

Privacy Meets Equality (Again): The case of tech-facilitated voyeurism in Canada

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CYBERVIOLENCE: CRIMINAL CASE LAW – CRIMINAL OFFENCES

OFFENCES AGAINST MINORS

OFFENCES AGAINST ADULTS

CHILD PORNOGRAPHY
OFFENCES

CRIMINAL HARASSMENT

DEFAMATORY LIBEL

EXTORTION

HUMAN TRAFFICKING,
ADVERTISING SEXUAL
SERVICES

IDENTITY FRAUD

INVITATION TO
SEXUAL TOUCHING

LURING A CHILD

MAKING SEXUAL
MATERIAL AVAILABLE
TO A CHILD

MISCHIEF IN RELATION
TO DATA

NON-CONSENSUAL
DISTRIBUTION OF
INTIMATE IMAGES

SEXUAL ASSAULT

SEXUAL EXPLOITATION

SEXUAL INTERFERENCE

VOYEURISM



“physical, sexual and psychological” acts resulting in or likely to result in “physical, sexual or psychological harm” to another including “threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”

UN Declaration Art 1 &2



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Accelerating efforts to eliminate violence against women and girls: preventing and responding to violence against women and girls in digital contexts

HRC/38/L.6 (2 July 2018)



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Canadian Internet Policy and Public Interest Clinic (CIPPIC)



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2010 and 2011



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Ryan Jarvis



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Beal Secondary School



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pen cam



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hallways, classrooms, cafeteria, staff offices and
the school yard



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principal



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talking to a female student



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emitting a red light



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standing over top of a female student



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put the pen in his pocket



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Jarvis denied



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Jarvis handed over the pen



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the police



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17 active videos
30 different individuals
27 of whom were female students
1 was a female colleague
aged 14-18



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generally pointing down toward cleavage



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focused primarily on the students' breasts



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only to capture the students' breasts



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Jarvis declined



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seized several electronic devices



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the seized computer had no hard drive



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external hard drive files placed there the day after
police requested access



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voyeurism contrary to s. 162(1)(c)



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s. 8 motion to exclude



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- (1) reasonable expectation of privacy
- (2) sexual purpose



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acquitted



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did have a reasonable expectation of privacy



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“for a sexual purpose”



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“most likely”



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no other porn found
most clips included entire faces and bodies
no nudity
no undressing/explicit sexual activity
no direct evidence of Jarvis' purpose



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“there may be other inferences to be drawn”



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“morally repugnant and professionally objectionable”



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not guilty



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“You feel emotionally raped.”



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They were TARGETED because
they were girls.
+
This was UNWANTED
=
SEXUAL VIOLENCE!!!!!!

WHICH CULTURE DO YOU WANT TO LIVE IN?

sexual violence?



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November 2016



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upheld the acquittal



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“there were no other inferences available on this record”



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“This was an overwhelming case of videos focused on young women’s breasts and cleavage.”



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not in circumstances giving rise to a reasonable
expectation of privacy



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“a state in which one is not observed or disturbed
by other people; the state of being free from
public attention”

(Oxford English Dictionary, quoted by OCA para 93)



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- (1) they were in public areas of the school
- (2) no one was prohibited from looking at them
- (3) there were many security cameras in the school so “no one believed they were not being observed and recorded” (OCA, para 104)



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“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.”
(OCA, para 108)



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“that expectation arises from the nature of the required relationship between students and teachers, not from an expectation of privacy”
(OCA, para 105)



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“The result is the opposite of what one would expect: surreptitious visual recording of high school students for a sexual purpose, while they are at high school, is not illegal.”
(OCA, dissent, para 134)



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girls and women



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64 reported voyeurism decisions on Canlii:
64 perpetrators were male (2 young offenders)
59 victims were female
9 victims were male
31 cases with child victims
20 cases with child victims only



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equality

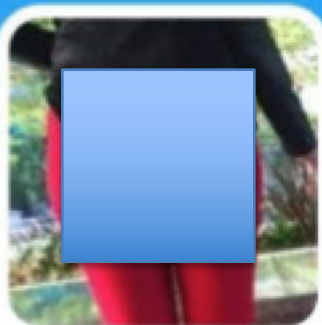


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equal participation




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lack of respect for girls' and young women's rights



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puzzles



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reasonably expect privacy



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public vs private



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powers of observation
record making capacity
duration



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contexts



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digital era



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privacy



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public/private divide



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rethink and/or reinterpret legislative language



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privacy



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privacy and equality



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Professor Janice Richardson



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Catharine MacKinnon



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privacy



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Jarvis



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LEAF



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Canadian Civil Liberties Association



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equality-enhancing conception of privacy



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“part of a spectrum of sexual violence that disproportionately negatively affects women and girls 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.’”

CIPPIC Factum para 1



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“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.”

CIPPIC Factum para 1



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“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.”

CIPPIC Factum para 1



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- (1) normative
- (2) contextual
- (3) *not* risk-based



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(1) normative



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privacy rights will not be eroded by technology



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“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.”

Wong para 46



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(2) privacy must be interpreted contextually



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“totality of the circumstances”



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what *exactly* the accused was trying to access
through the surveillance



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contextual integrity



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(3) a non-risk based approach is necessary



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equality consequences



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“smacks of sexist stereotypes that historically tied women’s rights to privacy, and bodily and sexual integrity, to forced chastity and modesty”

CIPPIC Factum para 14



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(a) the complainant's right to control their bodily
& sexual integrity



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(b) equality



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(c) relationship between the accused & the target



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(d) norms, rules and regulations relating to appropriate conduct



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an equality-enhancing conception of privacy



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