S.C.C. 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

Appellant
(Appellant)

-and-

RYAN JARVIS

Respondent
(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 LAWYER'S ASSOCIATION (ONTARIO)

Interveners

---

# FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

---


**Lax O'Sullivan Lisus Gottlieb LLP**
145 King Street West, Suite 2750
Toronto, ON M5H 1J8

**Jonathan C. Lisus | Zain M. Naqi**
Tel: (416) 598-1744
Fax: (416) 598-3730
Email: jlisus@counsel-toronto.com
znaqi@counsel-toronto.com

**Counsel for the Intervener,**
**Canadian Civil Liberties Association**

**Conway Baxter Wilson LLP/s.l.r**
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

**David P. Taylor**
Tel: (613) 691-0368
Fax: (613) 688-0271
Email: dtaylor@conway.pro

**Ottawa Agent for the Intervener,**
**Canadian Civil Liberties Association**

ORIGINAL TO:

**THE REGISTRAR**
301 Wellington St
Ottawa, ON K1A 0J1

COPIES TO:

**Attorney General of Ontario**
Crown Law Office - Criminal
10th Floor - 720 Bay Street
Toronto, ON M7A 2S9

**Christine Bartlett-Hughes**
**Jennifer Epstein**
Tel: (416) 326-2351
Fax: (416) 326-4656
Email: christine.bartlett-hughes@jus.gov.on.ca

**Counsel for the Appellant**

**Borden Ladner Gervais LLP**
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

**Nadia Effendi**
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

**Ottawa Agent for the Appellant**

**Ryder, Wright, Blair & Holmes LLP**
3rd Floor - 333 Adelaide Street West
Toronto, ON M5V 1R5

**Jennifer Micallef | Saman Wickramasinghe | Zachary Kerbel**
Tel: (416) 340-9070 Ext: 227
Fax: (416) 340-9250
Email: jmicallef@rwbh.ca

**Counsel for the Respondent**

**Supreme Advocacy LLP**
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

**Marie-France Major**
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for the Respondent**

**Ministry of Justice**
3rd Floor - 940 Blanchard Street
Victoria, BC V8W 3E6

**Lara Vizsolyi**
Tel: (250) 387-0150
Fax: (250) 387-4262
Email: lara.vizsolyi@gov.bc.ca

**Counsel for the Intervener, Attorney General of British Columbia**

**Gowling WLG (Canada) LLP**
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

**Robert Houston**
Tel: (613) 783-8817
Fax: (613) 788-3500
Email: robert.houston@gowlingwlg.com

**Ottawa Agent for the Intervener, Attorney General of British Columbia**

**University of Ottawa**
Common Law Section
57 Louis Pasteur Street
Ottawa, ON  K1N 6N5

**David Fewer**
Tel: (613) 562-5800 x 2558
Fax: (613) 562-5417
Email: david.fewer@uottawa.ca

**Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic**

**Office of the Privacy Commissioner of Canada**
(Gatineau)
30 Victoria Street
Gatineau, QC  K1A 1H3

**Regan Morris | James Nowlan**
Tel: (819) 994-5905
Fax: (819) 994-5424
Email: regan.morris@priv.gc.ca

**Counsel for the Intervener, Privacy Commissioner of Canada**

**McCarthy Tetrault LLP**
5300 - 66 Wellington Street West
Toronto, ON  M5K 1E6

**Caroline Zayid | Adam Goldenberg**
Tel: (416) 362-1812
Fax: (416) 868-0673
Email: czayid@mccarthy.ca

**Counsel for the Intervener, Ontario College of Teachers**

**Gowling WLG (Canada) LLP**
2600 - 160 Elgin Street
Ottawa, ON  K1P 1C3

**Matthew Estabrooks**
Tel: (613) 786-8695
Fax: (613) 563-9869
Email: mathhew.estabrooks@gowlingwlg.com

**Ottawa Agent for the Intervener, Ontario College of Teachers**

**Information and Privacy Commissioner of Ontario**
1400 - 2 Bloor Street East
Toronto, ON  M4W 1A8

**Stephen McCamman**
Tel: (416) 362-1920
Fax: (416) 325-9195
Email: stephen.mccammon@ipc.ca

**Counsel for the Intervener, Information and Privacy Commissioner of Ontario**

**Borden Ladner Gervais LLP**
1300 - 100 Queen Street
Ottawa, ON  K1P 1J9

**Nadia Effendi**
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

**Ottawa Agent for the Intervener, Information and Privacy Commissioner of Ontario**

**Women's Legal Education and Action Fund Inc.**
309 - 260 Spadina Avenue
Toronto, ON  M5T 2E4

**Karen Segal**
Tel: (416) 595-7170
Fax: (416) 595-7191
Email: k.segal@leaf.ca

**Counsel for the Intervener, Women's Legal Education and Action Fund Inc**.

**Borden Ladner Gervais LLP**
1300 - 100 Queen Street
Ottawa, ON  K1P 1J9

**Nadia Effendi**
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

**Ottawa Agent for the Intervener, Women's Legal Education and Action Fund Inc.**

**Henein Hutchison LLP**
3rd Floor - 235 King Street East
Toronto, ON  M5A 1J9

**Matthew Gourlay | Kate Robertson**
Tel: (416) 368-5000
Fax: (416) 368-6640
Email: mgourlay@hhllp.ca

**Counsel for the Intervener, Criminal Lawyer's Association (Ontario**)

**Supreme Advocacy LLP**
100 - 340 Gilmour Street
Ottawa, ON  K2P 0R3

**Marie-France Major**
Tel: (613) 695-8855 x 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for the Intervener, Criminal Lawyer's Association (Ontario)**

**I N D E X**

## PART I - OVERVIEW

1. This appeal raises the issue of whether, and to what extent, individuals enjoy a reasonable expectation of privacy in public or quasi-public spaces, such as schools.

2. The case comes to the Court as a dispute between the majority and dissenting judges of the Court of Appeal for Ontario about the proper interpretation of the voyeurism offence under section 162 of the *Criminal Code* – in particular, the element of the offence requiring that the accused surreptitiously record an individual "in circumstances that give rise to a reasonable expectation of privacy." The jurisprudential debate on the scope of the voyeurism offence, and the conduct it is meant to prohibit, is an important one. However, as framed by the court below, the dispute between the majority and dissent goes well beyond this issue of statutory interpretation, and has immediate, pressing, and wide-ranging implications for the privacy interests of Canadians at large.

3. The Canadian Civil Liberties Association ("**CCLA**") respectfully submits that the majority decision at the Court of Appeal sets a problematic precedent and creates the prospect of fundamental erosions in bedrock privacy protections, which this Court's jurisprudence has repeatedly enshrined. This Court has long held that privacy is "at the heart of liberty in a modern state."[1] It is "essential for the well-being of the individual."[2] At its core, the intrusion into a person's private life is "an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society."[3]

4. The CCLA submits that the majority's analysis of "reasonable expectation of privacy" does not give sufficient weight to these long-standing principles. It is problematic in two key respects:

(a) First, it reduces the expectation of privacy to a purely locational or territorial concept, which does not accord with this Court's jurisprudence. The majority's reliance on the *Oxford Dictionary* definition of "privacy" as "the state of being free from public attention" has the potential to impoverish the broad legal conception of privacy that has been developed over the last three decades.

---

[1] *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427 [*Dyment*].
[2] *Dyment*, at p. 427.
[3] *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 119.

(b) Second, the majority's approach runs the risk of obliterating privacy protections in public or quasi-public spaces. The majority's conclusion that surveillance in a space obviates any reasonable expectation of privacy from more intrusive surveillance opens up a large gap in privacy rights to the detriment of Canadians.

5. The CCLA submits that this Court should reject the narrow approach to privacy taken by the court below. It should reaffirm that privacy protections do not simply disappear because an individual enters into a public or quasi-public space where he or she may be viewed or observed by others. The analytical framework on privacy developed by this Court is much more nuanced and robust than that. Privacy interests must be assessed in a normative and contextual manner with proper regard to the impact on the individual, regardless of whether the source of the privacy intrusion is the state or an individual. This is a tried and tested approach. It should continue to be applied.

## PART II - ARGUMENT

### A. Governing Principles on Privacy Protection

6. Over the past three decades, this Court has developed a rich body of jurisprudence on privacy rights. Much of that case law has arisen in the context of the section 8 *Charter* protection against unreasonable searches and seizures by state officials. However, the conception of privacy elaborated in the jurisprudence – and the underlying principles that have emerged from it – goes well beyond section 8. The CCLA submits that the following bedrock principles have been established to guide the judicial analysis of privacy rights:

(a) ***Privacy is not an all-or-nothing concept***. In *R. v. Mills*, a case involving the regime for third-party production of private records, this Court held that privacy is not an all-or-nothing proposition.[4] The fact that an individual's private or confidential information can be accessed, shared, or divulged for one purpose does not mean that he or she gives up a reasonable expectation of privacy for all purposes.[5] The existence of a reasonable expectation is a context-specific inquiry. As the Court held in *Schreiber v. Canada (Attorney General)*:

---

[4] *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 108 [*Mills*].
[5] *Mills*, at para. 108; *R. v. Quesnelle*, 2014 SCC 46, at para. 34 [*Quesnelle*].

> … the single most important idea that emerges from the jurisprudence is that expectations of privacy must necessarily vary with the context. This is inherent in the idea that privacy is not a right tied to property, but rather a crucial element of individual freedom which requires the state to respect the dignity, autonomy and integrity of the individual.[6]

(b) ***Privacy protects people, not places***. In the seminal case of *Hunter v. Southam*, the Court rejected a narrow approach to privacy based on territory or location[7] and recognized that legal claims to privacy ultimately inhere in individuals.[8] In doing so, the Court departed from the historical view at common law that privacy was to be designated by places like the home, where one could expect to be shielded from the scrutiny of the state.[9] "Place" is one factor in determining whether a reasonable expectation of privacy exists, but it is not determinative.[10]

(c) ***Courts must assess the "totality of the circumstances***". Since *R. v. Edwards*, this Court has held that whether an individual has an expectation of privacy is based on the totality of the circumstances.[11] No single factor should overwhelm the analysis. A person's subjective expectation is a factor to be considered, but "its absence should not be used too quickly to undermine the protection" afforded to individuals against unacceptable intrusions into their private lives.[12]

(d) ***Privacy is a normative concept***. This Court has repeatedly affirmed that privacy is a "normative rather than a descriptive standard."[13] "[I]n determining whether an individual enjoys a reasonable expectation of privacy, the court is making a value judgment more than a finding of fact in the traditional sense."[14] "Fundamentally,

---

[6] *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, at para. 19.
[7] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 159.
[8] *Dyment*, at pp. 428-29.
[9] *R. v. Marakah*, 2017 SCC 59, at para. 26 [*Marakah*].
[10] *Marakah*, at para. 30. See also *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 62 [*Wong*].
[11] *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45. See also *R. v. Tessling*, 2004 SCC 67, at para. 31 [*Tessling*].
[12] *Tessling*, at para. 42.
[13] *Tessling*, at para. 42.
[14] *R. v. Ward*, 2012 ONCA 660, at para. 82.

the privacy analysis turns on a normative question of whether we, as a society, should expect" that certain private spheres are to be free from outside interference.[15]

(e) ***Privacy is an evolving notion***. Privacy is a "protean" concept.[16] It is flexible, shifting, and fluid. It should evolve in a manner that properly reflects changing societal expectations. This is especially true in light of new and emerging technologies that carry with them the power to allow for ever-greater intrusions into the private lives of individuals. As La Forest J. warned in *R. v. Wong*, "we must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy."[17]

7. The CCLA submits that there is no compelling justification to depart from these guiding principles in the present case. Although the scope of individual privacy interests must be assessed in their context and may change from case to case, the basic analytical framework should not.

## B. Privacy in Public or Quasi-Public Spaces

### *(i) Privacy Protections Extend to Public and Quasi-Public Spaces*

8. Canadians do not surrender their privacy interests when they go out into public. Applying a contextual approach to privacy means that individuals can successfully assert privacy protections in public or quasi-public spaces, such as parks,[18] schools,[19] bus terminals,[20] and similar places accessible to the public. Whether individuals are ultimately afforded such protection depends on the nature of the place, the nature of the privacy interest being asserted, the type of intrusion, and other contextual factors.

9. However, there is no *blanket rule* that privacy stops at a person's doorstep. Quite the opposite. It has long been held that mere presence in a public or quasi-public space does not obviate an expectation of privacy. In *R. v. Wong*, the Court considered a case involving video surveillance

---

[15] *Quesnelle*, at para. 44.
[16] *Tessling*, at para. 25.
[17] *Wong*, at p. 47.
[18] *R. v. Rudiger*, 2011 BCSC 1397 [*Rudiger*].
[19] *R. v. A.M.*, 2008 SCC 19 [*A.M.*].
[20] *R. v. Buhay*, 2003 SCC 30.

of a hotel room which was open to certain members of the public and where illegal gaming activities were taking place. In his concurring reasons, Lamer C.J. made the following instructive comments on analyzing reasonable expectations of privacy:

> The nature of the space in which the surveillance occurs will always be an important factor to consider in determining whether the target has a reasonable expectation of privacy in the circumstances. It is not, however, determinative. A person who is situated in what would normally be characterized as a public space (a restaurant, for example) may well have a reasonable expectation of privacy. For example, he or she would not reasonably expect that the police will surreptitiously monitor and record the private conversation taking place at his or her table.[21]

10. In the same vein, La Forest J. in *Wong* affirmed this Court's rejection of a "risk analysis" approach to privacy which posits that if a person is in public, he or she accepts not only the possibility of being incidentally seen or overheard by others but also the risk of more intrusive forms of surveillance (such as audio or visual recording).[22] The suggestion that individuals somehow attract or open themselves up to the risk of surveillance when they enter into public – and hence give up their privacy rights – has been rejected by this Court on numerous occasions. Presence in public does not preclude the right to privacy.

### *(ii) Students Have a Reasonable Expectation of Privacy in Public Schools*

11. Following a contextual approach, this Court has held that students enjoy privacy protections in public primary and secondary schools. Indeed, there is a long line of authority that students do not forfeit their privacy rights while in school, especially insofar as intrusions by school officials have the potential to affect students' bodily integrity. The fact of being in a quasi-public space like a school may diminish expectations of privacy but it does not eliminate them.

12. In *R. v. A.M.*, the Court dealt with a case concerning the use of sniffer dogs to search a high school student's backpack for drugs and other contraband. Writing for the majority, Binnie J. found that the highly regulated environment of a school may lead to a *lesser* expectation of privacy, but the expectation does not cease to exist.[23]

---

[21] *Wong*, at p. 62.
[22] *Wong*, at p. 51-52. See also *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 48.
[23] *A.M.*, at para. 65.

13. Courts have also held that students have a reasonable expectation of privacy in their physical persons while at school. In *R. v. M.(M.R.)*, the principal of a school searched a junior high school student for drugs in his office while a police officer was present. This Court found that "[a] student attending school would have a subjective expectation that his privacy, at least with respect to his body, would be respected," and that expectation was not "rendered unreasonable merely by virtue of a student's presence in a school."[24] Likewise, in *Gillies (Litigation Guardian of) v. Toronto District School Board*, the Ontario Superior Court held that students attending a school event had a reasonable expectation of privacy in their breath samples.[25]

14. For vulnerable groups such as students and children, there is an added layer to the analysis of reasonable expectation of privacy. Courts should recognize the vital goal of safeguarding the bodily and sexual integrity of students and the inescapable reality that students and teachers/administrators are in a special, trust-like relationship. Privacy interests can and should be informed by our collective societal expectations about the protection of such vulnerable groups.

### *(iii) Surveillance in Public Spaces Does Not Preclude A Reasonable Expectation of Privacy*

15. The CCLA submits that the majority decision at the Court of Appeal stands at odds with the governing framework on reasonable expectation of privacy and the authorities affirming privacy rights in public spaces. The decision has far-reaching implications and raises the spectre of a serious erosion of privacy in public, in particular, spaces that are subject to video surveillance for security purposes. It sets a precedent that, where individuals happen to be in public and might expect to be caught incidentally by security cameras, they relinquish their reasonable expectation of privacy against any other, more intrusive form of surveillance. The majority decision effectively establishes a rule that surveillance for one purpose (i.e., safety and security) sanctions surveillance for all other purposes.

16. This result is highly problematic from a civil liberties perspective. It takes an 'all-or-nothing' approach to privacy in public. It marks a major departure from the normative and contextual inquiry endorsed by this Court. It sacrifices the "totality of the circumstances" on the

---

[24] *R. v. M.(M.R.)*, [1998] 3 S.C.R. 393, at para. 32.
[25] *Gillies (Litigation Guardian of) v. Toronto District School Board*, 2015 ONSC 1038, at paras. 84-89.

altar of a narrow understanding of privacy focussing on "place" or "location" to the exclusion of other factors. It turns back the clock on a quarter-century of progressive privacy jurisprudence.

17. The majority comes to this problematic result by making two key analytical errors.

18. First, it adopts a definition of "privacy" that has no basis in the authorities. It defines "privacy" as "a state in which one is not observed or disturbed by other people; state of being free from public attention."[26] As Huscroft J.A., in dissent, notes, this definition "leads the majority to tie the protection of privacy to the location in which a privacy claim is asserted, as well as the ability to exclude others from that location."[27] But privacy is not exclusively or even primarily a locational or territorial concept. Expectations of privacy must account for a wide range of factors beyond where an individual happens to find herself. Such factors must have regard to values of dignity, bodily integrity, and liberty that privacy rights are meant to safeguard.

19. Second, it applies the very kind of "risk analysis" this Court has long rejected. In a critical passage, the majority explains its justification for why the students who were surreptitiously recorded by their teacher did not benefit from a reasonable expectation of privacy:

> It is clear that students expect a school to be a protected, safe environment. It should be a place where their physical safety, as well as their personal and sexual integrity is protected. However, the 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. While access to school property is often restricted, access is granted to students, teachers, other staff, and designated visitors. Those who are granted access are not prohibited from looking at anyone in the public areas. Here there were security cameras in many locations inside and outside the school. No one believed they were not being observed and recorded.[28]

20. The majority's reasoning is classic "risk analysis": by entering into a quasi-public space which is under constant security surveillance and accessible to many people, students accept the risk of being observed and recorded. According to the majority, that risk includes not only the risk of being viewed or observed in a transient way (e.g., being looked at by others in the school), or the risk of being subjected to regulated video recording (e.g., being recorded by a camera installed

[26] Court of Appeal reasons, at paras. 93-94.
[27] Court of Appeal reasons, at para. 124.
[28] Court of Appeal reasons, at para. 104.

for security purposes as governed by a relevant privacy statute), but also, by extension, the risk of more intrusive forms of recording (e.g., by any private individual for any other purpose).

21. Applied more broadly, this reasoning holds the potential to obliterate any reasonable expectation of privacy when an individual goes out into any public space. If the mere presence of video surveillance obviates the reasonable expectation of privacy of everyone who may be captured by camera footage, public and private actors may effectively determine the scope of privacy protections enjoyed by individuals in public spaces by simply deciding whether or not to install a system of surveillance. This result bootstraps privacy to the detriment of civil liberties across Canada.

22. This is a particularly dangerous result in an era of increasing video surveillance and technological development. It raises many troubling questions. For instance, can governments preclude a reasonable expectation of privacy of citizens in public by implementing a system of video surveillance on public streets? Can private individuals put up cameras in front of their homes and thereby prevent their neighbours from enjoying a reasonable expectation of privacy in their neighbourhoods? Can business owners do the same with respect to their patrons?

23. Canadians are often subjected to surveillance in public and quasi-public spaces. This is only likely to increase. A legal regime that implies consent to surveillance where there is none poses a significant constitutional risk. The technologies used to engage in surveillance are also increasingly sophisticated, available, and affordable for private purchase, and allow for close analysis of the visual data that is captured. The fact that individuals may accept limitations on their privacy in public for one purpose (e.g., video surveillance for security purposes) does not mean that they should be required to accept it for other purposes (e.g., surreptitious close-ups for a sexual purpose).

### *(iv) Reaffirming the Totality of the Circumstances Framework*

24. In lieu of the majority's analysis, this Court should reaffirm the totality of the circumstances test in assessing whether individuals enjoy a reasonable expectation of privacy in public or quasi-public spaces. That approach should apply whether a court is analyzing privacy interests under the section 8 rubric, in the context of a statute, or at common law. The factors relevant to this analysis include the following:

(a) ***Nature of the space/location***: The court may look to whether the space is public or quasi-public, to whom it is accessible, under what circumstances, and the activities that occur there.[29] An examination of the physical properties of a space may also be relevant – for example, the presence of fences or other barriers and the level of relative exposure or seclusion.[30]

(b) ***Rules or regulations that apply to the space:*** Are there by-laws, policies, or other rules and regulations that govern how people use or enjoy the space? Are there laws, policies, or social norms that limit or constrain the type of conduct that is acceptable? For instance, a by-law prohibiting photography may affect whether an individual has a reasonable expectation of privacy in not being recorded.[31]

(c) ***The presence of already existing forms of surveillance***: Surveillance may diminish or lessen an expectation of privacy, but it will not eliminate it. The purpose of the surveillance and the laws, regulations, or rules governing that surveillance, including applicable privacy legislation, will be relevant factors. Surveillance for security should not, in and of itself, sanction more intrusive surveillance.[32]

(d) ***The individual whose privacy interests are being invoked***: The court may consider whether the individuals are vulnerable and whether they are in a trust-like relationship with the person who is alleged to have interfered with their privacy.

(e) ***The nature of the intrusion***: The court may inquire into the types of interests that have been affected and how. Does the intrusion impact the individual's bodily or sexual integrity such that it is a violation of basic human dignity? Is it a minimal intrusion for a legitimate objective such as safety? This analysis requires a case-by-case assessment of the impugned conduct and its consequences.

(f) ***Use and capabilities of technology***: The court may take into account what are acceptable or unacceptable uses of the technology in question and its capabilities –

---

[29] *R. v. Lebenfish*, 2014 ONCJ 130, at para. 40 [*Lebenfish*].
[30] *Rudiger*, at para. 77.
[31] *Lebenfish*, at para. 41.
[32] *R. v. Ley and Wiwchar*, 2014 BCSC 2108, at paras. 30-35.

for example, the ability to single out an individual for inspection and to disseminate the information that is captured.[33]

(g) ***Control or expectations about control over personal information***: Individuals have a right to determine when, how, and to what extent they wish to release or allow the use of personal information about themselves.[34] As this Court held in *R. v. Marakah*, the fact that an individual does not have direct control over such information does not deprive her of a reasonable expectation of privacy.[35] For instance, young people have legitimate expectations about how and to what extent sexual imagery of them can be captured, stored, or disseminated.[36]

## PART III - CONCLUSION

25. The setting for this case is a school. However, it is increasingly likely that individuals will encounter some form of public or private surveillance technology as they move through pubic and quasi-public spaces. It is a major constitutional risk to suggest that any space subject to regulated surveillance for security purposes is a zone where no reasonable expectation of privacy can exist in any context. This is not a risk that we should be willing to accept in a free and democratic society.

26. Put simply, recognizing that we may be surveilled in public does not mean that we lose our privacy rights when we step out of our front doors. The inquiry into reasonable expectation of privacy in this case deserves a nuanced and contextual regard to the bedrock privacy principles that have repeatedly and rightly informed decisions from this Honourable Court.

Dated at Toronto, Ontario this 6th day of April, 2018.

Jonathan C. Lisus / Zain Naqi

Counsel for the Intervener,
Canadian Civil Liberties Association

---

[33] *Rudiger*, at paras. 107-110.
[34] *Tessling*, at para. 23.
[35] *Marakah*, at paras. 54-55.
[36] *R. v. Barabash*, 2015 SCC 29, at paras. 27-30.

## PART IV – TABLE OF AUTHORITIES

| No. | Authority | Paragraph Reference |
|---|---|---|
| 1. | *Simon Gillies et al v. Toronto District School Board*, 2015 ONSC 1038 | 13 |
| 2. | *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 | 6(b) |
| 3. | *R. v. A.M.*, 2008 SCC 19 | 8, 12 |
| 4. | *R. v. Barabash*, 2015 SCC 29 | 24(g) |
| 5. | *R. v. Buhay*, 2003 SCC 30 | 8 |
| 6. | *R. v. Duarte*, [1990] 1 S.C.R. 30 | 10 |
| 7. | *R. v. Dyment*, [1988] 2 S.C.R. 417 | 3, 6(b) |
| 8. | *R. v. Edwards*, [1996] 1 S.C.R. 128 | 6(c) |
| 9. | *R. v. Lebenfish*, 2014 ONCJ 130 | 24(a), 24(b) |
| 10. | *R. v. Ley and Wiwchar*, 2014 BCSC 2108 | 24(c) |
| 11. | *R. v. M.(M.R.)*, [1998] 3 S.C.R. 393 | 13 |
| 12. | *R. v. Marakah*, 2017 SCC 59 | 6(b), 24(g) |
| 13. | *R. v. Mills*, [1999] 3 S.C.R. 668 | 6(a), |
| 14. | *R. v. O'Connor*, [1995] 4 S.C.R. 411 | 3 |
| 15. | *R. v. Quesnelle*, 2014 SCC 46 | 6(a), 6(f) |
| 16. | *R. v. Rudiger*, 2011 BCSC 1397 | 8, 24(a), 24(f) |
| 17. | *R. v. Tessling*, 2004 SCC 67 | 6(c), 6(d), 6(e), 24(g) |
| 18. | *R. v. Ward*, 2012 ONCA 660 | 6(d) |
| 19. | R. v. Wong, [1990] 3 S.C.R. 36 | 6(b), 6(e), 9, 10 |
| 20. | *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 | 6(a) |

## PART V - STATUTORY PROVISIONS

*Criminal Code*, **R.S.C. 1985, c C-46**

| | |
|---|---|
| **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<br><br>*(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;<br><br>*(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<br><br>*(c)* the observation or recording is done for a sexual purpose. | **162 (1)** Commet une infraction quiconque, subrepticement, observe, notamment par des moyens mécaniques ou électroniques, une personne — ou produit un enregistrement visuel d'une personne — se trouvant dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée, dans l'un des cas suivants :<br><br>*a)* la personne est dans un lieu où il est raisonnable de s'attendre à ce qu'une personne soit nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite;<br><br>*b)* la personne est nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite, et l'observation ou l'enregistrement est fait dans le dessein d'ainsi observer ou enregistrer une personne;<br><br>*c)* l'observation ou l'enregistrement est fait dans un but sexuel. |