

Table of Contents

<i>About the Contributors</i>	iii
<i>Table of Cases</i>	xiii
Chapter 1 The Reasonable Expectation of Privacy: Digital Interests in the Supreme Court of Canada in Section 8 Jurisprudence (2010-2020) – by Richard Jochelson and David Ireland	
1. Introduction	1
2. A Quick Review of the REP Analysis	4
3. Digital Privacy in the Last Ten Years (2010-2020).	8
4. Future Trends and Challenges	26
5. Conclusion	32
PART 1: RETHINKING A “REASONABLE EXPECTATION OF PRIVACY”	
Chapter 2 Reasonable Expectations of Privacy as Rights – by Hamish Stewart	
1. Introduction	35
2. A Reasonable Expectation of Privacy as a Rights-Related Concept.	37
3. Illuminating Some Conundrums	41
(a) Third-Party Records	41
(b) <i>Marakah</i> and <i>Mills</i> : Aspects of Electronic Communications.	44
(c) The Offence of Voyeurism	52
4. Conclusion	57
Chapter 3 Ought from Is: Towards Truly Reasonable Expectations of Privacy – by Avner Levin	
1. Introduction	59
2. What Expectations of Privacy Are Now	62
3. What Others Have Said About Expectations of Privacy.	76
4. What Expectations of Privacy Should Become.	79
5. Conclusion	87
Chapter 4 Clarifying the Role of “Control” in Section 8 Jurisprudence – by Pierre-Luc Déziel	
1. Introduction	89

- 2. The Traditional Roles of Control in Section 8 Jurisprudence . . . 91
 - (a) The Role of Control in the Territorial Realm. 92
 - (b) The Role of Control in the Informational Realm. 96
 - (c) Preliminary Conclusion 102
- 3. Assigning a New Role to Control in the Information Context in *Marakah* 103
 - (a) The Decision of the Ontario Court of Appeal: *Marakah* Through a Territorial Lens. 104
 - (b) The Decision of the Supreme Court of Canada: *Marakah* Through an Informational Lens. 106
 - (c) The Issue of Confusing Control as the Consequence and Control as the Cause of Engaging Section 8 110
- 4. Conclusion 118

PART 2: REASSESSING PRIVACY RIGHTS

Chapter 5 Toward Survivor-Centred Outcomes for Targets of Privacy-Invasive TFVA: Assessing the Equality-Affirming Impact of *R. v. Jarvis* – by Jane Bailey and Jasmine Dong

- 1. Introduction 121
- 2. The Privacy/Equality Connection in TFVA 124
 - (a) Interpersonal Privacy-Invasive TFVA 125
 - (b) Corporate and State-Perpetrated Privacy Invasions 128
- 3. Why Explicit Equality Analyses of Privacy Might Matter 129
- 4. *R. v. Jarvis*: Equality-Adjacent Privacy Analysis 135
- 5. The Impact of *Jarvis* on Subsequent Case Law 138
 - (a) Attention to Social Context Post-*Jarvis* and the Beginnings of an Intersectional Approach. 140
 - (b) Post-*Jarvis* Decisions Avoiding “Victim-Blaming” Logic . . 143
 - (c) Cultural and Attitudinal Shifts Promoted by *Jarvis* 146
 - (d) Centring of Survivors’ Perspectives in Decisions Post-*Jarvis* 150
- 6. Conclusion 151

Chapter 6 Voyeurism and the *Charter*: A Comment on the Supreme Court of Canada’s Privacy Principles in *R. v. Jarvis* – by Chris D.L. Hunt

- 1. Introduction 155
- 2. Judicial Approaches to Voyeurism in *R. v. Jarvis*. 157
 - (a) Background 157
 - (b) Trial Decision 158
 - (c) Ontario Court of Appeal Decision 158
 - (d) Supreme Court of Canada Decision. 160
 - (i) Majority Reasons. 160

(ii) Concurring Reasons	163
3. Reflections on the Privacy Principles in <i>R. v. Jarvis</i>	165
4. Conclusion	178
Chapter 7 Digital Privacy in Civil Discovery: The Relevance of “Charter Values” – by Nayha Acharya and Robert J. Currie	
1. Introduction	179
2. Privacy in the Discovery Process	181
(a) The Procedural Backdrop	181
(b) Privacy Protections	183
(c) What Role for the <i>Charter</i> ?	185
3. Why <i>Should</i> Privacy Matter?	188
(a) Key Values Underpinning Privacy Rights and Legitimate Adjudicative Fact-Finding	188
(b) Legitimacy of Civil Justice Fact-Finding Procedures	191
(c) Recent Canadian Case Law	194
(i) Nova Scotia	196
(ii) British Columbia	199
(iii) Ontario	202
(d) Summation of the Case Law Presented	207
4. Conclusion	208
Chapter 8 Courts in the Digital Age: “Adaptive Leadership” for Harnessing Technology and Enhancing Access to Justice – by Karen Eltis	
1. Introduction: AI and Decision-Making in Context.	211
2. Overview of the Unintended Effects of Harnessing Technology in the Justice Context	215
(a) From <i>A.B. to Costeja</i> and Beyond: Defining and Protecting Court Data	215
(i) A Step Forward	218
(ii) From the General to the Specific: A Sampling from Comparative Practice: Recommendations	219
A. Securing Paperless Documents.	219
B. Limiting the Details Unleashed Digitally to the Minimum Necessary, Contextually and Proportionally	219
(iii) Additional Technological Tools to Palliate Access Issues	220
(b) Triage Between and Among Cases: Developing Criteria for “Going Digital”.	221
(c) Inching Towards a Civilian Approach: From an Adversarial to an Inquisitorial View?	224
3. Artificial Intelligence	227
4. Conclusion	231

PART 3: NEW FRONTIERS IN CHARTER JURISPRUDENCE

Chapter 9 Tracking and Tracing During the Pandemic: Technology, Privacy and a Public Health Crisis – by Teresa Scassa

1. Introduction 233

2. Contact-Tracing and Exposure Notification Apps 235

3. The *Charter* and Digital Contact-Tracing 237

4. Necessity and Proportionality 240

 (a) Pressing and Substantial Objective: Pandemic Contact-Tracing 241

 (b) Proportionality 245

 (i) Rational Connection. 245

 (ii) Minimal Impairment 245

 A. Alternatives to Digital Contact-Tracing 246

 B. Location vs. Contact Data 247

 C. Centralized vs. Decentralized Storage. 248

 D. Mandatory vs. Voluntary 250

 E. Balancing Goals and Impacts. 253

5. Conclusion 257

Chapter 10 Familial DNA Searching and the *Charter* – by Colton Fehr

1. Introduction 261

2. Familial Searches. 263

3. Addressing Legal Barriers to a *Charter* Claim 264

 (a) Reasonable Expectation of Privacy 265

 (b) Application to Familial DNA Searches 268

 (c) Third-Party and Police Databases: A Distinction With(out) a Difference? 271

4. Constructing a “Reasonable” Search Power. 271

 (a) Exigent Circumstances 272

 (b) Warrantless Searches 276

 (c) External Limits 278

5. Conclusion 281

Chapter 11 Striking the Right Balance? Complainant Privacy and Full Answer and Defence in the New First-Party Records Regime – by Robert Diab and Robyn Young

1. Introduction 283

2. Context, Scope and Nature of the First-Party Records Regime 285

3. A Survey of the Early Case Law 291

 (a) Is the Document a “Record” under Section 278.1? 291

 (b) Cases on Admissibility under Section 278.92 296

 (c) Cases on the Timing of an Application 299

TABLE OF CONTENTS

xi

4. Are the Amendments Effective?	301
5. Conclusion	305

