

R v Jarvis: An Argument for a Single Reasonable Expectation of Privacy Framework

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ABSTRACT

The “reasonable expectation of privacy” concept plays an important role in Canadian criminal and constitutional law, particularly in the context of s. 8 of the *Charter*. This article analyzes a recent Ontario Court of Appeal decision, *R v Jarvis*, which concerned the interpretation of a “reasonable expectation of privacy” in the context of voyeurism. In *Jarvis*, the Court of Appeal distinguished between a reasonable expectation of privacy in the contexts of voyeurism and s. 8, and declined to apply the “totality of the circumstances” approach. The author argues for the application of a single reasonable expectation of privacy framework—one which incorporates the robust and flexible “totality of the circumstances” approach—in both constitutional and non-constitutional contexts. Applying the totality of the circumstances approach guarantees that all relevant factors are considered when assessing the presence and degree of a reasonable expectation of privacy.

Keywords: Criminal law; voyeurism; *Charter of Rights and Freedoms*; reasonable expectation of privacy; totality of the circumstances; *Jarvis*

I. INTRODUCTION

The “reasonable expectation of privacy” concept plays an important role in Canadian criminal and constitutional law. Its most frequent application is in the context of s. 8 of the *Charter*, where it affords

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protection from unreasonable state search and seizure.¹ Here, the reasonable expectation of privacy acts primarily as a threshold.² Without a reasonable expectation of privacy in the subject matter of the search or seizure, one cannot claim the protection of s. 8. This concept has generated a remarkable body of jurisprudence since the seminal *Hunter v Southam*³ was decided by the Supreme Court of Canada in 1984. As a result, a robust and versatile framework for assessing the presence and degree of an individual's reasonable expectation of privacy has developed. This framework is often referred to as the totality of the circumstances approach.⁴

A reasonable expectation of privacy (on the part of the complainant) also constitutes an essential element of certain *Criminal Code* offences.⁵ The *actus reus* of voyeurism, for example, is made out where an individual surreptitiously observes or records a person who is in circumstances that give rise to a reasonable expectation of privacy.⁶ The *mens rea* requires the observation or recording to be for a sexual purpose, or for the purpose of observing or recording an individual that is either in a place where they can reasonably expect to be nude, exposing their sexual regions, or engaging in explicit sexual activity, or in a place where they are in fact nude, exposing their sexual regions, or engaging in explicit sexual activity.⁷

¹ See section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11.

² Reasonable expectation of privacy also serves “as a description of the result of the balancing exercise that seeks to weigh an individual’s privacy interest against the state’s interest in intruding upon this privacy, in order to determine what level of protection the individual’s interest merits.” Lisa M Austin, “Information Sharing and the ‘Reasonable’ Ambiguities of Section 8 of the Charter” (2007) 57:2 UTLJ 499 at 503 [Austin, “Reasonable Ambiguities”].

³ *Hunter et al v Southam Inc*, [1984] 2 SCR 145, (*sub nom Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc*) 55 AR 291 [Hunter].

⁴ *R v Edwards*, [1996] 1 SCR 128 at para 45, 26 OR (3d) 736 [Edwards]; Steve Coughlan, *Criminal Procedure*, 3rd ed (Toronto: Irwin Law, 2016) at 76.

⁵ *Criminal Code*, RSC 1985, c C-46, ss 184 (private communications, as interpreted in *Goldman v R*, [1980] 1 SCR 976, 108 DLR (3d) 17), 162 (voyeurism), 162.1 (publication, etc., of an intimate image without consent).

⁶ *Ibid*, s 162(1).

⁷ *Ibid*, s 162(1)(a)–(c).

This article analyzes a recent Ontario Court of Appeal decision, *R v Jarvis*,⁸ which involved a high school teacher surreptitiously video recording female students while on school property. At issue was the reasonable expectation of privacy of the students. Both the majority and the dissent distinguish between a reasonable expectation of privacy in the context of s. 8, and in the context of voyeurism, respectively. This causes them to refrain from applying the robust reasonable expectation of privacy framework developed in the constitutional context, and to disregard relevant privacy jurisprudence, including cases concerning students' reasonable expectation of privacy in school. Instead, the majority establishes their own reasonable expectation of privacy framework, one which lacks a consideration of the totality of the circumstances. The result is a narrow reasonable expectation of privacy framework that is largely location based and binary.

I argue the following: First, the Court unnecessarily distinguishes between a reasonable expectation of privacy in the contexts of voyeurism and s. 8, respectively. Select jurisprudence, and pragmatism, support the application of a single reasonable expectation of privacy framework in both constitutional and non-constitutional contexts. Second, at the least, a reasonable expectation of privacy framework, in any context, should involve a consideration of the totality of the circumstances. This position is supported by Canadian voyeurism jurisprudence. While the *Jarvis* majority is not the first to question the applicability of s. 8 principles to voyeurism, it is the only voyeurism case of any depth that does not utilize a totality of the circumstances approach when analyzing a reasonable expectation of privacy.

II. THE *JARVIS* DECISIONS

Do students have a reasonable expectation of privacy while in the common areas at school? This question was recently addressed by the Ontario Court of Appeal in *Jarvis*. A 2-1 majority held that they do not, subject to narrow exceptions.

Jarvis, a high school teacher, was charged with committing voyeurism under s. 162(1)(c) of the *Code*:

⁸ *R v Jarvis*, 2017 ONCA 778, 356 CCC (3d) 1 [*Jarvis* ONCA].

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 (c) the observation or recording is done for a sexual purpose.⁹

On multiple occasions, Jarvis used a pen camera to surreptitiously record his interactions with female students, and one female colleague. The videos were taken on school premises, and often focused on the individuals' chests and cleavage.¹⁰

The case turned on two issues:¹¹ first, were the recordings made in circumstances that gave rise to a reasonable expectation of privacy and, second, were the recordings made for a sexual purpose?¹² At trial, Goodman J found that the students did have a reasonable expectation of privacy at school. Justice Goodman held that the quasi-public environment and the presence of security cameras diminished, but did not eliminate, a reasonable expectation of privacy.¹³ Justice Goodman also paid particular attention to the use of technology in facilitating the alleged offence. He reasoned that Jarvis would not have recorded surreptitiously if there were no objective privacy interests to invade.¹⁴ Moreover, the use of technology increased the severity of the alleged infringement: these were not fleeting interactions, but rather sustained, permanent recordings.¹⁵

Jarvis was ultimately acquitted however, because Goodman J was left with a reasonable doubt that the videos were taken for a sexual purpose.¹⁶ Justice Goodman believed that other, non-sexual inferences could be drawn from the recordings,¹⁷ although he failed to describe such inferences. The Crown appealed the decision to the Ontario Court of Appeal.

⁹ *Criminal Code*, *supra* note 5, s 162(1)(c).

¹⁰ *Jarvis ONCA*, *supra* note 8 at para 7.

¹¹ In a separate pre-trial application, Jarvis challenged the constitutionality of the search and seizure of the videos on his pen camera. Justice Goodman found that the original warrantless search of the pen camera violated section 8, but admitted the evidence under the *Grant* analysis and section 24(2) of the *Charter*. See *R v Jarvis*, 2014 ONSC 1801, 312 CRR (2d) 17.

¹² *Jarvis ONCA*, *supra* note 8 at para 18.

¹³ *R v Jarvis*, 2015 ONSC 6813 at paras 47–48, 25 CR (7th) 330 [*Jarvis ONSC*].

¹⁴ *Ibid* at para 40.

¹⁵ *Ibid* at para 41.

¹⁶ *Ibid* at para 79.

¹⁷ *Ibid* at para 77.

The Court of Appeal first addressed the sexual purpose issue. Reversing Goodman J, they unanimously found that the videos were taken for a sexual purpose. In their view, Goodman J had made two errors of law: first, by suggesting that a “lack of nudity or sexually suggestive clothing or poses could derogate from the sexual purpose of the videos”¹⁸ and, second, by concluding that other, non-sexual inferences could be drawn from the videos without an evidentiary basis.¹⁹

The Court then divided over the reasonable expectation of privacy issue. The majority accepted the respondent’s argument that Goodman J had conflated the surreptitious element with the reasonable expectation of privacy element, allowing the former to influence the interpretation of the latter.²⁰ As a matter of statutory interpretation, the majority held that, “[i]f the fact that [the complainants] are 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.”²¹ As such, the trial judge had erred in law “by finding that the students were in circumstances that gave rise to a reasonable expectation of privacy ... while engaging in normal school activities and interactions in the public areas of the school where there were many other students and teachers.”²²

Writing for the majority, Feldman JA held that the students were not in circumstances that gave rise to a reasonable expectation of privacy: “If a person is in a public place, fully clothed and not engaged in toileting or sexual activity, they will normally not be in circumstances that give rise to a reasonable expectation of privacy.”²³ The location—the common areas of a school—and the presence of security cameras, and other individuals, eliminated any reasonable expectation of privacy.²⁴ Justice Feldman noted, however, that there may be exceptional circumstances where an individual in a public place does have a reasonable expectation of privacy. For example,

¹⁸ *Jarvis* ONCA, *supra* note 8 at para 53.

¹⁹ *Ibid* at para 54.

²⁰ *Ibid* at para 101.

²¹ *Ibid* at para 108.

²² *Ibid* at para 110.

²³ *Ibid* at para 108.

²⁴ *Ibid* at para 104.

one may hold a reasonable expectation of privacy that is limited to the “areas of the body that are covered or hidden.”²⁵

Justice Huscroft, in lone dissent, framed the reasonable expectation of privacy issue as a normative, not descriptive,²⁶ assessment: “should high school students expect that their personal and sexual integrity will be protected while they are at school?”²⁷ He held that they should. In his view, the majority’s approach, which was largely location based, was too rigid.²⁸ While location is a relevant consideration, Huscroft JA felt that it should not be determinative;²⁹ the fact that the students were in a quasi-public place, and would be seen by others, did not eliminate a reasonable expectation of privacy.³⁰

In addition, Huscroft JA disagreed with the majority’s assertion that a reasonable expectation of privacy must be determined without considering the impugned conduct at issue.³¹ For Huscroft JA, to hold otherwise would lead to the absurd result that “the scope of the voyeurism offence is narrowed by the very thing Parliament intended to protect in establishing the offence – the reasonable expectation of privacy.”³²

III. THE DIFFERENT REASONABLE EXPECTATION OF PRIVACY FRAMEWORKS

A. Reasonable Expectation of Privacy in the *Charter* Context

In the context of s. 8 of the *Charter*, the evolution of the reasonable expectation of privacy framework has been gradual and piecemeal. As noted above, the Supreme Court of Canada’s decision in *Hunter v Southam*—where the Court first articulated the concept of a reasonable expectation of privacy, and its constitutional implications³³—marks the beginning of a line

²⁵ *Ibid* at para 96.

²⁶ *Ibid* at para 117.

²⁷ *Ibid* at para 131.

²⁸ *Ibid* at para 124.

²⁹ *Ibid* at para 128.

³⁰ *Ibid* at para 133.

³¹ *Ibid* at para 134.

³² *Ibid*.

³³ *Hunter*, *supra* note 3 at 159.

of landmark s. 8 cases spanning three decades. As Professor Richard Jochelson notes, *Hunter* “delineated the constitutional minimums that the state must honour in the context of searches of citizens.”³⁴ These minimums included obtaining prior authorization to perform a search (i.e., a warrant), whenever feasible, from an individual “capable of acting judicially,”³⁵ whom was satisfied of the existence of “reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search.”³⁶ From there, the Court has worked to groom (or, sometimes, prune³⁷) the protections offered under this branch of the constitutional tree.

Many equally important cases have followed *Hunter*. While a comprehensive overview³⁸ of its extensive lineage is beyond the scope of this article, I will briefly touch upon select cases which were fundamental to the development of the reasonable expectation of privacy framework during the course of my explanation, below.

Aside from developing a reasonable expectation of privacy framework, s. 8 jurisprudence has also established several general principles which guide the framework’s application. For example, reasonable expectation of privacy is a normative, not descriptive, standard.³⁹ Considering competing interests (typically, police investigation and citizen privacy), the court evaluates whether the individual ought to reasonably expect privacy in the circumstances. Put another way, the court must consider whether the individual’s “interest in privacy *should* be prioritized over other interests.”⁴⁰ Another principle is that the nature of the privacy interest must be framed

³⁴ Richard Jochelson, “Trashcans and Constitutional Custodians: The Liminal Spaces of Privacy in the Wake of *Patrick*” (2009) 72 Sask L Rev 199 at 201 [Jochelson, “Trashcans and Constitutional Custodians”].

³⁵ *Hunter*, *supra* note 3 at 162.

³⁶ *Ibid* at 168.

³⁷ See e.g. Richard Jochelson, “Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference” (2008) 13:2 Rev Const Stud 209; Don Stuart, “The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain” (1999) 25:1 Queen’s LJ 65.

³⁸ For such an overview, see Coughlan, *supra* note 4 at 71–89; Jochelson, “Trashcans and Constitutional Custodians,” *supra* note 37 at 201–208.

³⁹ *R v Tessling*, 2004 SCC 67 at para 42, [2004] 3 SCR 432 [Tessling]; *Jarvis ONCA*, *supra* note 8 at para 117.

⁴⁰ *Jarvis ONCA*, *supra* note 8 at para 117 [emphasis in original].

in broad and neutral terms.⁴¹ The apparent illegality of the circumstances cannot be used to colour and prejudice the analysis.

The reasonable expectation of privacy framework is now mostly well settled. Section 8 applies if, and only if, the individual claiming its protection establishes a reasonable expectation of privacy in the subject matter of the search or seizure.⁴² The court decides whether the claimant has a reasonable expectation of privacy in the subject matter of a search or seizure, and its degree, by considering the totality of the circumstances.⁴³ The “totality of the circumstances” assessment gives the reasonable expectation of privacy framework its robustness and versatility. As stated in *R v Gomboc*, “[a]n examination of the ‘totality of the circumstances’ involves consideration of *all*, not just some, of the relevant circumstances.”⁴⁴ Ever since the Supreme Court of Canada’s decision in *Tessling*, the relevant considerations have usually been grouped under four headings.⁴⁵

First, what is the subject matter of the alleged search? The subject matter of the search or seizure should not be determined “narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action.”⁴⁶ This was not always the philosophy of the courts. In the early decision of *R v Edwards* (the case in which the totality of the circumstances approach was developed), we see a specific focus on property-related considerations.⁴⁷ The accused was a drug dealer storing crack cocaine at his girlfriend’s apartment. When police searched the property, found the crack cocaine and charged Edwards, the accused tried to establish a reasonable expectation of privacy in his girlfriend’s apartment, which would enable him to challenge the constitutionality of the search. The Court rejected his

⁴¹ *R v Wong*, [1990] 3 SCR 36 at 50, 1 CR (4th) 1 (“it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engaged in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy” at 50).

⁴² *Edwards*, *supra* note 4 at para 45 (technically, a potential intrusion is not deemed a “search” or “seizure” unless, and until, a reasonable expectation of privacy is found).

⁴³ *Ibid.*

⁴⁴ *R v Gomboc*, 2010 SCC 55 at para 94, [2010] 3 SCR 211 [*Gomboc*] [emphasis in original].

⁴⁵ See Coughlan, *supra* note 4 at 76. See also *R v Marakah*, 2017 SCC 59 at para 11 [*Marakah*]; *R v Cole*, 2012 SCC 53 at para 40, [2012] 3 SCR 34 [*Cole*].

⁴⁶ *R v Ward*, 2012 ONCA 660 at para 65, 112 OR (3d) 321 [*Ward*].

⁴⁷ *Edwards*, *supra* note 4 at para 45.

argument, holding that Edwards had failed to establish any proprietary interests in the apartment.⁴⁸ Among other things, Edwards could not show that he owned the apartment, exercised control over it, nor regulated who could access it.

In contrast, more recent cases have better reflected the modern philosophy that the subject matter should be identified with precision. In *R v Kang-Brown*, for example, the subject matter of a sniffer-dog search was not the air around the bag but the contents of the bag itself.⁴⁹ In *R v Patrick*, the subject matter of a police search was not the garbage that had been left at the property line for collection; it was “a bag of ‘information’ whose contents, viewed in their entirety, paint a fairly accurate and complete picture of the householder’s activities and lifestyle.”⁵⁰

A diversity of subject matters *per se* has also contributed to flux in the reasonable expectation of privacy framework. In recent years, technological advances have occasioned the need to assess reasonable expectations of privacy over more intangible subject matters, such as thermal energy emanations,⁵¹ electricity readings⁵² and electronic text message conversations.⁵³ In these situations, the property-related considerations of *Edwards* have been either transposed, rendered inapplicable, or minimized in relation to informational-privacy considerations. As such, a nuanced approach to determining the nature of the subject matter—or, more importantly, what the subject matter may reveal about a particular individual—has become vital to the reasonable expectation of privacy assessment.

Second, does the claimant have a direct interest in the subject matter? This is sometimes characterized as a question of standing.⁵⁴ Without a direct interest, an individual will be unable to claim the protection of s. 8. As Professor Steve Coughlan notes, the presence of this interest will be obvious

⁴⁸ *Ibid* at para 46.

⁴⁹ *R v Kang-Brown*, 2008 SCC 18 at paras 58, 174, [2008] 1 SCR 456.

⁵⁰ *R v Patrick*, 2009 SCC 17 at para 30, [2009] 1 SCR 579 [*Patrick*].

⁵¹ *Tessling*, *supra* note 39.

⁵² *Gomboc*, *supra* note 44.

⁵³ *Marakah*, *supra* note 45; *R v Jones*, 2017 SCC 60, [2017] 2 SCR 696 [*Jones*]; *R v TELUS Communications Co*, 2013 SCC 16, [2013] 2 SCR 3.

⁵⁴ *Edwards*, *supra* note 4; *Marakah*, *supra* note 45.

where the search is of one's home, person, or vehicle.⁵⁵ However, the interest need not be possessory or proprietary to satisfy this component.⁵⁶

Third, does the claimant have a subjective expectation of privacy in the subject matter? The importance of this element is dwindling. The subjective expectation of privacy is a low hurdle,⁵⁷ and the court may presume or infer its existence in the absence of claimant testimony.⁵⁸ This approach is consistent with the normative characterization of the reasonable expectation of privacy. Given the waning value of the subjective expectation of privacy, it remains to be seen whether this element will eventually be abandoned by the courts.

Fourth, would a subjective expectation of privacy be objectively reasonable in the circumstances? The core of the reasonable expectation of privacy analysis is performed at this stage. Ultimately, all relevant circumstances of the case must be considered, although there is no definitive list.⁵⁹ Previously, examples of relevant considerations have included: place where the search occurred, control over the subject matter of the search, whether the subject matter was in public view, whether the subject matter was encompassed by a statutory or contractual framework, or whether the subject matter tended to expose biographical information about the claimant.⁶⁰ No single consideration is determinative.⁶¹

The applicability of any given consideration will be circumscribed by the nature of the relevant privacy interest(s).⁶² The jurisprudence has recognized three privacy interest categories: physical privacy,⁶³ “involving

⁵⁵ Coughlan, *supra* note 4 at 77.

⁵⁶ See e.g. *Hunter*, *supra* note 3 at 158; *R v Dymont*, [1988] 2 SCR 417 at 426–427, 73 Nfld & PEIR 13; *R v Plant*, [1993] 3 SCR 281 at 291–292, 84 CCC (3d) 203 [*Plant*].

⁵⁷ *Patrick*, *supra* note 50 at para 37.

⁵⁸ *Jones*, *supra* note 53 at para 21.

⁵⁹ *Cole*, *supra* note 45 at para 45.

⁶⁰ See e.g. *Edwards*, *supra* note 4 at para 45; *Patrick*, *supra* note 50 at para 27.

⁶¹ Coughlan, *supra* note 4 at 76.

⁶² *R v Orlandis-Habsburgo*, 2017 ONCA 649 at para 40, 352 CCC (3d) 525; Hamish Stewart, “Normative Foundations for Reasonable Expectations of Privacy” (2011), 54 SCLR (2d) 335 at 338.

⁶³ Originally, physical privacy was referred to as “personal privacy.” The latter term is now used as an umbrella under which physical, territorial, and informational privacy all fall. See *Ward*, *supra* note 46 at para 60.

bodily integrity and the right not to have our bodies touched or explored,”⁶⁴ territorial privacy, “involving varying expectations of privacy in the places we occupy,”⁶⁵ and informational privacy, “involving ‘the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.’”⁶⁶ The latter category often considers how far the information is from a “biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.”⁶⁷ These categories, which may overlap, operate as analytical tools in the reasonable expectation of privacy analysis.⁶⁸

Even if a reasonable expectation of privacy is established, its degree may be diminished depending on the circumstances.⁶⁹ Such is the case in schools. In *R v M(MR)*,⁷⁰ the Supreme Court addressed the student-privacy question explicitly: “To what extent are students entitled to an expectation of privacy while they are on school premises?”⁷¹ This case involved the search of a 13-year-old student by the vice-principal, which yielded a small amount of marijuana. The Court unanimously held that students have a diminished, but existent, reasonable expectation of privacy in their person while at school.⁷² The privacy expectation was reduced because students knew that they may be subject to search by school authorities.⁷³ In *R v A(M)*,⁷⁴ which concerned a sniffer-dog search on school property, a majority

⁶⁴ *Gomboc*, *supra* note 44 at para 19.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Plant*, *supra* note 56 at 293.

⁶⁸ Coughlan, *supra* note 4 at 82–83.

⁶⁹ *Tessling*, *supra* note 39 at para 22. After a reasonable expectation of privacy is found, its degree is used to configure the level of justification required to intrude upon it. The extent of the privacy expectation also factors into the exclusion of evidence test. See Coughlan, *supra* note 4 at 71, n 21.

⁷⁰ *R v M(MR)*, [1998] 3 SCR 393, 166 DLR (4th) 261 [M(MR)].

⁷¹ *Ibid* at para 1.

⁷² *Ibid* at paras 32 (Cory J, for the majority), 71 (Major J, dissenting in part).

⁷³ *Ibid* at para 33.

⁷⁴ *R v A(M)*, 2008 SCC 19 at paras 1 (Lebel J, for the majority), 65 (Binnie J, concurring in part), 157 (Bastarache J, dissenting), [2008] 1 SCR 569 [A(M)].

of the Supreme Court also found a diminished, but existent, reasonable expectation of privacy in the contents of students' backpacks.

B. Reasonable Expectation of Privacy in *Jarvis* (Court of Appeal)

Justice Feldman, for the majority, crafts a reasonable expectation of privacy framework from scratch. As was excerpted in Part II, “[i]f a person is in a public place, fully clothed and not engaged in toileting or sexual activity, they will normally not be in circumstances that give rise to a reasonable expectation of privacy.”⁷⁵

Justice Feldman’s primary consideration—informed, in part, by the Oxford English Dictionary definition of privacy⁷⁶—appears to be location: “A person expects privacy in places where the person can exclude others ... [or] where a person feels confident that they are not being observed.”⁷⁷ While “students expect a school to be a protected, safe environment ... where their physical safety, as well as their personal and sexual integrity is protected,”⁷⁸ the common “areas of the school where students congregate and where classes are conducted are not areas where people have any expectation that they will not be observed or watched.”⁷⁹

This characterization embodies a descriptive, as opposed to normative, approach. The fact that students will be observed by security cameras, and other individuals, dominates the analysis, and erases any reasonable expectation of privacy. Aside from being contrary to Supreme Court of Canada jurisprudence,⁸⁰ a descriptive approach threatens the existence of privacy in societies where the use of audio-visual technology is ubiquitous.⁸¹ Moreover, a descriptive approach makes the reasonable expectation of

⁷⁵ *Jarvis* ONCA, *supra* note 8 at para 108.

⁷⁶ *Ibid* at para 93.

⁷⁷ *Ibid* at para 94.

⁷⁸ *Ibid* at 104.

⁷⁹ *Ibid*. This consideration ties into Feldman J’s larger statutory interpretation of a “reasonable expectation of privacy.” For more discussion on the statutory interpretation conducted in *Jarvis*, see Michael Plaxton, “Privacy, Voyeurism, and Statutory Interpretation” *Crim LQ* [forthcoming in 2018].

⁸⁰ *Tessling*, *supra* note 39 at para 42.

⁸¹ See generally Lisa Austin, “Privacy and the Question of Technology” (2003) 22:2 *Law & Phil* 119.

privacy analysis strictly binary. There appears to be no room for degrees of privacy in the majority's framework; if a reasonable expectation of privacy applies to any part of your body, it is all or nothing. This runs contrary to jurisprudential and academic conceptions of privacy, where the existence of a reasonable expectation of privacy is often considered a matter of degree.⁸²

Conversely, Huscroft JA's approach approximates the totality of the circumstances analysis. He considers the following factors while assessing the students' reasonable expectation of privacy:

- students are required to attend school for an educational purpose;
- schools are not public places open to all; access to them is controlled by school authorities;
- the high school's hallways and grounds are under 24-hour video surveillance, but the surveillance does not focus on particular students or their body parts;
- access to surveillance video recordings for personal use is not permitted; and
- school board policy prohibited the appellant from making the type of visual recordings that he made.⁸³

Justice Huscroft concludes, "the students' interest in privacy is entitled to priority over the interests of anyone who would seek to compromise their personal and sexual integrity while they are at school."⁸⁴

Both the majority and the dissent in *Jarvis* distinguish between a reasonable expectation of privacy in the context of s. 8 of the *Charter*, and a reasonable expectation of privacy in the context of voyeurism. The majority focuses on the fact that it is a private citizen, and not the state, doing the intruding. In their words, "[i]n the context of this offence, the protection is not from the state but from other people. There is no issue of prior judicial authorization. ... [the protection] is applicable solely to a complainant's privacy interest in not having their body viewed or video-recorded in a sexual context."⁸⁵ Justice Huscroft, on the other hand, concludes that "[t]he

⁸² *R v Mills*, [1999] 3 SCR 668 at para 108, 180 DLR (4th) 1; *Tessling*, *supra* note 39 at para 22; Elizabeth Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50:3 UTLJ 305 at 321-322; Austin, "Reasonable Ambiguities," *supra* note 2 at 503; Richard Jochelson, James Gacek & Lauren Menzie, *Criminal Law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt* (New York: Routledge, 2018) at 24.

⁸³ *Jarvis ONCA*, *supra* note 8 at para 131.

⁸⁴ *Ibid* at para 133.

⁸⁵ *Ibid* at para 86 [emphasis added].

reasonable expectation of privacy analysis performs a fundamentally different role in the context of the voyeurism offence.”⁸⁶

These observations are correct. Concerning Feldman JA’s position, since the apparent intruder is not the state, the protection and procedures of s. 8 do not apply. Concerning Huscroft JA’s position, the role of the reasonable expectation of privacy is fundamentally different in the context of voyeurism and in the context of s. 8. In the former context, it is an essential element of the offence. Without it, there can be no finding of guilt. In the latter context, it is the threshold one must reach before analyzing the reasonableness of the search or seizure. A reasonable expectation of privacy is necessary, but not sufficient, for the s. 8 analysis.

It is not obviously correct, however, that the truth of these propositions should occasion a departure from the reasonable expectation of privacy framework developed in the context of s. 8, solely because the concept is being applied in a non-constitutional context. In other words, there appears to be no principled reason for determining the presence and degree of an individual’s reasonable expectation of privacy based on who is intruding (i.e., the nature of the intruder),⁸⁷ or the role that privacy plays in a larger analytical framework. Contrary to the respective approaches of the majority and the dissent, the nature of the intruder, and the role of the reasonable expectation of privacy concept in a larger analytical framework, should not be used to constrain the content of a reasonable expectation of privacy.

IV. AN ARGUMENT FOR A SINGLE FRAMEWORK

In the context of s. 8, must the accused’s reasonable expectation of privacy be assessed against the state in isolation, or can it be assessed against the world at large? In other words, does a reasonable expectation of privacy against the public also constitute a reasonable expectation of privacy against the state, and vice versa?

The jurisprudence is not well settled on this point. In fact, there appears to be little direct consideration of this issue. This is to be expected: in the

⁸⁶ *Ibid* at para 120 [emphasis added].

⁸⁷ Professor A Wayne MacKay makes a similar point in the section 8 context, arguing that the standard of a reasonable search should not be lowered for teachers simply because they are not police officers. See A Wayne Mackay, “Don’t Mind Me, I’m from the R.C.M.P.: R. v. M. (M.R.) – Another Brick in the Wall Between Students and Their Rights” (1997), 7 CR (5th) 24 at 32.

context of s. 8, the antagonist is always the state. An affirmative answer, however, would add support to the proposition that the presence and degree of a reasonable expectation of privacy should not be constrained by the nature of the intruder. If a reasonable expectation of privacy against the public is also one held against the state, any reason to distinguish between the two—aside from determining the application of constitutional protection—disappears.

In *R v Ward*,⁸⁸ the Ontario Court of Appeal has seemingly subscribed to the state-in-isolation approach. Speaking for the Court, Doherty JA held that:

[a] purposive approach to s. 8 ... dictates that personal privacy claims be measured as against the specific state conduct and the purpose for that conduct. ... a person, by allowing others into a zone of personal privacy, does not forfeit a claim that the state is excluded from that same zone of privacy.⁸⁹

Conversely, there is some jurisprudential support for the world-at-large approach. This position was recently endorsed by Moldaver J in *R v Marakah*.⁹⁰

In *Marakah*, a majority judgement authored by McLachlin CJ (as she then was) held that, in certain circumstances, an individual may maintain a reasonable expectation of privacy in text messages that have been sent, received and retained by their intended recipient.⁹¹ Justice Moldaver, writing for himself and Côté J in dissent, held that the sender no longer has any control over the messages once they have been delivered. Thus, a continuing expectation of privacy in those messages is unreasonable.⁹²

Concerning a reasonable expectation of privacy and the nature of the intruder, Moldaver J stated the following:

in this Court's significant body of s. 8 jurisprudence, including *Duarte*, the question of whether an individual holds a reasonable expectation of privacy in a particular subject matter is answered in relation to the world at large, not the state in isolation. If an expectation of personal privacy is unreasonable against the public, then it is also unreasonable against the state.⁹³

⁸⁸ *Ward*, *supra* note 46.

⁸⁹ *Ibid* at paras 76-77.

⁹⁰ *Marakah*, *supra* note 45 (Moldaver J, dissenting on a different point).

⁹¹ *Ibid* at paras 4-5.

⁹² *Ibid* at para 98 (Moldaver J, dissenting).

⁹³ *Ibid* at para 160 [emphasis added].

In support of this position, Moldaver J points to several cases⁹⁴ where the presence and degree of a reasonable expectation of privacy were discussed in relation to public access. These cases indicate that the ability of the public at large to access, or publish, the subject matter of a search or seizure derogates from a reasonable expectation of privacy, even in the context of s. 8.

The bulk of Justice Moldaver's analysis on the nature of the intruder relates to his claim that he and McLachlin CJ disagree about whether a reasonable expectation of privacy should be assessed against the state in isolation.⁹⁵ With respect, it is not entirely clear that there is actual disagreement on this point. The ostensible point of contention is the following excerpt from McLachlin CJ: "[t]he risk that the recipient could have disclosed [the electronic conversation], if he chose to, does not negate the reasonableness of Mr. Marakah's expectation of privacy against state intrusion."⁹⁶

Justice Moldaver seems to fasten on McLachlin CJ's use of "state." However, McLachlin CJ's pronouncement merely echoes a rule from *R v Duarte*,⁹⁷ namely, that a reasonable expectation of privacy can apply to an ongoing conversation despite the risk that one of the participants may later disclose its contents to a third party.⁹⁸ The specific reference to the state is not necessarily determinative. As Moldaver J himself points out, the use of state-specific language is to be expected in the s. 8 context.⁹⁹ This, however, "does not mean that a person's reasonable expectation of personal privacy against the state is distinct from his or her reasonable expectation of personal privacy against the world."¹⁰⁰ The use of "state" in *Marakah*, a s. 8 case, is logical given that the state is, in fact, the antagonist.

⁹⁴ *Ibid* at para 162, citing *Patrick*, *supra* note 50 at paras 2, 43; *Gomboc*, *supra* note 44 at paras 33, 41; *Tessling*, *supra* note 39 at paras 40, 46-47; *Plant*, *supra* note 56 at 294-295; *R v Stillman*, [1997] 1 SCR 607 at para 62, 185 NBR (2d) 1. See also *R v Duarte*, [1990] 1 SCR 30 at 43-44, 48, 71 OR (2d) 575 [*Duarte*]; *Edwards*, *supra* note 4 at paras 49-50.

⁹⁵ *Marakah*, *supra* note 45 at para 158.

⁹⁶ *Ibid* at para 45.

⁹⁷ *Duarte*, *supra* note 94 at 43-44.

⁹⁸ *Marakah*, *supra* note 44 at para 163.

⁹⁹ *Ibid* at para 164.

¹⁰⁰ *Ibid* [emphasis added]. But see James AQ Stringham, "Reasonable Expectations Reconsidered: A Return to the Search for a Normative Core for Section 8?" (2005), 23 CR (6th) 245 at 249.

Chief Justice McLachlin’s pronouncement does not appear to foreclose the possibility that a reasonable expectation of privacy can be applied to the world at large. Chief Justice McLachlin does not explicitly disagree with Moldaver J on this point, and an implicit disagreement is not readily apparent. The existence of a disagreement will determine whether or not Moldaver J is in actual dissent on this point, and whether his analysis is *obiter dictum*. In either event, it remains to be seen whether Moldaver J’s analysis, and summary of relevant case law, garners any attention when *Jarvis* is decided by the Supreme Court of Canada.¹⁰¹

Finally, pragmatism, too, dictates that a protean concept such as privacy should be assessed under a single flexible and robust framework. Otherwise, individuals will be needlessly subject to separate bodies of jurisprudence, offering different levels of privacy, based entirely on who is intruding on their privacy. This is an unnecessary complication. The totality of the circumstances analysis, and the reasonable expectation of privacy jurisprudence developed in the context of s. 8, could be adapted to voyeurism and any other non-constitutional, privacy-engaging contexts that may arise in the future. The “subject matter of the apparent search” could become the “subject matter of the apparent intrusion,” and so on. Ultimately, the most essential import from the s. 8 context is the totality of the circumstances analysis. It seems bizarre to assess whether we ought to recognize a reasonable expectation of privacy without a consideration of all the relevant circumstances of the case.

V. THE TOTALITY OF THE CIRCUMSTANCES AND VOYEURISM

Voyeurism is a relatively new offence that has received little judicial attention.¹⁰² So, too, has the reasonable expectation of privacy component of the offence.¹⁰³ A case law search of WestLaw and CanLII yielded thirty-two cases where voyeurism was tried or appealed.¹⁰⁴ Of these cases, only five

¹⁰¹ *R v Jarvis*, 2017 ONCA 778, 356 CCC (3d) 1, appeal as of right to the SCC, 37833 (20 April 2018). The Supreme Court of Canada granted intervenor status to the Privacy Commissioner of Canada and the Information and Privacy Commissioner of Ontario, among others.

¹⁰² *R v Rudiger*, 2011 BCSC 1397 at para 74, 278 CCC (3d) 524 [*Rudiger*]; *R v Keough*, 2011 ABQB 48 at para 147, 267 CCC (3d) 193 [*Keough*].

¹⁰³ *Keough*, *supra* note 102 at para 152.

¹⁰⁴ Noting up with WestLaw (citing references) for the voyeurism provision yielded 129

have engaged significantly with the meaning of a reasonable expectation of privacy. These cases include: both *Jarvis* decisions, *R v Rudiger*,¹⁰⁵ *R v Lebenfish*¹⁰⁶ and *R v Taylor*.¹⁰⁷ Both *Jarvis* decisions, *Rudiger* and *Lebenfish* consider the applicability of s. 8 to the context of voyeurism.

In *Rudiger*, the accused was caught in the act of video recording children while hidden in his van. The vehicle was stationed in a parking lot adjacent to a public park, where the children were at play. The videos depicted the children's private areas while they were being changed by their caregivers.¹⁰⁸ Justice Voith held that the application of s. 8 jurisprudence to the case should be treated with caution because of the idiosyncrasy of constitutional interpretation, the balancing between state interests and the accused's privacy, and the nature of the privacy interests usually engaged in s. 8 contexts.¹⁰⁹ Notwithstanding this caution, Voith J endorsed the application of "overarching considerations"¹¹⁰ stemming from s. 8, including: privacy is a protean concept, whether a reasonable expectation of privacy exists is based on an assessment of the totality of the circumstances, the expectation of privacy is a normative, not descriptive standard, and s. 8 protects people, not places.¹¹¹ Justice Voith concluded that—notwithstanding the public location—the caregivers, and their children, had a reasonable expectation of privacy.¹¹² In his view, the use of technology to zoom in on, and permanently record, the children's private areas vastly exceeded their reasonable

case results with the following filters engaged: search within results "privacy" and only show results citing "Subsection or Clause" 162, 162(1) and letter subsections. Due to the way WestLaw aggregates results, many of these cases were duplicates. I analyzed the list of cases to exclude duplicates and sentencing decisions. I then searched for the keyword "privacy" in the remaining results to assess their engagement with the reasonable expectation of privacy element. A CanLII Document Text search of "162 voyeurism" yielded 148 cases. I cross-referenced the CanLII list against the WestLaw list and analyzed the non-duplicate cases for their engagement with a reasonable expectation of privacy.

¹⁰⁵ *Rudiger*, *supra* note 102.

¹⁰⁶ *R v Lebenfish*, 2014 ONCJ 130, 10 CR (7th) 374 [*Lebenfish*].

¹⁰⁷ *R v Taylor*, 2015 ONCJ 449 [*Taylor*].

¹⁰⁸ *Rudiger*, *supra* note 102 at para 76.

¹⁰⁹ *Ibid* at paras 82–87.

¹¹⁰ *Ibid* at 88.

¹¹¹ *Ibid*.

¹¹² *Ibid* at paras 103–117.

expectations of privacy.¹¹³ Echoing *Tessling*, Voith J cautioned against allowing technology to shrink the private sphere.¹¹⁴

In *Lebenfish*, the accused was taking pictures of naked women at a public, clothing-optional beach. At issue was whether the accused obtained the photographs surreptitiously, and whether the beachgoers had a reasonable expectation of privacy. After holding that the Crown had failed to establish the surreptitious element, Green J commenced his analysis on the latter issue, endorsing the view that certain privacy concepts—protean, totality of the circumstances, and normative, not descriptive, assessment—were of “general application to any evaluation of privacy claims,”¹¹⁵ including voyeurism.¹¹⁶ Quoting *Rudiger*, Green J noted, however, that not all of the s. 8 concepts could be transposed.¹¹⁷ Considering the totality of the circumstances, Green J concluded that the nude beachgoers did not hold a reasonable expectation of privacy, citing factors including: the public and clothing-optional nature of the beach, the absence of signage, city policy or city by-laws prohibiting photography on the beach, and the fact that the photographs captured only that which was immediately visible to the naked eye (i.e., not enhanced through a zoom lens or other technological means).¹¹⁸

In a similar case, *Taylor*, the accused took pictures of women’s buttocks while they were sunbathing in thong bikinis on the beach. Justice Blouin endorsed the approaches of *Rudiger* and *Lebenfish*.¹¹⁹ Unlike *Lebenfish*, however, Blouin J found that, despite the possibility that the women would be “ogled,”¹²⁰ they had a reasonable expectation that close-ups of their private areas would not be “captured as a permanent record”¹²¹ by the accused.¹²² This case also differed from *Lebenfish* in that the surreptitious

¹¹³ *Ibid* at para 110.

¹¹⁴ *Ibid* at para 112.

¹¹⁵ *Lebenfish*, *supra* note 106 at 36.

¹¹⁶ *Ibid* at paras 35–36.

¹¹⁷ *Ibid* at para 36.

¹¹⁸ *Ibid* at para 40.

¹¹⁹ *Taylor*, *supra* note 107 at para 28.

¹²⁰ *Ibid* at para 32.

¹²¹ *Ibid*.

¹²² *Ibid*.

element was made out, the beach in question was not clothing-optional, and the accused used a zoom lens to focus on the complainants' private areas. Taylor was ultimately acquitted because Blouin J was not satisfied beyond a reasonable doubt that the images were captured for a sexual purpose.

We already know the position of the Court of Appeal in *Jarvis*. Justice Goodman, on the other hand, adopted an approach similar to that of *Rudiger* and *Lebenfish*. It is interesting to note that Goodman J initially declined to apply the s. 8 analysis to the voyeurism offence, stating that the s. 8 test was not flexible enough.¹²³ Justice Goodman recognized, however, that "there may be overarching considerations relevant to this [voyeurism] assessment,"¹²⁴ and concluded "that whether a reasonable expectation of privacy exists, in a given case, is based on an assessment of the totality of the circumstances ... that the expectation of privacy is a normative rather than a descriptive standard [and] ... that s. 8 'protects people and not places.'"¹²⁵ As we can recall, the totality of the circumstances led Goodman J to find that the students held a reasonable expectation of privacy.

Most of these decisions indicate a willingness to recognize certain fundamental privacy principles in all contexts, voyeurism included. Most important among these principles is the recognition that a reasonable expectation of privacy should be determined with reference to the totality of the circumstances. While the Ontario Court of Appeal is not bound by these decisions, it is interesting to note that the Court's decision is the only one proceeding against the slight jurisprudential tide.

If these fundamental privacy principles were adopted by the majority in *Jarvis*, it is possible that the reasonable expectation of privacy outcome would have been different. Imagine, as a result, that relevant s. 8 jurisprudence applied, and that the reasonable expectation of privacy was determined based on an assessment of the totality of the circumstances. As a starting point, precedent indicates that the students have an existing, but diminished, reasonable expectation of privacy in their person while at school,¹²⁶ and that "the public nature of the forum does not eliminate all privacy claims."¹²⁷ Of course, whether a reasonable expectation of privacy

¹²³ *Jarvis* ONSC, *supra* note 13 at para 37.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* at para 30.

¹²⁶ *M(MR)*, *supra* note 70 at paras 32, 71; *A(M)*, *supra* note 74 at paras 1, 65, 157.

¹²⁷ *Ward*, *supra* note 46 at para 72.

exists is not strictly precedent-based, but is determined based on the totality of the circumstances.

Whether a reasonable expectation of privacy exists would depend on a consideration of the relevant factors, including: the quasi-public location (the common areas of the school); the potential for observation by other people and security cameras; whether the subject matter—the cleavage area, with the attendant potential compromise of sexual- and bodily-integrity privacy interests—would be considered within the public view;¹²⁸ Huscroft JA’s factors,¹²⁹ including the school policy prohibiting Jarvis’ video recordings; the impact of using technology in the commission of the crime;¹³⁰ the particular vulnerability of children, and the heightened protection of their privacy;¹³¹ and the relationship of trust inherent in the student-teacher relationship.¹³²

Applying the totality of the circumstances analysis does not guarantee a particular outcome. A judge weighing the facts of *Jarvis* under this framework would still have to consider the factors that erode a reasonable expectation of privacy, and may come to the same conclusion as the majority. What the totality of the circumstances analysis does guarantee, however, is a consideration and balancing of all the relevant factors.

VI. CONCLUSION

The *Jarvis* decision engages with a number of important privacy-related issues. Do students have a reasonable expectation of privacy at school? To what extent does one’s appearance in a public, or quasi-public, place erode their reasonable expectation of privacy? What is the impact of technology on our privacy interests? Underpinning all of these specific issues, however, is a lurking question: how should a reasonable expectation of privacy be assessed generally?

¹²⁸ *Tessling*, *supra* note 39 at para 40 (“a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public”).

¹²⁹ *Jarvis ONCA*, *supra* note 8 at para 131.

¹³⁰ *Rudiger*, *supra* note 102 at paras 93–101, 110–117; *Taylor*, *supra* note 107 at para 32.

¹³¹ *AB v Bragg Communications*, 2012 SCC 46 at paras 14, 17–18, [2012] 2 SCR 567. See also Brock Jones, “Jarvis: Surely Schoolchildren Have a Reasonable Expectation of Privacy Against Videotaping for a Sexual Purpose?” (2017), 41 CR (7th) 71.

¹³² *Jarvis ONCA*, *supra* note 8 at para 47.

Over the course of this article, I have argued that the answer to this question need not change based on the nature of the intruder, or the role that privacy plays in a larger analytical framework. There is no principled reason to allow either of these factors to singlehandedly constrain the content of a reasonable expectation of privacy. With respect, if the majority's approach in *Jarvis* is preserved, the nuance of the reasonable expectation of privacy analysis, at least in the context of voyeurism, will be lost. While *Jarvis* only considers a reasonable expectation of privacy vis-à-vis this specific offence, the Court's distinction between the constitutional and non-constitutional context has potentially wider implications given the ever-increasing creep of technology into our private lives.

Both s. 8 of the *Charter*, and the offence of voyeurism, protect people, not places. As such, a single reasonable expectation of privacy framework—one which considers the totality of the circumstances—should be adopted. The implementation of this framework ensures an approach to privacy that is robust, flexible and sensitive to any factual matrix. The difficulty of assessing a reasonable expectation of privacy without a consideration of all the relevant circumstances seems readily apparent. With *Jarvis* under reserve by the Supreme Court of Canada, one hopes that the Court will endorse a framework that brings clarity and consistency to this important issue.