persons": *A.B. v. Bragg Communications Inc.*, at para. 18, quoting *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 255 C.R.R. (2d) 207, at para. 41 (emphasis deleted); see also *R. v. M. (M.R.)*, at para. 53. That Canadian law provides children with greater privacy rights than similarly situated adults in a number of contexts evidences a societal consensus on this point, and on the shared value of protecting children's privacy: see B. Jones, "*Jarvis*: Surely Schoolchildren Have A Reasonable Expectation of Privacy Against Videotaping for a Sexual Purpose?" (2017), 41 C.R. (7th) 71; *A.B. v. Bragg Communications Inc.*, at para. 17, citing the *Criminal Code*, s. 486 and the *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 110.

[87] Reasonable adults are particularly solicitous of the privacy interests of children and young persons in relation to observation and especially visual recording. One reason for this is that reasonable adults recognize that children and young persons are often not in a position to protect their own privacy interests against intrusion. For example, children are particularly at risk with respect to unwanted recording because they have limited choice about which spaces they occupy, limited means to exclude others from those spaces, and limited choice about what parts of their bodies may be exposed in those spaces. Children are also expected to be obedient to adults and follow their instructions, and they place a high degree of trust in adults and authority figures, such as their parents and teachers. And in a situation where an adult would be alert to the potential for intrusions on her privacy as a result of observation or recording, a child may be completely unsuspecting, putting her faith in the adults around her and failing to take evasive action, even if evasive action were otherwise possible.

[88] These considerations are applicable to our assessment of the students' expectations of privacy in the case at bar. 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.

[89] 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.

[90] That being said, individuals going about their day-to-day activities — whether attending school, going to work, taking public transit or engaging in leisure pursuits — also reasonably expect not to be the subject of targeted recording focused on their intimate body parts (whether clothed or unclothed) without their consent. A student attending class, walking down a school hallway or speaking to her teacher certainly expects that she will not be singled out by the teacher and made the subject of a secretive, minutes-long recording or series of recordings focusing on her body. The explicit focus of the videos on the bodies of the students recorded, including their breasts, leaves me in no doubt that the videos were made in violation of the students' reasonable expectations of privacy. Indeed, given the content of the videos recorded by Mr. Jarvis and the fact that they were recorded without the students' consent, I

would likely have reached the same conclusion even if they had been made by a stranger on a public street rather than by a teacher at school in breach of a school policy.

V. Conclusion and Disposition

[91] To determine whether a person who is observed or recorded is in circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1), a court must ask whether the person is in circumstances in which she would reasonably expect not to be the subject of the type of observation or recording that in fact occurred. In the case at bar, the subjects of the videos were teenage students at a high school. They were recorded by their teacher in breach of the relationship of trust that exists between teachers and students as well as in contravention of a formal school board policy that prohibited such recording. Furthermore, the videos targeted individual students or small groups of students, were shot at close range, and were of high quality. Significantly, the videos had as their predominant theme or focus the bodies of students, particularly their breasts. In my view, there is no doubt that, in recording these videos, Mr. Jarvis acted contrary to the reasonable expectations of privacy that would be held by persons in the circumstances of the students when they were recorded. I therefore conclude that the Crown has established beyond a reasonable doubt that Mr. Jarvis recorded persons who were in circumstances that gave rise to a reasonable expectation of privacy, as that expression is used in s. 162(1) of the *Criminal Code*.

[92] It is not in issue in this Court that the Crown has established the other elements of the offence with which Mr. Jarvis was charged. Accordingly, I would allow the appeal, enter a conviction, and remit the matter for sentencing.

The reasons of Côté, Brown and Rowe JJ. were delivered by

ROWE J. —

[93] I have had the benefit of reading the Chief Justice's reasons; I rely on his summary of the facts and judicial history of the case, and I concur in the result. However, I would interpret differently "reasonable expectation of privacy" as it appears in s. 162(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. I would not have regard to s. 8 jurisprudence in order to interpret s. 162(1). The conceptual framework for defining *Charter* rights should remain distinct from that used to define the scope of *Criminal Code* offences. Courts should not expand criminal liability by reference to *Charter* jurisprudence. As well, I will address how I would interpret "reasonable expectation of privacy" in s. 162(1), having regard for autonomy and sexual integrity.

I. *Charter* Jurisprudence Should Not Inform the Interpretation of Section 162(1)

A. *Constitutional and Statutory Construction Call for Different Interpretative Principles*

[94] Different interpretive principles apply to the interpretation of constitutional and statutory provisions. It has been long held by this Court that a purposive approach should be applied when interpreting the normative language of the *Charter*: *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295. As a rights-endowing constitutional document, "[t]he expressions found in the Charter are to be understood in light of their significance in the legal and philosophical origins of the Charter, their contribution to the structure of protected interests (the scheme), and their role in securing the Charter's goals": R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 264. Professor Sullivan states that such an approach is used when interpreting the language of the *Charter*, rather than the modern approach used for the interpretation of statutes approved by this Court in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27, at p. 41.

[95] The *Criminal Code* is a statute, not a constitutional document. While there is considerable interplay in the jurisprudence between the *Criminal Code* and the *Charter*, the analysis used to interpret each must be kept distinct. It would be a fundamental error to give the wording in s. 162(1) the meaning given to it in s. 8 jurisprudence. To do so would be to apply a meaning intended to substantiate a breach of an individual's fundamental rights by a state actor to the inverse context of subjecting a citizen to criminal sanction and quite possibly depriving them of their liberty. Reasonable expectation of privacy in the two contexts is based on divergent considerations; they are not to be guided by the same analytical framework.

[96] This is reinforced by reference to the original meaning rule of statutory interpretation, according to which the words of an ordinary statute are to be read in the way they were understood at the time the statute was enacted: "'[t]he words of a statute must be construed as they would have been the day after the statute was passed . . . '": *Perka v. The Queen*, [1984] 2 S.C.R. 232, at pp. 264-65, quoting *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at p. 242. While applicable to ordinary statutes, the rule has been rejected as the basis for constitutional interpretation; see generally *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 509, and specifically with respect to s. 8 in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 61. This is of special significance when dealing with elements of a criminal offence where an open-ended and evolving standard, of the kind used in *Charter* interpretation, would fail to give fair notice to potential offenders.

[97] Certainty and stability are of particular importance when defining the scope of criminal offences. The fair notice principle articulated in *Frey v. Fedoruk*, [1950] S.C.R. 517 — itself a "peeping Tom" case — that "declaration[s of criminal conduct] should be made by Parliament and not by the Courts" (p. 530) is well-established and now statutorily mandated by s. 9(a) of the *Criminal Code*, which states that "no person shall be convicted . . . of an offence at common law". As Justice Cromwell wrote in *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402:

> . . . Stability and certainty are particularly important values in the criminal law and significant changes to it must be clearly intended . . .
>
> . . .

> . . . the courts have refrained from developing the common law meanings of legal terms used in the *Code* so as to extend the scope of criminal liability. Courts will only conclude that a new crime has been created if the words used to do so are certain and definitive. [Citations omitted; paras. 54 and 59.]

[98] I agree with the respondent that to interpret "reasonable expectation of privacy" in s. 162(1) by reference to the s. 8 jurisprudence would put the judiciary in the position of creating new common law offences, despite their abolition in the enactment of s. 9(a) of the *Criminal Code*: R.F, at para. 42. Of course, the factual context will change with time, notably as regards technologies to observe persons; but that is different from the nature of the reasonable expectation of privacy. Thus, even if "reasonable expectation of privacy" had the same meaning under s. 8 and s. 162(1) at the time of the enactment, the meanings would diverge over time as the s. 8 jurisprudence evolves but the meaning of s. 162(1) is intended to remain fixed as of the time of its enactment. *Criminal Code* offences are not grafted onto the living tree of the *Charter*.

B. *The Purpose and Function of Section 8 of the Charter and Section 162(1) of the Criminal Code are Fundamentally at Odds*

[99] While s. 162(1) of the *Criminal Code* and s. 8 of the *Charter* are both in play in the criminal law context, they concern different interests. Section 8 of the *Charter* limits the powers of the state vis-à-vis its citizens. It limits the investigative powers of the state, and maintains a check on the actions of the police. The imbalance between the state and its citizens is fundamental. Protecting citizens from the abuse of

authority by the state is the context that defines the interests to be safeguarded by the s. 8 "reasonable expectation of privacy".

[100] On occasions where the term has been applied in a legal context other than s. 8, it has also been described in terms of the individual's rights versus the interests of the state. For example, in describing a reasonable expectation of privacy in the context of the *Access to Information Act*, R.S.C. 1985, c. A-1, and the *Privacy Act*, R.S.C. 1985, c. P-21, Justice La Forest wrote: "The principle ensures that, at a conceptual level, the dignity and autonomy interests at the heart of privacy rights are only compromised when there is a compelling state interest for doing so": *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 71.

[101] By contrast, in the context of the voyeurism offence, "reasonable expectation of privacy" defines one of the external circumstances that must be proven by the Crown beyond a reasonable doubt in order to secure a conviction. To obtain a guilty verdict, the prosecution must prove that the accused, an ordinary citizen, encroached upon the reasonable expectation of privacy of the subject of the observation, another ordinary citizen. The power imbalance of the police as agents of the state vis-à-vis a citizen that is at the heart of the preoccupations under s. 8 of the *Charter* is not present under s. 162(1) of the *Criminal Code*. As s. 162(1) protects invasions of privacy perpetrated by one individual against another, the meaning given to "reasonable expectation of privacy" in s. 8, where the purpose is to prevent abuse of state authority, simply has no application.

[102] Further, the scope of the circumstances giving rise to a "reasonable expectation of privacy" under s. 8 of the *Charter* is necessarily different from the scope under s. 162(1) of the *Criminal Code*. The interests protected by s. 8 of the *Charter* include personal privacy, territorial privacy and informational privacy: *Tessling*, at para. 20. Of necessity, the interests protected by the reasonable expectation of privacy under s. 8 cover a range of circumstances broader than for the same words in s. 162(1), as the latter is directed solely to observations and recordings of the person. The reasonable expectation of privacy under s. 162(1) therefore can relate only to the protection of one's physical image, a subcategory of personal privacy, itself a subcategory of that which is protected under s. 8 as described in *Tessling*.

[103] In this I differ from the Chief Justice, who states in paragraph 67 that s. 162(1) implicates territorial privacy. Respectfully, I cannot agree. The interest of privacy that one has in their own person while in a particular location is different from territorial privacy in the context of s. 8. Territorial privacy refers to the privacy interest in the space itself. The reference to "place" in s. 162(1)(a) is a circumstantial factor to determine the expectation of privacy one has in one's own image; it is not an extension of the s. 8 privacy interest to the space around an individual. The relationship between location and the reasonable expectation of privacy will be discussed below.

C. *Charter Values Are a Legitimate Interpretive Aid Only in Cases of Ambiguity*

[104] The Chief Justice looks to the jurisprudence relating to s. 8 of the *Charter* as part of the "broader legal context": para. 54. From this jurisprudence he identifies, at para. 59, "fundamental shared ideals": "the s. 8 case law represents a rich body of judicial thought on the meaning of privacy in our society". As this Court held in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, the "'*Charter* values' presumption" is applicable only where there is ambiguity as to the meaning of a provision (at para. 28).

[105] What does it mean, then, for a provision to have ambiguity? This Court has held that "genuine" ambiguity only arises where there are "two or more plausible readings, each equally in accordance with the intentions of the statute": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, cited in *Bell ExpressVu v. Rex*, at para. 29. Put simply, it is only if legal ambiguity persists after having analysed a provision using the modern approach to statutory interpretation as adopted by this Court (see e.g., *Rizzo & Rizzo Shoes Ltd.*) that *Charter* values should be invoked as an interpretative aid. The fact, as in this case, that different judges arrived at differing interpretations is not a basis to say that a provision is legally ambiguous. As Iacobucci J. put it:

> . . . ambiguity cannot reside in the mere fact that several courts — or, for that matter, several doctrinal writers — have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. [Emphasis added.]

(*Bell ExpressVu v. Rex*, at para. 30)

[106] Applying the rule, s. 162(1) is not legally ambiguous. At most, one can say that there has been disagreement as to what circumstances ought to be considered in deciding whether there was a reasonable expectation of privacy. This is different from there being "two . . . plausible readings, each equally in accordance with the intentions of the statute": *CanadianOxy Chemicals Ltd.*, at para. 14. Accordingly, the application of *Charter* values as an interpretive aid is not appropriate in this case.

II. "Reasonable Expectation of Privacy" in the Context of Voyeurism

[107] Drawing on the s. 8 jurisprudence, the Chief Justice's approach to identifying circumstances that give rise to a reasonable expectation of privacy requires consideration of "the entire context in which the observation or recording took place": para. 5. One cannot disagree with his central proposition that "circumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) are circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred": para. 28. Nonetheless, with respect, I would not adopt the multi-factored analysis put forward by the Chief Justice.

[108] Of the nine non-exhaustive factors that he has identified at para. 29, four are considerations required by the wording of the provision: the location of the person

being observed or recorded, the subject matter of the observation or recording, the purpose for which the observation or recording was made, and any awareness of, or consent to, the observation or recording. Location ("place") is part of the definition of the impugned conduct under para. (a); the subject matter of the observation or recording, including the activity the subject was engaged in and whether the focus was on intimate parts of their body, is a necessary consideration under para. (b); the purpose for which the observation or recording was made is necessary to a finding of sexual purpose under para. (c); and the complainant's awareness of the observation or recording is implied by the overarching requirement of surreptitiousness under subs. (1).

[109] The five other factors set out by the Chief Justice as being relevant to a reasonable expectation of privacy are: whether the conduct consisted of an observation or recording; the manner in which the observation or recording was made (including whether it was fleeting or sustained; whether it was aided by technology and the nature of that technology); the existence of any rules, regulations or policies governing the observation or recording in question; the relationship between the parties (including the existence of a relationship of trust or authority), and the "personal attributes" of the complainant. With great respect, it seems to me that these five factors are ones properly considered in the determination of a fit sentence once a conviction has been entered, rather than in the definition of the offence.

[110] A relationship of trust between the parties should not be a factor in finding a person guilty of voyeurism. While Parliament has expressly included the consideration of a relationship of trust in the language of other criminal offences, such as sexual exploitation (ss. 153 and 153.1), there is no evidence that the voyeurism offence was meant to be defined or delineated by the relationship of the complainant to the accused. The provision's silence on the relationship between the parties must be interpreted as the offence applying no less to strangers than to persons in a position of trust. As put by Laskin J.A., "legislative exclusion can be implied when an express reference is expected but absent": *University Health Network v. Ontario (Minister of Finance)* (2001), 208 D.L.R (4th) 459, at para. 31 (C.A.).

[111] The protection of children was a priority in adopting Bill C-2, instructively entitled *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004 (assented to July 2005). Accordingly, s. 162(1) should be applied so as to protect the integrity of children and other vulnerable persons. However, the analysis should not turn on the relationship between the viewer and the subject. Rather, where there is a relationship of trust between the accused and the complainant, this would be an aggravating factor in determining a fit sentence.

[112] Again, with respect, I would not adopt such a multi-factored test to decide whether there is a reasonable expectation of privacy in the context of the voyeurism

offence. Rather, I would propose the following interpretation of that component of the offence.

A. *The Purpose and Object of Section 162(1)*

[113] I agree with the Chief Justice as to the purpose and object of s. 162(1): para. 48. The broad aim of criminal law is to prevent harm to society: W. R. LaFave and A. W. Scott, *Substantive Criminal Law* (2nd ed. 1986), vol. 1, at p. 17; A. W. Mewett and M. Manning, *Mewett & Manning on Criminal Law* (2nd ed. 1985), at p. 14, cited with approval in *R. v. Chartrand*, [1994] 2 S.C.R. 864, at p. 881. The offence of voyeurism is not conceptually unique, but rather an extension of the criminal law to protect well-established interests of privacy, autonomy and sexual integrity of all individuals, in light of threats posed by new technologies to encroach upon them.

[114] The development of the voyeurism offence addressed limitations in the criminal law. Previously, the offences that were relied on to deal with what has been historically referred to as "peeping Tom" behaviour were offences interfering with property (trespassing at night, s. 177; mischief, s. 430). The application of these offences to the behaviour in question is deficient in two ways.

[115] First, the trespassing and mischief offences require interference with property or its lawful enjoyment. Therefore, they do not adequately respond to the use of modern technology by voyeurs to spy surreptitiously on people from afar.

Parliament's concern with the use of technology to observe and record from a distance, thus making the offences of trespassing at night and mischief ineffective to catch such liable behaviour, is plain. While the provision setting out the offence of voyeurism (s. 162) was enacted in 2005 as part of Bill C-2, the offence, almost identical in wording, had been debated in Parliament on two other occasions: once in 2003 as part of Bill C-20 and again in 2004 as part of Bill C-12 (*An Act to Amend the Criminal Code* (*protection of children and other vulnerable persons*) *and the Canada Evidence Act*, 3rd Sess., 37th Parl., 2004.) On second reading of Bill C-20 (*An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 2nd Sess., 37th Parl., 2003.), then Minister of Justice Martin Cauchon noted:

> The development of new technologies has changed the situation [of surreptitious observation and recording] considerably. Nowadays, it is possible to obtain miniature cameras at a relatively reasonable cost. It is easier to be a voyeur from a distance using such cameras, and to do so in locations that would not have been accessible before.
>
> (House of Commons Debates, vol. 138, No. 46, 2nd Sess., 37 Parl. January 27, 2003 (not given Royal Assent), at p. 2692)

The mischief is the ability to observe or create recordings undetected by the subject, in public as well as in private, by effectively placing the voyeur in close proximity or at invasive angles of observation to the subject.

[116] The potential for the use of technology to infringe another's privacy is great. As Professor Paton-Simpson remarked:

> By transcending the limits of sensory perception, technology has almost limitless potential to contravene normal expectations of privacy in both public and private places. For example, in the ordinary course of things, a person expects to be observed only from certain angles and distances and does not expect to be scrutinized in close-up without realizing and being able to react.
>
> (E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 330 (footnotes omitted))

An insidious characteristic of modern technology is that it allows a viewer to observe from a position where they could not, but for the technology. For example, in *R. v. Rudiger*, 2011 BCSC 1397, 244 C.R.R. (2nd) 69, Voith J. held that children playing in swimwear in a park retained a reasonable expectation of privacy. The technology used to observe them allowed the accused effectively to place himself near the children's genitals and buttocks. Though the accused may have been able to observe the children from a distance, he would not have been allowed by the children — or their caregivers — to observe from such proximity without the enablement of the technology. As a result, there was a violation of the children's reasonable expectation of privacy by the accused, despite the fact that the children were in plain view to the public. This is a useful example of the proper interpretation of the provision.

[117] The second deficiency with the use of the trespassing at night and mischief offences is that doing so mischaracterizes the wrong targeted by the offence of voyeurism. Trespassing at night and mischief are offences against property rights. In the 2002 consultation paper *Voyeurism as a Criminal Offence*, the Department of Justice defined voyeurism as either a behaviour associated with "'sexual gratification

from. . . covert observation'", or "symptomatic of a sexual disorder": p. 3. Importantly, s. 162(1) appears under Part V of the *Criminal Code* ("Sexual Offences, Public Morals and Disorderly Conduct"), and is properly categorized under the heading "Sexual Offences".

[118] The offences created by ss. 162(1) and 162.1(1) are the first in the *Criminal Code* to include a complainant's reasonable expectation of privacy as an element of the offence. As such, the phrase must be interpreted with due consideration given to its function within the offence itself and within the scheme of offences in which it is located. Voyeurism is a sexual offence and should be interpreted in light of the harms contemplated in related provisions under the same heading in Part V of the *Criminal Code* ("Sexual Offences"). As will be discussed below, this calls for an interpretation of "privacy" that has regard to personal autonomy and sexual integrity.

B. *Placing Section 162(1) in the Sexual Offences Scheme*

[119] The provision in question ought to be situated in the overall statutory scheme so as to ensure that the scheme functions consistently and harmoniously as a whole: "the objective is to interpret statutory provisions to harmonize the components of legislation inasmuch as is possible, in order to minimize internal inconsistency": *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 689. Professor Sullivan describes the presumption of consistency:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something towards accomplishing the intended goal. [Footnote omitted, p. 337.]

[120] As a principle of statutory interpretation, consideration of the legislative scheme has been employed by this Court in the interpretation of the *Criminal Code*. For example, regarding the interpretation of the offence of child abduction in *Chartrand*, Justice L'Heureux-Dubé wrote for a unanimous Court:

> In this examination of the purpose of s. 281, it is necessary to look at the whole scheme designed by Parliament to deal with such related offences as kidnapping, hostage taking and abduction, more precisely, ss. 279 to 286 of the *Code*. Those sections deal with the whole range of related offences. [p. 879]

Following an examination of the related offences, the Court found the purpose of the child abduction provision to be "to secure the right and ability of parents (guardians, etc.) to exercise control over their children (those children for whom they act as guardians, etc.) for the protection of those children, and at the same time to prevent the risk of harm to children by diminishing their vulnerability": p. 880.

[121] Similarly, this Court has relied on the grouping of provisions to assist in interpretation: see e.g., *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236. As Professor Sullivan notes, "[w]hen provisions are grouped together under a heading it is

presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions": p. 463. In *R. v. Drapeau* (1995), 96 C.C.C. (3d) 554, Fish J.A. (as he then was), in interpreting the offence of mischief, considered its placement within Part XI of the *Criminal Code* ("Wilful and Forbidden Acts in Respect of Certain Property") and found that mischief dealt primarily with "the integrity of the property itself and not with conduct affecting the exercise of property rights": p. 561.

[122] In this case, one should look to the scheme for sexual offences as a whole so as to inform the interpretation of s. 162(1). Sexual offences are designed to protect the personal autonomy and sexual integrity of the individual. In the introduction to his treatise on sexual offences in Canada, Professor Stewart states, "We believe that the principal purpose of the law of sexual offences is to protect sexual autonomy, though we recognize that the protection of sexual autonomy will often overlap with the harm principle": H. C. Stewart, *Sexual Offences in Canadian Law*, (loose-leaf), at p. 1-7.

[123] I pause to note briefly that while the trespassing at night and mischief offences could be considered related, as discussed above, the use of these offences to address criminally voyeuristic behaviour was an incidental application of the criminal law. Section 162(1) is properly categorized as a sexual offence, and as such its wording bears no resemblance to the property offences of trespassing at night and mischief. Therefore, those provisions do not provide a useful basis for the interpretation of s. 162(1).

[124] There is extensive jurisprudence from this Court that defines sexual offences in terms of violation of one's autonomy and integrity. Sexual assault is an assault "committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated": *R. v. Chase*, [1987] 2 S.C.R. 293, at p. 302, affirmed by this Court in *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909; *R. v. V. (K.B.)*, [1993] 2 S.C.R. 857; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. A. G.*, 2000 SCC 17, [2000] 1 S.C.R. 439; *R. v. Larue*, 2003 SCC 22, [2003] 1 S.C.R. 277; *R. v. Lutoslawski*, 2010 SCC 49, [2010] 3 S.C.R. 60; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346.

[125] Describing the interests that the criminal law seeks to protect with respect to sexual assault, this Court stated in *Ewanchuk* that "[t]he law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected": para. 66. As observed by Professor Stewart, this Court "has put the sexual autonomy and sexual integrity of the complainant, rather than the motivation of the accused, at the centre of the distinction between sexual and non-sexual assault": p. 1-7 (footnote omitted). This Court recognized in *Hutchinson* that creation of the offence of sexual assault protects the "values of personal autonomy and physical integrity": para. 91.

[126] The child pornography jurisprudence provides additional guidance on the interests underlying the sexual offences scheme as a whole. Chief Justice McLachlin

held that child pornography "denies children their autonomy and dignity", and that the "violation of dignity may stay with the child as long as he or she lives": *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 185 and 92. See also *R. v. Hewlett*, 2002 ABCA 179, 167 C.C.C. (3d) 425, at para. 22; *R. v. L.A.C.*, 2005 ABPC 217, 386 A.R. 102, at para. 54. While child pornography falls under the heading "Offences Tending to Corrupt Morals" in Part V of the *Criminal Code*, the interests at stake are closely tied to those contemplated by the voyeurism offence and other sexual offences.

[127] The interests protected under s. 162(1) accord with those described in *Ewanchuk*, *Hutchinson*, and *Sharpe*. They represent a shift in the conception of sexual offences away from sexual propriety and towards a focus on sexual integrity. As noted by Professor Craig, "[t]his shift from focusing on sexual propriety to sexual integrity enables greater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety)": E. Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (2012), at p. 68.

[128] "Privacy" defies a singular definition. It is a protean concept given content from the circumstances to which it is applied. But the privacy interest engaged by s. 162(1) is not so amorphous as to defy sufficient certainty and stability to meet the requirements of the criminal law. The phrase "circumstances that give rise

to a reasonable expectation of privacy" in the context of the sexual offence of voyeurism is meant to protect a privacy interest in one's image against observations or recordings that are, first, surreptitious and, second, objectively sexual in content or purpose. This privacy interest itself, where it is substantially and not trivially engaged (e.g. by merely uncouth or ill-mannered behavior), is founded on the twin interests of the protection of sexual integrity and the autonomy to control one's personal visual information.

III. Circumstances that Give Rise to a Reasonable Expectation of Privacy in One's Image

[129] With respect to the scope of the privacy interest engaged by s. 162(1), I agree with the Chief Justice that the wording of the provision supports the view that a reasonable expectation of privacy does not turn solely on the location of the person being observed or recorded. The explicit reference to location in para. (a) suggests that "circumstances" must mean something beyond places that are traditionally private. In order for para. (b) to be operative, Parliament must have understood that a person could have a reasonable expectation of privacy in places other than where one would be expected to be nude or engaged in sexual activity. Similarly, para. (c) would be "mere surplusage" if it did not recognize an essential privacy interest maintained by the individual *regardless of their location* : *R. v. Proulx,* 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28. The recognition of this essential privacy interest, separate and apart from the privacy interest tied to "traditionally private" places, is aligned with an

interpretation of the provision that centres the protection of personal autonomy and sexual integrity.

[130] Of course, location can be relevant when determining whether a reasonable expectation of privacy exists. Privacy's roots are embedded in the same soil as the sanctity of the home and the protection of one's property. As noted by Justice La Forest, "The sanctity of the home is deeply rooted in our traditions. It serves to protect the security of the person and individual privacy": *R. v. Landry*, [1986] 1 S.C.R. 145, at p. 167, in dissent. The importance of being free from interference in one's home has long been judicially recognized, for example in 1604, in *Semayne's Case*: "That the house of every one is to him as his. . . castle and fortress, as well for his defence against injury and violence, as for his repose": (1604), 5 Co. Rep. 91 a, 77 E.R. 194, at p. 195.

[131] The expectation of privacy is highest in places where one can exclude others. When one is in public, one's expectation of privacy is attenuated. The development of technology has extended the privacy interest from the territorial (the sanctity of the home), to include the informational (the protection of one's personal information). Thus, the privacy interest may be attenuated but does not cease to exist when a person can be openly observed or recorded, for example, by security cameras. In recognizing that the privacy interest is strongest in "traditionally private" places, I note that with regard to s. 162(1)(a), conduct that infringes a reasonable expectation of privacy for the purposes of that paragraph must still meet the test described below.

The fact that a person is in a "private" place does not satisfy the reasonable expectation of privacy inquiry *per se*. To conclude that location is determinative would undermine the interests that Parliament sought to protect in the creation of the voyeurism offence.

[132] Whether a person has a reasonable expectation of privacy is a normative question. I share the view set out in the dissenting opinion of the Court of Appeal in this case that finding that a person has a reasonable expectation of privacy in the relevant circumstances "is to conclude that his or her interest in privacy *should* be prioritized over other interests": 2017 ONCA 778, 139 O.R. (3d) 754, at para. 117 (emphasis in original). Infringing a person's reasonable expectation of privacy in the context of the voyeurism offence can be conceptualized as crossing a threshold where the law prioritizes the observed person's interest in protecting their autonomy and sexual integrity over the accused's liberty of action.

[133] If both the following two related questions are answered in the affirmative, then an observation or recording occurred in circumstances that gave rise to a reasonable expectation of privacy under s. 162(1):

(1) Did the surreptitious observation or recording diminish the subject's ability to maintain control over their image?

(2) And if so, did this type of observation or recording infringe the sexual integrity of the subject?

In brief, an infringement of one's privacy interest under s. 162(1) can only be sustained if that individual is recorded or observed in a way that both causes them to lose control over their image; and also infringes their sexual integrity. This conjunctive test accords with what Parliament sought to protect by creating the voyeurism offence: "the state's interest in protecting the privacy of individual citizens and its interest in preventing sexual exploitation of its citizens coalesce where the breach of privacy also involves a breach of the citizen's sexual or physical integrity": *Voyeurism as a Criminal Offence: A Consultation Paper*, at p. 8 (emphasis added).

A. *Did the Surreptitious Observation or Recording Diminish the Subject's Ability to Maintain Control Over Their Image?*

[134] What is private can be determined with regard to two related concepts: exclusivity and control. By virtue of one's ability to exclude others and control access to one's personal information, that information is protected from unwanted interference and is therefore private. Alan Westin defined privacy as the claim of persons to "determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7. The personal information that one chooses to display, how that information is presented and accessed, and the ability to be selective about who can access that information, are all examples of the exercise of exclusivity and control by the person asserting the privacy interest.

[135] The ability to maintain control over what personal visual information is shared, and with whom, is a facet of privacy linked to personal autonomy. Professor Parker has described privacy as "control over when and by whom the various parts of us can be sensed by others": R. B. Parker, "A Definition of Privacy" (1974), 27 *Rutgers L. Rev.* 275, at p. 281 (emphasis deleted). Professor Gavison defined privacy as being "a limitation of others' access to an individual" and a loss of privacy as occurring where "others obtain information about an individual, pay attention to him, or gain access to him": (R. Gavison, "Privacy and the Limits of Law" (1980), 89 *Yale L.J.* 421, at p. 428). In another article, she argued that the private is "that which is unknown and unobserved; the public is that which is known or observed, or at least is capable of being known or observed, because it occurs in a public place": R. Gavison, "Feminism and the Public/Private Distinction" (1992), 45 *Stan. L. Rev.* 1, at p. 6. Relying on this definition, Professor Paton-Simpson provided a similar description of privacy as "relating to limitations on 'accessibility in the form of being known or observed'": E. Paton-Simpson, at p. 308.

[136] A common feature in all the foregoing is the idea that privacy is the ability to control what is known or observed about oneself. An infringement of privacy occurs when that which is unknown/unobserved becomes known/observed without the person having put this information forward. These perspectives provide a framework inclusive of location as well as personal dignity: they identify an essential privacy interest that a person retains even when in a public place.

[137] While a person would not have a reasonable expectation of privacy in circumstances where they can be observed in passing or at a respectful distance (for example, passing on a sidewalk or conversing in a hallway), they may well have a reasonable expectation that their privacy will not be infringed in the same circumstances by being surreptitiously observed telescopically or at certain angles, *a fortiori* where the image is recorded. Where a person chooses to disrobe in a public place such as a communal change room, they will reasonably expect to be observed in passing. However, that person will still maintain an essential privacy interest that can be infringed by surreptitious observation or recording, with or without the use of technology, which allows more invasive access to the subject's image than would otherwise be possible.

[138] The majority of the Court of Appeal reasoned that in order to give meaning to each word in the provision, the reasonable expectation of privacy must add something to the offence beyond that required by the surreptitiousness element: "[i]f the fact that [a person is] being surreptitiously recorded without their consent for a sexual purpose were enough to give rise to a reasonable expectation of privacy, that would make the privacy requirement redundant": para 108. This led the Court to conclude that a person will normally not be in circumstances that give rise to a reasonable expectation of privacy when they are in public, fully clothed, and not engaged in sexual activity: para 108.

[139] For the reasons I have noted above, the reasonable expectation of privacy element should not be rendered redundant when considering observation or recording in a public place. I agree with the appellant Crown that while the surreptitiousness of the recording may signal circumstances that give rise to a reasonable expectation of privacy, the two elements remain distinct: A.F, at para. 71. Surreptitiousness relates to the actions of the observer, while the reasonable expectation of privacy pertains to the individual being observed or recorded. The two concepts are related in the sense that one informs the other; but the concepts are distinguishable. For example, one can imagine a person approaching a woman and pointing a camera at her body at close range. This behaviour would be reprehensible, and would invade the woman's reasonable expectation of privacy, but would fail the surreptitiousness requirement in s. 162(1). Similarly, a person in a shopping mall recorded by concealed security cameras cannot be said to have a reasonable expectation of privacy with regard to those images, even though they have been captured surreptitiously.

[140] As raised by the appellant, the surreptitiousness of the observation or recording improperly removes the individual's ability to maintain control over how they are observed (A.F, at para. 8). In addition, while the voyeurism offence targets both observation and recordings, because of its permanence, a recording compounds the denial of the subject's autonomy by giving the voyeur repeated access to the observation. This brings me to my next question.

B. *Did This Type of Observation or Recording Infringe the Sexual Integrity of the Subject?*

[141] In order to find that a person was in circumstances that gave rise to a reasonable expectation of privacy for the purposes of s. 162(1), the observation or recording must have infringed the sexual integrity of the subject. I agree with the majority of the Court of Appeal for Ontario that it is not contrary to s. 162(1) to surreptitiously observe or record another person where their sexual integrity is not compromised. The offence of voyeurism is limited to visual intrusions that infringe another person's sexual integrity. The inquiry into the impact on sexual integrity is reflective of the object of the provision, and the scheme of sexual offences as a whole.

[142] This Court stated in *Chase* that a sexual assault is an assault "committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated": p. 302. A similar approach should be adopted when assessing whether the impugned observation or recording infringes the complainant's sexual integrity in the context of the voyeurism offence. Whether the observation or recording was sexual in nature such that it infringes the sexual integrity of the subject should be decided on an objective standard, and considered in light of all the circumstances. While the intent of the perpetrator may be relevant in determining whether the observation or recording was sexual in nature, it is not determinative: *Chase*, at p. 302.

[143] Viewing the infringement of sexual integrity under the test set out in *Chase* ensures that the "reasonable expectation of privacy" analysis is not conflated with the sexual purpose inquiry under s. 162(1)(c). It is important to keep these

inquiries distinct. One can imagine a surreptitious observation or recording that violates the sexual integrity of the subject, but is done for another purpose, for example, nude photographs taken for the purpose of blackmail. Absent a sexual purpose, this behaviour would not be caught under s. 162(1)(c), though depending on the circumstances, the behaviour may fall under s. 162(1)(a) or (b), or be caught by a different provision of the *Criminal Code*.

[144] By contrast, when observations or recordings are done in public and the subject is neither nude, nor exposing intimate body parts, nor engaged in sexual activity, Parliament limited criminal conduct to circumstances where the observations or recordings are for a sexual purpose under para. (c). I agree with the majority of the Court of Appeal that "sexual purpose" in the context of the voyeurism offence must be determined objectively, "based on all of the circumstances": para. 45. Interpreting the phrase "sexual purpose" in the context of child pornography, Chief Justice McLachlin held the proper inquiry should be objective: "The [objective approach] applies to the phrase 'for a sexual purpose', which I would interpret in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers": *R. v. Sharpe*, at para. 50 (emphasis added).

[145] Adapted to the context of voyeurism, the question is properly framed as follows: is the subject of the observation or recording reasonably perceived as intended to cause sexual stimulation in the observer? As pointed out by the majority of the Court of Appeal, an interpretation of sexual purpose that includes sexual

gratification is consistent with the interpretation of the same phrase in other sections of the *Criminal Code*. See e.g: *R. v. Morrisey*, 2011 ABCA 150, at para. 21 (CanLII) (sexual interference, s. 151); *R. v. Colley (J.B.)*, 2009 BCCA 289, 273 B.C.A.C. 107, at paras. 12 and 15, leave to appeal refused, [2009] 3 S.C.R., invitation to sexual touching, s. 152); and *R. v. M.B.*, 2014 QCCA 1643, at paras. 22-24 (CanLII) (sexual interference, s. 151; sexual exploitation, s. 430). If the answer to this objective inquiry is "yes", then the observation or recording was done for a sexual purpose. As noted above, the "sexual purpose" inquiry under para. (c) is distinct from the determination of a violation of sexual integrity under the reasonable expectation of privacy analysis.

IV. Application

[146] The students had a reasonable expectation of privacy regarding how their bodies would be observed in the classrooms and hallways of their school. The visual information — the proximity and angles of how the students' bodies were observed — was subject to the students' limitation and control. The technology used by Mr. Jarvis allowed him to take videos of the clothed breasts and cleavage of his students — for extended periods of time — at angles and in a proximity that went beyond the access that the students allowed in this setting, thus infringing their autonomy.

[147] The recordings were objectively sexual in nature. The focus of the recordings was on the young women's intimate body parts, taken at close range. In addition, while not determinative of a violation of sexual integrity, it is no longer in dispute that the recordings were made for a sexual purpose. The combination of these

factors leads me to conclude that by surreptitiously recording images of their breasts, Mr. Jarvis infringed the sexual integrity of the students.

[148] Had Mr. Jarvis placed himself in the position of the pen-camera and simply observed the students, they would undoubtedly have recoiled. It was reasonable in the circumstances for the students to expect not to be observed and recorded in the way that they were. Accordingly, the Crown has discharged its burden on this, the only contested element of the offence before this Court. A conviction should be entered and the matter should be remitted for sentencing.

Appeal allowed.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Ursel Phillips Fellows Hopkinson, Toronto; Ryder Wright Blair & Holmes, Toronto.

Solicitor for the intervener Attorney General of British Columbia: Attorney General of British Colombia, Victoria.

Solicitor for the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitor for the intervener Privacy Commissioner of Canada: Office of the Privacy Commissioner of Canada, Gatineau.

Solicitors for the intervener Canadian Civil Liberties Association: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the intervener Ontario College of Teachers: McCarthy Tétrault, Toronto.

Solicitor for the intervener Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitor for the intervener Women's Legal Education and Action Fund Inc.: Women's Legal Education and Action Fund Inc., Toronto.

Solicitors for the intervener Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto; Markson Law Professional Corporation, Toronto.