SCC Court File No.: 37833

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

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- and –

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RESPONDENT

- and –

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PART I - OVERVIEW

[1] Voyeurism is part of a spectrum of sexual violence that disproportionately negatively affects women and girls[1] by appropriating their sexual integrity to the ends of an accused, reducing them "to a means to achieve some purpose or goal unrelated to [their] own aspirations, desires or self-interest."[2] Instead of being "treat[ed] … as an equal, worthy of respect and entitled to choose how her personal information is shared with others", the target is instrumentalized to achieve the goals of the accused.[3] These kinds of privacy invasions that intrude on sexual and bodily integrity undermine women's and girls' right to full and equal participation in Canadian society.

[2] The voyeurism alleged in this particular case poses grave implications for the privacy and equality rights of Canadian young people, and for their bodily and sexual integrity – especially for girls and young women who are disproportionately likely to be negatively affected by sex crimes like voyeurism. The long-lasting implications of digital records and the non-consensual creation, collection and distribution of young people's sexual images raise serious concerns for their well-being and reputations (especially for girls and young women in the context of sexualized records). In this context, young Canadians deserve to know that the *Criminal Code* prohibits their teachers from abusing their positions of power by surreptitiously recording students for a sexual purpose. Conversion of an in-the-moment observation of a student in school common areas into a permanent digital recording of her breasts violates her rights to privacy and to equality. More broadly, it creates an atmosphere hostile to girls' and young women's right to equal education and public participation.

[3] At the Court of Appeal, the majority's location-based interpretation of "privacy" within s. 162(1)(c) has "produce[d] absurd consequences", contrary to this Court's admonition in *Rizzo*.[4]

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[1] Tina Hotton Mahony, Joanna Jacob & Heather Hobson, *Women in Canada: A Gender-Based Statistical Report* (6 June 2017), online: <www.statcan.gc.ca>; Moira Aikenhead, "Non-Consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence" (2018) 30:1 CJWL 117 at 124; Nicola Henry, Anastasia Powell & Asher Flynn, *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse: A Summary Report* (Melbourne: RMIT University, 2017), online: <www.whiteribbon.org.au>.

[2] Jane Bailey & Carissima Mathen, "Technologically-Facilitated Violence Against Women & Girls: If Criminal Law *Can* Respond, *Should* It?" (2018) University of Ottawa Working Paper Series, SSRN at 21-22, online: <https://papers.ssrn.com/abstract=3043506>.

[3] *Ibid* at 22.

[4] *Re Rizzo & Rizzo Shoes Ltd,* [1998] 1 SCR 27 at para 27.

It results in the inequitable and illogical[5] finding that young Canadians have no reasonable expectation of privacy against being surreptitiously recorded by their teachers for a sexual purpose in school classrooms and hallways. Further, the majority's all or nothing approach reduces privacy to secrecy or concealment, which: (i) is inconsistent with this Court's normative approach to privacy; (ii) trades on sexist stereotypes of forced modesty and chastity for girls and women; and (iii) is out of step with lived experiences, especially those of young people.

[4] CIPPIC submits that "circumstances giving rise to a reasonable expectation of privacy" in s. 162(1)(c) should be interpreted in an equality-enhancing, normative, contextual, and non-risk based manner that maximizes the dignity and integrity of complainants across the spectrum of situations in which this form of sexual violence can be committed. CIPPIC further submits that two key principles should govern any analytical framework this Court may develop:

(1) *impact on complainants' ability to assert control over their sexual and bodily integrity*, including whether any recording enabled more invasive access to the complainant than would otherwise be possible in an unrecorded interaction in the circumstances; and

(2) *impact on equality*, including any effect this form of sexual objectification has on equality-seeking group members, such as girls and young women, to participate freely and equally in the place where the recording was made (or in similar places).

[5] Three factors may be relevant, though not necessary or determinative, in assessing whether circumstances give rise to a reasonable expectation of privacy. The relevance and application of these factors should be determined in light of the governing principles listed above:

(1) *relationship between the accused and the complainant* (which may strengthen privacy expectations but is not necessary to establish them), including consideration of aspects that may affect expectations of trust and confidence, any power imbalances between the accused and the complainant, and any special obligations the accused may owe to the complainant;

(2) *norms, rules and/or regulations related to recording/appropriate conduct* in the place where the recording occurred (which may strengthen privacy expectations but are not necessary to establish them); and

[5] *Ibid.*

(3) *actions of the accused*, including whether surreptitious means were necessary because recording images for a sexual purpose was inconsistent with expectations in the circumstances.

PART II - POSITION ON APPELLANT'S QUESTION

[6] CIPPIC submits that "circumstances that give rise to a reasonable expectation of privacy" in s. 162(1)(c) of the *Criminal Code* should be interpreted in an equality-enhancing, normative, contextual, and non-risk-based manner.

PART III - FACTS

[7] CIPPIC accepts and adopts the statement of facts set out in the Appellant's Factum.

PART IV - STATEMENT OF ARGUMENT

A. A *CHARTER*-INFORMED, EQUALITY-ENHANCING, NORMATIVE, CONTEXTUAL, AND NON RISK-BASED INTERPRETATION

[8] The Respondent's position that *Charter* values have no relevance to the interpretation of s. 162(1)(c)[6] conflicts with this Court's consistent treatment of statutorily created privacy rights as quasi-constitutional.[7] Further, as this Court held in *Mabior*: (i) the meaning of contested language in legislative provisions such as section 162(1)(c) must be interpreted "harmoniously with the constitutional norms enshrined in the *Charter*";[8] and (ii) where the sexual and bodily integrity of victims are at stake, *Charter* values of "equality, autonomy, liberty, privacy and human dignity" are particularly relevant.[9]

[9] It is logical to interpret s. 162(1)(c) according to *Charter* values because Parliament specifically chose to incorporate "reasonable expectation of privacy" in the language of the section, a term that explicitly derives from *Charter* privacy jurisprudence. At the same time, *Charter* based interpretations of students' privacy expectations vis-a-vis the state in cases such as *M(MR)* and *AM*

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[6] Factum of the Respondent at paras 42–46.
[7] *Douez v Facebook, Inc*, 2017 SCC 33 at paras 4, 50.
[8] *R v Mabior*, 2012 SCR 47 at para 44.
[9] *Ibid* at para 22.

are not determinative in this case because in those cases compelling countervailing state interests, such as the protection of student safety, led to diminished protection for student privacy. No such countervailing concerns arise in the circumstances of this case.[10]

1. A Normative Approach is Necessary

[10] Canadian courts and privacy regulators[11] have consistently approached privacy as a normative,[12] protean concept,[13] which means (among other things) that:

(1) privacy rights will not be eroded by technology (such as the proliferation of surveillance cameras in schools) because privacy protections will "keep pace with technological development … to ensure we are ever protected against unauthorized intrusions … whatever technical form the means of invasion may take;"[14] and

(2) where a privacy right is asserted against surveillance, a court should ask whether "giving sanction to the particular form of unauthorized surveillance in question ... [would] see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society."[15] CIPPIC submits that voyeuristic surveillance of students in schools by teachers diminishes the aims of a free and open society devoted to equal education and opportunity.

2. A Contextual Approach is Necessary

[11] The majority's approach reduces privacy to a right to concealment or secrecy. Canada long ago rejected that path for the scope of privacy rights. Indeed, wherever Canadian courts and legislators have recognized privacy rights, they have recognized privacy's pluralistic nature and the fostering of underlying values such as equality, "dignity, integrity and autonomy."[16] As a result, the majority's thin, location-based approach to the complainants' privacy in this case stands in sharp contrast with this Court's more robust and flexible "totality of the circumstances" approach.[17] This approach provides helpful guidance for identifying and assessing factors that may be relevant to determining privacy expectations in the context of voyeurism:

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[10] *R v M(MR)*, [1998] 3 SCR 393; *R v AM*, 2008 SCC 19.

[11] Office of the Privacy Commissioner of Canada, "Draft Guidance: Inappropriate Data Practices—Interpretation and Application of Subsection 5(3)", (28 September 2017), online: <www.priv.gc.ca>.

[12] *R v.Wong*, [1990] 3 S.C.R. 36 at 46; *R. v. Tessling*, [2004] SCC 67 at para 42.

[13] *Tessling, ibid,* at paras 25, 42.

[14] *Wong*, *supra* note 12 at para 9. See also *R v Marakah*, 2017 SCC 59; *R v Jones*, 2017 SCC 60.

[15] *Wong*, *ibid* at para 46.

[16] *R v Plant*, [1993] 3 SCR 281 at 293; *Tessling*, *supra* note 12 at para 42.

[17] *R v Jarvis*, 2017 ONCA 778 at paras 71–83.

(1) *consider exactly what it is that the accused is attempting to access, not just where the surveillance occurred* – in the context of considering the subject matter of the search as part of the totality of the circumstances this Court considers where the physical acts of the search occurred, the space invaded and "the nature of the privacy interests compromised"[18] because they help to understand the *purpose* of the person conducting the surveillance. On that basis, this Court saw past the copy of the message stored on the receiver's device in *Marakah*, to recognize that the searchers in that case (the police) were really after "the electronic conversation between two or more people."[19] A parallel analysis in the context of a voyeuristic recording requires recognition that even though an image may be taken in a public place, the extraction of that image from its original context in a "permanent electronic recording" (an act which this Court in *Wong* described as a "pernicious risk")[20] enables more invasive access than originally possible, with potentially serious implications for bodily and sexual integrity;

(2) *the presence of other surveillance devices cannot on its own diminish normative expectations* – this Court strongly articulated this principle in the context of considering the place of search as part of the totality of the circumstances.[21] A parallel analysis in the context of a voyeuristic recording requires recognition that the generalized presence of surveillance cameras does not automatically diminish expectations of privacy against individualized, sexualized, surreptitious surveillance;

(3) *revelation of "details of the claimant's lifestyle or information of a biographic nature" engages privacy expectations*, including inferences arising from the actual information seized.[22] A parallel analysis in the context of a voyeuristic recording would be the degree to which the extraction and documentation of a particular image from its original context allowed the accused to engage in a more detailed examination of the target, thereby invading her bodily and sexual integrity; and

(4) *exclusive control over the image recorded is not required*[23] since simply recording a target's image can interfere with their privacy by undermining their ability to '"determine for

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[18] *Marakah*, *supra* note 14 at para 15.
[19] *Ibid* at para 19.
[20] *Wong, supra* note 12 at 48.
[21] *Ibid*.
[22] *Marakah supra* note 14 at para 32.
[23] *Ibid*.

themself when, how and to what extent information about them is communicated to others.'"[24] This Court has recognized a material distinction between the risk of words being repeated and the recording and transmission of those words.[25] A parallel analysis in the context of voyeurism requires recognition that the target's decision to reveal aspects of self in one place and context cannot be presumed to authorize their revelation in another form in other contexts.

[12] Using a multi-factor framework is consistent with more robust conceptualizations of privacy, such as Professor Helen Nissenbaum's "contextual integrity" approach in which "norms of specific contexts", especially with respect to information gathering, dissemination and distribution of information are taken into account.[26]

3. A Non-Risk Based Approach is Necessary

[13] As pointed out in the Appellant's factum, this Court has consistently rejected a risk-based approach to privacy.[27] Similarly, those targeted by voyeurs should not be considered to have waived all privacy interests simply by being in a public, since as this Court recognized in *UFCW, Local 401*:

> It goes without saying that by appearing in public, an individual does not automatically forfeit his or her interest in retaining control over the personal information which is thereby exposed. This is especially true given the developments in technology that make it possible for personal information to be recorded with ease, distributed to an almost infinite audience, and stored indefinitely.[28]

[14] Further, adopting a risk-based approach in the context of assessing the privacy rights of targets of sexual violence like voyeurism, violates the equality rights of girls and women, who are disproportionately likely to be negatively affected. Under the majority's approach targets' rights hinge on taking steps to hide parts of their body from public view (e.g. under skirts). This approach not only flies in the face of this Court's prior rulings, it smacks of sexist stereotypes that historically tied women's rights to privacy, and bodily and sexual integrity, to forced chastity and modesty.[29] Girls' and young women's rights to privacy and education free from harassment should not depend

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[24] *Ibid* at para 39, quoting AF Westin, *Privacy and Freedom* (1970), at 7.
[25] *R v Duarte,* [1990] 1 SCR 30 at 44, cited with approval in *Marakah supra* note 14 at para 40.
[26] Helen Nissenbaum, "Privacy as Contextual Integrity" (2004) 79 Wash L Rev 119 at 119.
[27] Factum of the Appellant at paras 59–61.
[28] *Information and Privacy Commissioner of Alberta v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 27.
[29] Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History and Disclosure of Personal Records" (2006) 43:3 Alta L Rev 743 at 747.

upon a requirement to conceal themselves or parts of their bodies sexualized by society.

B. APPLYING AN EQUALITY-ENHANCING, NORMATIVE, CONTEXTUAL, AND NON-RISK BASED APPROACH TO TEACHER/STUDENT VOYEURISM

1. An Equality-Enhancing, Normative, Contextual, Non-Risk Based, Approach Better Aligns with Young People's Lived Experiences

[15] A robust and flexible approach to interpreting s. 162(1)(c) is particularly important in light of the growth of surveillance technologies that make it difficult to move through public (or even seemingly private) spaces without creating lasting records of our lives. This concern is especially acute for young people who inhabit an increasingly integrated "online/offline" existence, and whose digital footprints (including non-consensually created, collected and circulated sexual images) can harm their sexual and bodily integrity, well-being and reputations both now and in the future, especially where past information is used out of context in future decision making about them.[30]

[16] As such, in addition to being inconsistent with this Court's approach to privacy, the majority's all or nothing approach is grossly out of touch with the lived experiences of young people. Professors Steeves and Regan, in their study of young people's privacy experiences and practices, describe privacy as "an inherently social practice" in which we negotiate the boundary between self and other, so that boundaries fixed in any particular context "depend on individual preferences and abilities as well as the social meaning of the context."[31]

[17] As a result, understanding what expectations of privacy may arise in particular circumstances requires consideration of social norms and practices within that context, which extends well beyond whether interactions occur in a "public" place.[32]

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[30] Office of the Privacy Commissioner of Canada, *Draft Position on Online Reputation*, (26 January 2018), online: <www.priv.gc.ca>; Jane Bailey, "A Perfect Storm: How the Online Environment, Social Norms and Law Constrain Girls' Online Lives", in *eGirls, eCitizens*, Jane Bailey & Valerie Steeves, eds (Ottawa: University of Ottawa Press, 2015) [Bailey, Storm]; Jane Bailey & Valerie Steeves, *Defamation Law in the Age of the Internet: Young People's Perspectives* (Toronto: Law Commission of Ontario, 2017), online: <www.lco-cdo.org>.

[31] Valerie Steeves & Priscilla Regan, "Young People Online and the Social Value of Privacy", (2014) 12:4 J Information, Communication & Ethics in Society 298 at 300.

[32] *Ibid* at 302–303.

2. Privacy Expectations in Contexts of Teacher/Student Voyeurism

[18] We turn to the two governing principles and three factors identified in Part I to explore the kinds of norms and practices that may be of particular relevance to assessing expectations of privacy in the context of alleged voyeurism by teachers against students in schools:

(1) *Impact on complainants' right to control their sexual and bodily integrity* - This Court has recognized that protection of young people's privacy has "undoubted constitutional significance" and "fosters respect for dignity, personal integrity and autonomy of the young person".[33] Where teachers take images of young people for sexual purposes, their right to determine "how, when and to whom they reveal themselves and to what extent it will be communicated to others"[34] is seriously undermined. These non-consensual images create a permanent record that can be revisited and viewed repeatedly, enabling decidedly more invasive surveillance of a student's body than in the original context in which the image was taken, with serious repercussions for the student's bodily and sexual integrity. As this Court recognized in the context of child pornography in *Sharpe*, creation of this kind of non-consensual recording results in "the child [having] to live … with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone."[35]

(2) *Impact on equality* – Teachers' surreptitious recordings of students for sexual purposes are inconsistent with young people's internationally recognized rights to privacy (including rights against "unlawful attacks on [their] honour and reputation") and to education without discrimination based on prohibited grounds such as sex.[36] As this Court recognized in *Ross*, discriminatory attitudes and conduct by teachers contribute to a "poisoned educational environment" that can lead children from targeted groups to "feel isolated and suffer a loss of self-esteem".[37] The equality consequences of sexualized surveillance can be particularly grave for girls and young women[38] and young people in

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[33] *AB v Bragg Communications Inc*, 2012 SCC 46 at para 18, citing with approval *Toronto Star Newspaper Ltd v Ontario*, 2012 ONCJ 27 at paras 40, 41, 44.
[34] *Marakah*, *supra* note 14 at para 39, quoting AF Westin, *Privacy and Freedom* (1968) at 7.
[35] *R v Sharpe*, 2001 SCC 2 at para 92.
[36] *Convention on the Rights of the Child*, 20 November 1989, UNTS vol 1577 at 44, arts 16, 28, 2.
[37] *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 40.
[38] *R v B.Z*, 2016 ONCJ 547 at para 20.

the LGBTQ12S community.[39] Our digitally networked world, where images and recordings are so easily replicated, cropped and modified in ways to accentuate or imitate sexuality, and widely distributed, exacerbates these consequences, discouraging targeted group members from full and equal participation out of fear that a de-contextualized fragment of their lives will be captured and later used to judge them.[40]

(3) *Relationship between the accused and the complainant* – While girls and young women have a reasonable expectation of privacy that no one will take surreptitious images of their breasts while they are in school, the nature of the student/teacher relationship enhances students' expectations of privacy vis-a-vis their teachers. Teachers are in "a position of trust and authority towards their students",[41] thereby creating fiduciary-like obligations, which, as described in the Appellant's factum,[42] are reflected in statutorily-imposed duties on teachers. This relationship of trust is an essential building block to the learning environment and to public confidence in schools. Placing young people under surveillance (whether at home or in school) "interferes with the developmental need of young people to develop relationships of trust with each other and with the adults who nurture and guide them."[43] CIPPIC submits that this relationship of trust and authority reasonably incubates student expectations of privacy and confidentiality vis-a-vis their teachers. The relationship also creates a privacy climate inconsistent with teachers making recordings of students for sexual purposes.

(4) *Norms, rules and regulations related to recording/appropriate conduct* – Norms, rules and regulations operating in schools and structuring teacher/student relationships enhance students' expectations of privacy vis-a-vis their teachers. A complex network of legislation imposes strict requirements on schools' (and teachers') use of students' personal information,[44] including in relation to video surveillance and the circumstances

[39] Jane Bailey, "'Sexualized Online Bullying' through an Equality Lens: Missed Opportunity in *AB v Bragg*?" (2013) 59 McGill LJ 709 at 729–730.
[40] Bailey, Storm, *supra* note 30 at 29–30.
[41] *R v Audet*, [1996] 2 SCR 171 at para 43.
[42] Factum of the Attorney General of Ontario at para 23.
[43] Steeves & Regan, *supra* note 31 at 310.
[44] Ann Cavoukian, *A Guide to Ontario Legislation Covering the Release of Students' Personal Information* (June 2011), online: <www.ipc.on.ca>.

in which its use can be justified.[45] As in this case, many schools and school boards have explicit policies relating to students' personal information, including with respect to recording or photographing students. CIPPIC submits that these regulatory structures, combined with social norms against taking photos of women's and girls' breasts without their consent, support student expectations against being voyeuristically recording by their teachers while in school, particularly because collection of information and images for sexual purposes is completely inconsistent with schools' and teachers' mandates.

(5) *Actions of the accused* – The choice of an accused to surreptitiously make recordings, even though they are being made in public areas of the school, suggests the existence of privacy expectations in the context that are inconsistent with the recordings being made.

PART V - CONCLUSION

[19] The Ontario Court of Appeal's majority decision in this case sets a dangerous precedent in terms of the privacy, bodily and sexual integrity, and equality of young Canadians in schools, with especially disturbing implications for girls and young women. Far from immunizing them from criminal responsibility, teachers' professional responsibilities toward their students amplify their accountability and the trust and confidence vested in them. That very relationship of trust and confidence cultivates a privacy expectation and that teachers will not surreptitiously capture students' images for sexual purposes. Failure to recognize and defend this privacy expectation stokes a hostile atmosphere in schools, undermining the equality rights of girls and young women, who are disproportionately likely to be targeted by voyeurism.

PART VI - COSTS

[20] CIPPIC will not seek costs in this matter and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of April, 2018.

[*original signed by*]

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Jane Bailey and David Fewer

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[45] Information and Privacy Commissioner of Ontario, *Guidelines for the Use of Video Surveillance* (October 2015), online: <www.ipc.on.ca>.

PART VII - TABLE OF AUTHORITIES

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