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Ontario Justice Education Network

TOP FIVE 2014

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

CANADA (ATTORNEY GENERAL) v BEDFORD, 2013 SCC 72, [2013] 3 SCR 1101.

Date Released: December 20, 2013

http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do

Facts

Prostitution is not illegal in Canada, but a number of activities related to prostitution were against the law. Three sex workers brought an application in the Ontario Superior Court of Justice challenging the constitutionality of several of Canada's prostitution laws. Specifically, they challenged s. 210 of the *Criminal Code of Canada*, which prohibits operation or attendance at a bawdy-house; s. 212(1)(j), which prohibits living on the avails (proceeds) of prostitution; and s. 213(1)(c), which prohibits communicating in public for the purpose of prostitution.

The applicants' argument was that these laws increased the risk of death and bodily harm faced by sex workers because they made it more difficult for them to take steps to ensure their safety, like working indoors, hiring security guards or "screening" potential clients by talking to them in safe public places before being alone with them. Therefore, they argued, these laws deprived sex workers of their right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Procedural History

The Superior Court of Justice found all three *Criminal Code* provisions to be unconstitutional in violation of s. 7 of the *Charter*. The Ontario Court of Appeal (ONCA) unanimously denied the appeal with regard to ss. 210 and 212(1)(j). But with regard to the communication provision, s. 213(1)(c), the majority sided with the government and found that it was constitutional. The minority dissented with that finding.

Issues

1. Do the *Criminal Code* provisions infringe the applicants' right to security of the person under s. 7 of the *Charter*?
2. If security of the person is infringed, is it in accordance with the principles of fundamental justice?
3. If the infringement is not in accordance with the principles of fundamental justice, can it be justified under s. 1 of the *Charter*?

Decision

Appeal denied; cross-appeal granted. The SCC granted a declaration that the provisions are void as unconstitutional, but suspended the declaration's effect for one year to allow Parliament to enact new legislation.

Ratio

A unanimous Supreme Court of Canada (SCC) agreed with the ONCA in finding that the "bawdy-house" and "avails" provisions infringed on the applicants' s. 7 rights. Moreover, the Court also overturned the ONCA finding with respect to the "communication" provision. In this decision, the Court found the latter provision was also in violation of the *Charter*, that none of the violations were in accordance with the principles of fundamental justice and that none of the three provisions could be saved under s. 1 of the *Charter*. The laws, which are designed to limit the nuisance that prostitution imposes on the community, go too far and impose a disproportionate risk on the health and safety of sex workers. As such, the *Criminal Code* provisions are not consistent with the principles of fundamental justice.

Reasons

The SCC found that the right to security of the person is infringed because these laws prevented people who are engaged in a risky -- but legal -- activity from taking steps to protect themselves from the risks. The SCC drew an analogy between the *Criminal Code* provisions and a law that prevents motorcyclists from wearing helmets. Such a law has the effect of increasing the danger of an already hazardous activity.

Next, the SCC considered whether the *Criminal Code's* infringement on the right to security of the person were in keeping with fundamental justice. The principles of fundamental justice are the basic values underpinning the constitution. According to the SCC, a law is contrary to these basic constitutional values when the state seeks to attain its objective in a fundamentally flawed way. The SCC pointed to three attributes of fundamental justice that might be engaged in this case. The first is **arbitrariness**, where there is no connection between the goal of the law and its effect. The second is **overbreadth**, where the law goes too far and interferes with conduct that has nothing to do with the goal of the law. Third, **gross disproportionality** occurs where the effect of the law is far more severe than is necessary to meet the state's objective.

The SCC found that s. 210, the bawdy house provision, violates security of the person since it forces prostitutes into the streets rather than a fixed indoor location. Such a provision is not in accordance with fundamental justice since the impact on the applicants' security of the person is grossly disproportionate to its objective, which is to protect communities from the nuisance of "sex shops". Regulating against such nuisances cannot come at the expense of the health, safety and lives of prostitutes, whose work is legal.

The SCC also found that s. 212(1)(j), the living on the avails provision, infringes the applicants' right to security since it prevents prostitutes from hiring bodyguards, drivers and receptionists. The purpose of the avails law is to protect prostitutes from exploitative pimps. Prohibiting safety and security services goes too far in pursuit of the law's objective, and so the SCC found the law to be overbroad and therefore not in accordance with the principles of fundamental justice.

Finally, the SCC found that s. 213(1)(c), the communication provision, infringes security because it prevents prostitutes from screening clients and pushes them to work in isolated areas. The negative impact of this provision on the safety and lives of street prostitutes is grossly disproportionate to the possible nuisance that these prostitutes could cause by communicating for business purposes, and it is therefore not in accordance with fundamental justice.

The SCC concluded that the *Criminal Code* provisions violate s. 7 of the *Charter* and are not justified under s. 1 of the *Charter*. It noted that the government had "not seriously argued" that the provisions, if found to infringe s. 7, could be justified under s. 1.

DISCUSSION

1. What was the basic argument made by the applicants on behalf of sex workers?

2. Does it surprise you that prostitution is legal in Canada? If so, why do you think you had a different impression?

3. How do you think the analysis in this case would change if prostitution were illegal?

4. Does the ability of the court system to use of s. 7 of the *Charter* to change legislation undermine Parliamentary democracy? Can you think of other laws that may be challenged through the courts as infringing s. 7 of the *Charter*?

5. Social research shows that prostitution is a profession that often attracts people who have histories of being victims of violence and sexual abuse.
   a. How might this make them vulnerable to manipulation and further abuse by managers ("pimps") and clients?
   b. Should the government's response be to increase the legal protection of sex workers, or should the government focus on creating supportive social programs for at-risk people to provide them a safer alternative to earning a living? Are they mutually exclusive options? Explain your answer.

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TSILHQOT'IN NATION v BRITISH COLUMBIA, 2012 SCC 47, [2012] 2 SCR 584

Date Released: June 26, 2014

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do

Facts

In the process of colonizing Canada the British Government, or Crown, entered into legal agreements with many of the diverse groups of Native people who had long been established here. These agreements, called **treaties**, set out the terms whereby Indigenous peoples gave up their claim to their traditional lands in exchange for reservations of land and other promises. While this happened throughout most of Canada, for the most part, it did not happen in British Columbia. The Tsilhqot'in Nation, a semi-nomadic Indigenous group, is one of hundreds of Indigenous groups in British Columbia with unresolved land claims.

In 1983, the Province of British Columbia granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. In order to try to prevent this logging from happening, a claim was made for **Aboriginal title** to the land at issue on behalf of all Tsilhqot'in people. Aboriginal title is the concept that an Aboriginal group's rights to their traditional lands survived the European settlement and remain valid unless they have been legally surrendered through a treaty or another formal legal process. Title claims require the group making the claim to show that their ancestors occupied the land in question prior to European assertion of sovereignty. In other words, they would need to establish that the land was under the group's control before it was claimed as new territory of a colonial state. The federal and provincial governments opposed the title claim.

Procedural History

The British Columbia Supreme Court determined that to prove their title claim, occupation could be established by showing regular and exclusive use of sites or territory within the claim area. After considering the evidence presented, the Court ruled that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities. The governments appealed.

The British Columbia Court of Appeal applied a narrower test for Aboriginal title: site-specific occupation. This Court held that, to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty. Based on this formulation, the Court of Appeal held that the Tsilhqot'in claim to Aboriginal title had not been established. The Tsilhqot'in appealed to the Supreme Court of Canada (SCC).

Issues

1. How should Canadian courts define "occupation" of land for the purpose of assessing claims for Aboriginal title?
2. If Aboriginal title is established, what rights and responsibilities does it confer to the Crown and the Aboriginal group in question?
3. Under what circumstances, if any, could these rights and responsibilities be limited?

Decision

A unanimous SCC allowed the appeal and granted a declaration of Aboriginal title over the area requested.

Ratio

The SCC clarified the test for establishing Aboriginal title by laying out more specific rules for defining "occupation" of land. Chief Justice McLachlin, writing for the unanimous SCC, determined that to make a successful claim for Aboriginal title, the Aboriginal group has the burden of meeting three criteria. The occupation must be:

1) **Sufficient**, meaning a strong presence that displays acts that demonstrate the land in question belonged to, was controlled by, or was under the exclusive guardianship of the claimant group.
2) **Continuous**, meaning that the present occupation must be rooted in pre-sovereignty times; and
3) **Exclusive**, meaning the Aboriginal group had the intention and capacity to retain exclusive control over the lands.

The SCC also ruled that in cases where Aboriginal title is claimed, the Crown has a duty to consult in good faith with potential claimant groups and seek consent for the use of the land even before title is proven in the courts. Furthermore, where the government's proposed use of the land is likely to have a negative impact on the group's use of it in the future, the government may be required to accommodate the claimants.

Reasons

The SCC found that the trial judge appropriately applied the correct legal test to the evidence, and affirmed the trial judge's decision to grant Aboriginal title to the Tsilhqot'in. Although their population was small, the Tsilhqot'in regularly used the land, satisfying the "sufficient occupation" requirement. They were able to meet the "continuous occupation" requirement by showing that Tsilhqot'in people had maintained a presence over time in the same or nearby areas. Exclusivity was established by evidence that prior to sovereignty, the Tsilhqot'in actively worked to keep others from occupying the land they considered to be their own and demanded permission from outsiders who wished to use the land.

According to the SCC, to have Aboriginal title means that the Indigenous group has the exclusive right to decide how the land is used and the right to benefit from those uses. But, Aboriginal title is collective, meaning it is held not only for the present generation but also for all succeeding generations. Therefore, the land cannot be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Chief Justice McLachlin noted, however, that this limitation on the use of land does not prevent the land from being used in modern ways. In other words, an Aboriginal group can decide to use title land in modern ways if these uses still protect the benefit of the land for future generations.

Finally, the Court clarified that while Aboriginal title means that the Crown must normally obtain consent from the title holder to use title land, there are some conditions under which Aboriginal title can be overridden. Specifically, the government must show:

1) That it met its obligation to consult and accommodate the Aboriginal group;
2) That its actions were backed by a compelling and substantial objective; and
3) That its action is consistent with the duty to respect the collective nature of Aboriginal title and to act balance the adverse effects on the Aboriginal interest.

The result is a balance that preserves the Aboriginal right while permitting effective regulation by the province. The SCC found that in this case, the province failed to consult the Tsilhqot'in or accommodate their interests in issuing commercial licenses affecting the land. The government therefore breached its legal duty of care to the Tsilhqot'in people.

DISCUSSION

1. What is a treaty?

2. What is Aboriginal title?

3. How should disputes among the individuals of the group that holds Aboriginal title be settled? What if members of the group disagree about how to use the land?

4. What are some potential benefits and drawbacks to modern uses of land, like mining or pipelines, and traditional uses, like hunting and fishing?

5. Only 200 of the 400 members of the Tsilhqot'in Nation live on the lands in question. Should band members who live elsewhere participate in the decisions about the land's use? What about sharing in the profits from the land?

6. Métis peoples trace their descent from mixed ancestry of First Nations and Europeans. If Aboriginal title requires proof of occupation prior to the settlement of Europeans, does this mean that Métis peoples can never establish Aboriginal title?

   Would this be fair? Explain.

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R. v SPENCER, 2014 SCC 43.

Date Released: June 13, 2014

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14233/index.do

Facts

18 year-old Matthew David Spencer, of Saskatoon, used LimeWire, which is a free peer-to-peer file-sharing program, to download and store child pornography. He was living with his sister at the time and was using internet service registered to her name. Peer-to-peer systems such as LimeWire do not have one central database of files, but instead allow their users to share files with other users. Such systems are commonly used to download music and movies.

A Saskatoon police officer signed onto LimeWire to search for users sharing child pornography. When Spencer's computer was connected to LimeWire, the officer was able to browse the contents of his "shared folder", which was available to all LimeWire users. The officer saw what he believed to be child pornography in the folder. Through further investigation, police were able to determine the Internet Protocol (IP) address of Spencer's computer, that was in Saskatoon and that Shaw Communications Inc. (Shaw) was the Internet Service Provider (ISP).

The police made a "law enforcement request" to Shaw for the subscriber information including the name, address and telephone number of the customer using that IP address. The request was made under s. 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5

7(3). […]an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation related to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law.

The request indicated that police were investigating child pornography and that the subscriber information was being sought as part of an ongoing investigation. The police did not have, nor did they try to obtain, a search warrant. Shaw complied with the request and provided Mr. Spencer's sister's personal subscriber information. As a result, Mr. Spencer was identified and charged with possessing and making available child pornography, which are offenses under the *Criminal Code of Canada*.

Canadian Charter of Rights and Freedoms

8. Everyone has the right to be secure against unreasonable search or seizure.

24(1). Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2). Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Procedural History

At trial, Spencer was convicted of possession of child pornography but acquitted of making available child pornography. The Saskatchewan Court of Appeal affirmed the conviction for possession, set aside the acquittal for making available child pornography and ordered a new trial. Mr. Spencer appealed both the conviction and the new trial order to the Supreme Court of Canada (SCC).

Issues

1. Did the conduct of the police in obtaining the subscriber information from the ISP constitute a "search" within the meaning of s. 8 of the *Charter*?
2. If so, was the search authorized by law?
3. If not, should the evidence obtained as a result be excluded pursuant to s. 24(2) of the *Charter*?

Decision

The SCC unanimously dismissed the appeal. Justice Cromwell, writing for the Court, found that the request by the police for the subscriber information indeed constituted a "search" within the scope of s. 8 of the *Charter*. Furthermore, the search was not conducted legally. However, the SCC ultimately decided that the evidence obtained through the unauthorized search should not be excluded from the record in the new trial.

Ratio

Whether police conduct is considered a search or seizure for the purposes of s. 8 of the *Charter* depends on whether the accused had a reasonable expectation of privacy in the information produced. The Court found that there is a reasonable expectation of privacy in subscriber information like that produced by Shaw to the police. The disclosure of this information will often amount to the identification of a user and expose his or her intimate or sensitive activities being carried out online, usually on the understanding that these activities are anonymous. Accordingly, a request by a police officer to an ISP for the voluntarily disclose such information amounts to a search.

Reasons

At trial, Spencer argued the police had infringed his right to be secure against unreasonable search or seizure under s. 8 of the *Charter*. The SCC first had to determine whether the conduct of the police was indeed a search. In examining the connection between the police's investigative technique and the privacy interest at stake, the SCC not only looked at the nature of the precise information sought, but also at the nature of the information that it reveals. Writing for the SCC, Justice Cromwell took the view that the basic information regarding the identity of a subscriber of an internet connection (like their name and address) is linked to particular, monitored Internet activity and would reveal intimate details of the lifestyle and personal choices of the individual. This is important since an internet user only reveals this intimate personal information with the belief that their online activities are anonymous.

The SCC explored whether Mr. Spencer's expectation of privacy in this case was reasonable. It examined Shaw's Terms of Service since they were relevant in assessing the reasonableness of a subscriber's expectation of privacy. Shaw's Terms of Service, taken as a whole, provided a confusing and unclear picture of what it would do when faced with a police request for subscriber information. Since the Terms of Service could not be relied on to justify the disclosure of subscriber information, the SCC found that Spencer's expectation of privacy was indeed reasonable.

The next question examined by the SCC was whether s. 7(3)(c.1)(ii) of *PIPEDA* authorized the disclosure of personal information. That section of the law allows an organization to disclose personal information as long as the request is made by someone with the "lawful authority" to make it. For the police to have lawful authority, they would need either a warrant or a statute (law) authorizing them to act.

The SCC was not convinced that the police could properly identify its lawful authority to obtain the subscriber information in these circumstances without the support of a warrant. Other sections of *PIPEDA* specifically require telecom companies to disclose private information when the police do have a warrant. From this, the

SCC determined that *PIPEDA* was effectively creating an investigative power for police to get information that would normally require a warrant without seeking one. The Court noted that because the stated purpose of *PIPEDA* was actually to increase individual privacy, this was inconsistent with the intent of the legislation. *PIPEDA* could not serve as the authority to demand information – that would require new and duly enacted legislation for that explicit purpose. Without appropriate legal authority, the disclosure was an infringement of Mr. Spencer's privacy.

Justice Cromwell clarified that the illegality of Mr. Spencer's actions did not cancel his privacy rights. As Mr. Spencer was engaged in online activity for which he had a reasonable expectation of privacy and anonymity, the police had no authority to force Shaw to provide identifying information. Without a warrant, the police could **ask** for the information, but they had no authority to **compel** Shaw to grant the request. In other words, privacy rights mean the police cannot use anonymous IP addresses as the starting point in "fishing expeditions" to identify specific suspects for investigation. However, the SCC was clear that an ISP in general has a legitimate interest in preventing crimes committed through its services, thus entirely different considerations may apply where an ISP detects illegal activity on its own and wishes to report this activity to the police.

Section 24(2) of the *Charter* provides the courts with a test that can be used to determine whether evidence of a crime that was collected through a violation of *Charter* rights can still be presented at trial. Two key points in this test are a) whether the police were acting in good faith in their investigation, and b) whether public perception of the justice system would be harmed more by including or excluding the evidence. Although Mr. Spencer's constitutional right against unreasonable search was violated, the SCC found that the police were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. In the Court's view, the nature of the police conduct in this case would not harm public perceptions of the justice system. On the contrary, the offences in this case were serious and society had a strong interest in prosecuting Mr. Spencer. Therefore, the SCC ruled that excluding the evidence would bring the administration of justice into disrepute. The lower court's conviction for possession of child pornography was upheld and a new trial was ordered for Mr. Spencer on the charge of making child pornography available.

DISCUSSION

1. How well do you understand your ISP's privacy policy? When you are online, do you think of yourself as anonymous? Why or why not?

2. Do you agree with the Court that monitoring someone's online activity would reveal deeply personal and private information? Could it reveal information that was sensitive, but not illegal?

3. Before *Spencer* it had become commonplace for police to obtain identifying information about Canadians from ISPs. What is the harm in allowing the police to continue that practice in cases such as this?

4. In your opinion, will police investigations of similar cases be significantly delayed because they must apply for a search warrant?

5. The SCC was convinced that the seriousness of the offence was enough to include the evidence at trial, even though it was obtained unlawfully. In your opinion, should this be true of other anonymous cyber-crimes, like harassment, identity theft or leaking classified documents? Explain.

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REFERENCE v SENATE REFORM, 2014 SCC 32, [2014] 1 SCR 704.

Date Released: April 25, 2014

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13614/index.do

Facts

Under Canadian law, lawmakers can submit a question to the courts if they need an opinion on an important legal question. These questions are called **references** and they typically seek input about whether a proposed law is constitutionally valid.

When establishing Canada's political structure, the framers of the *Constitution Act, 1867*, sought to adapt the British form of government. They preserved the British structure of a lower lawmaking chamber made up of elected representatives (the House of Commons) and an upper lawmaking chamber whose members were appointed by the head of state (the Senate). The role of the Senate is to carefully study laws proposed by the House of Commons before they are adopted, and all laws require Senate approval in order to come into effect. The Senate was also intended to provide regional representation as opposed to representation according to population. This was to ensure that each distinct region in Canada would have a chance to be represented in the law-making process. Over time, the Senate additionally came to represent various groups that were under-represented in the House of Commons and therefore did not always have a meaningful chance to present their views through the majority rules democratic process.

Even though the Senate is one of Canada's foundational political institutions it has been subject to calls for reform since its beginnings. Some of these criticisms are that the Senate does not provide effective oversight or meaningfully represent the interests of the provinces, that it lacks democratic legitimacy, and that appointments are based on political favours rather than merit. In light of these criticisms, and the occurrence of a number of scandals involving Senators, the Government of Canada brought forth several questions to the Supreme Court of Canada (SCC) in an attempt to determine the scope of Parliament's powers to reform the Senate and the steps necessary to effect such change.

Procedural History

On February 1, 2013, the Governor General, under s. 53 of the *Supreme Court Act*, asked the SCC for a reference on four key issues related to the constitutional procedures required to reform or abolish the Senate.

Issues

1. Can Parliament unilaterally set fixed terms of office for Senators?
2. Can Parliament enact legislation that provides a means of consulting the population of each province and territory as to its preferences for potential nominees for appointment to the Senate?
3. Can Parliament unilaterally remove the requirement that Senators must own land worth $4,000 in the province for which they are appointed and have a net worth of at least $4,000?
4. If Parliament wished to abolish the Senate, which of two processes would it need to follow: the **general amending formula** (which requires the support of most of the provinces" or the **unanimous consent procedure** (which requires the support of all of the provinces as well as the House of Commons and the Senate itself)?

Decision

1. Parliament cannot unilaterally fix terms for Senators. The general amending formula applies because such a decision engages the interests of the provinces.
2. Parliament cannot unilaterally enact legislation that creates a consultative election scheme for the appointment of Senators. The entire "method of selecting Senators" is subject to the general amending procedure.
3. Parliament can act on its own to abolish land ownership and personal net worth requirements for Senate appointees, since doing so does not affect the interests of the provinces.
4. The unanimous consent procedure rule, rather than the general amending formula, applies to outright abolition of the Senate.

Ratio

The federal government cannot make sweeping unilateral changes to the Senate. The Senate is a constitutionally-created body, and laws that would change how it is composed or criteria for its members are subject to the same rules as other constitutional law. Parliament can singlehandedly make changes to the Senate that do not alter its fundamental nature and role, but for significant changes that have an impact on the interests of the provinces and territories, the processes that are in place must still be followed.

Reasons

In answering the Governor General's questions, the SCC began by laying out the framework for constitutional amending procedures. In the *Constitution Act, 1982, (the "Act")* there are several key rules to consider. First, s. 44 sets out one rule, known as the **unilateral federal amending procedure**. It states that the federal Parliament "… may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons".

While this might appear to give Parliament the power to make unilateral changes, in fact this power is limited by ss. 41 and 42 of the *Act*. Among other conditions, these two sections clarify what procedures are to be followed for making constitutional changes that are likely to have a significant impact on the interests of Canada's provinces and territories. Depending on whether provincial interests are at stake, and if so, how important these interests are, there are different rules that apply.

The first of these is the **general amending procedure**. This formula, also known as the 7/50 procedure, requires that constitutional amendments must be authorized by the Senate, the House of Commons, and legislative assemblies of at least 7 provinces whose population represents, in total, at least half of the population of all the provinces. The second is the **unanimous consent procedure**, which goes further and requires the approval of all the provincial governments. Finally, the government argued that it had the power to make some changes using a **unilateral rule.** This would mean it could simply enact legislation without requiring the approval of the provinces or the Senate.

The SCC first examined the notion of "consultative elections". Essentially, the question was: if the Prime Minister can appoint whomever he or she wants to the Senate, could he or she appoint a person who has won an "unofficial" consultative election? Under this rule, the Prime Minister would take a vote by the people into account when appointing Senators from a region. Appointing in this manner would leave the formal mechanism for appointing Senators (summons by the Governor General acting on the advice of the Prime Minister) untouched.

In dismissing consultative elections, the SCC turned its attention to the intentions of the Constitution. The Court found that the framers of the *Constitution Act, 1867,* deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of sober second thought, independent from the electoral process and the political arena. In other words, the Senate must remain completely independent from the House of Commons. In this way, "[a]ppointed Senators would not have a popular mandate - they would not have the expectations and legitimacy that stem from popular election. This would ensure that they would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons." Consultative elections would significantly change the Senate's fundamental nature and role as a complementary legislative body of sober second thought. The SCC therefore ruled that the general amending formula (the approval of seven provinces representing fifty percent of the population) would be required to make this change.

With respect to the question of which amending formula applies for the abolition of the Senate, the SCC ruled that the unanimous consent procedure would be required. The general amending formula only applies to Senate reform, and outright abolition is outside its scope. Abolition of the Senate would have the effect of changing the amending formula altogether, since the Senate is mentioned in the general amending formula. In other words, this would involve changing the rules by which the Constitution can be altered, and this would be so serious that it would require unanimous support. As well, the Court noted, using this procedure would mean that the Senate itself would have the power to veto its own abolition.

The next issue is with respect to Senatorial terms. The federal government argued that s. 44 gave it the unilateral power to enact legislation defining the length of terms for Senators. Most provinces argued term limits could mean that a government could replace an entire Senate during its governing period, thus undermining the Senate's ability to conduct independent legislative review and provide sober second thought. However, the general formula, not the unilateral rule, would apply, since the amendment would affect the interests of the provinces. The SCC found that fixed terms would be a significant change affecting the interests of the provinces by giving Senators less independence.

The SCC found that the unilateral rule is an exception to the general process that only applies to changes to the Senate that do not alter its fundamental nature and role. The SCC ruled that the unilateral rule applies to the constraints on property ownership or net worth for senators, because changing these would not change the basic function of the Senate, impact a senator's ability to perform his or her duties or engage the interests of the provinces. The lone exception noted was Quebec, where there is a unique arrangement that requires senators to hold property in the province. As changing this would require the approval of Quebec's National Assembly, the SCC ruled that Parliament could remove all property requirements except in the case of Quebec.

DISCUSSION

1. What is the general purpose of the Senate? Why does Canada have two legislative bodies?

2. Which segments of Canadian society would have both owned property and had a net worth each valued at $4000 or more, when the Senate eligibility rules were written in the 19th century? Who would be modern equivalents to these Canadians?

3. Under the current structure, Ontario, Quebec, the Maritimes and Western Canada each have 24 senators and Newfoundland and Labrador and three territories each have one. Does this structure effectively ensure regional representation?

4. What are some arguments for and against the idea of having senators be elected by popular vote in their regions?

5. The "living tree" doctrine is the principle of constitutional interpretation that says that the constitution is not static and is constantly evolving. Our constitution therefore must be read in a broad and progressive way, so that it can adapt to the changing attitudes and realities of Canadian society. With this in mind, could the SCC have applied this principle and taken a different view on Senate reform? Explain your answer.

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CANADA (CITIZENSHIP AND IMMIGRATION) v HARKAT, 2014 SCC 37, [2014] 2 SCR 33.

Date Released: May 14, 2014

https://www.canlii.org/en/ca/scc/doc/2014/2014scc37/2014scc37.html

Facts

In 2001, Parliament enacted Division 9 of Part I of the *Immigration and Refugee Protection Act (IRPA)* in response to the September 11 attacks in the United States. The scheme grants authorities extraordinary and controversial powers to detain suspected terrorists and deport them from Canada. Under Division 9, the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness can issue a certificate declaring that a foreign national or permanent resident is inadmissible to Canada. This declaration is based on security grounds that are determined through evidence gathered by the Canadian Security and Intelligence Service (CSIS) The person is then detained for an undefined time period while the grounds for the certificate and the detention is reviewed by a judge of the Federal Court. During this period, the detainee may never actually be charged with any offense. The Federal Court review is held in a private hearing, which is closed to the public, and if the judge finds the certificate to be reasonable, the certificate becomes a removal order which cannot be appealed and which may be immediately enforced. All or part of the evidence can be withheld from the person and his or her lawyer and all or part of the hearing itself may be conducted with neither the accused nor counsel present.

In 1995, Mohamed Harkat entered Canada on a forged Saudi Arabian passport and sought refugee status due to the risk of political persecution in his native Algeria. His refugee claim was assessed by Canadian authorities, and was found to be valid. Mr. Harkat was granted refugee status in 1997, and lived and worked in Ottawa until 2002.

In 2002, the Minister of Citizenship and Immigration issued a national security certificate against Mr. Harkat on the basis of information from CSIS. The allegation was that he was affiliated with members of al Qaeda, an international, militant radical-Islamist organization, and that he was in Canada acting as a "sleeper agent" on the group's behalf. Mr. Harkat was in custody without being charged with a crime for over three years, including a year in solitary confinement. He was eventually released in 2006 on strict bail conditions, but remained under continuous surveillance.

Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Simply put, s. 7 of the *Charter* means that any state infringement upon a person's life, liberty or security rights must be done in a way that is consistent with certain basic ideas about fairness. One of these "principles of fundamental justice" is the well-established right to a fair hearing, in which individuals can know what evidence the government is relying upon, challenge that evidence and instruct their own lawyers about how to represent their interests.

Mr. Harkat, along with two others, challenged the constitutionality of the *IRPA* scheme (see *Charkaoui v. Canada*, 2007 SCC 9, [2007] 1 SCR 350). In 2007, the Supreme Court of Canada (SCC) found that the scheme breached s. 7 of the *Charter*. According to the SCC, the *IRPA* scheme was unconstitutional since parts of the court proceedings are closed to the alleged terrorist (the named person), the named person was not represented in the closed proceedings, and the government did not have to disclose its case against the named person to him or her. The Court found that these conditions were not consistent with the principles of fundamental justice and that they were unjustifiable violations of the accused's liberty rights.

In response to *Charkaoui*, the government amended the *IRPA* process so that one or more "special advocates" could represent the named person during the closed hearing. This special advocate is able to meet the accused and have access to all the government's information against the accused, but is not able to share it publically or fully with the accused[1]. Further, the named person is entitled to receive a summary of the case against him or her that can also be disclosed publicly where it would not harm national security. The Ministers issued a second security certificate against Mr. Harkat, and Mr. Harkat again challenged the constitutionality of the amended *IRPA* scheme.

Procedural History

After considering evidence presented in both public and closed hearings, the Federal Court found the *IRPA* scheme and the certificate declaring Mr. Harkat inadmissible to Canada to be constitutional. Mr. Harkat appealed to the Federal Court of Appeal, where the appeal was allowed in part. The Federal Court of Appeal agreed that the *IRPA* scheme is constitutional, but excluded certain evidence from the record and sent the case back to the lower court to re-examine whether the issuance of the certificate was reasonable. The Ministers appealed to the SCC to restore the Federal Court's original finding that the security certificate was reasonable. Mr. Harkat cross-appealed, claiming once again that the amended *IRPA* scheme is unconstitutional.

[1]In June 2015, the Canadian Senate passed Bill C-51, the *Anti-Terrorism Act*, 2015. Notably, this more recent legislation limits the information and evidence that must be disclosed to the special advocate in security certificate cases.

Issues

Does the *IRPA* scheme as amended by the Federal Government still violate s. 7 of the *Charter*?

Decision

The provisions of the *IRPA* scheme challenged by Mr. Harkat are constitutional. The SCC found that the rules do not violate the named person's right to know the case being made against him or her or prevent the named person from having a decision made based on the facts and the law.

Ratio

Although it found the impugned provisions of the *IRPA* constitutional the SCC also found that the special advocate scheme is still an imperfect substitute for full disclosure in an open court. There may still be cases under the *IRPA* where the seriousness of the allegations and the nature of the evidence result in an unfair process. Therefore, the designated judge has an ongoing responsibility to assess the allegations, evidence and tactics of the Minister, to keep the accused reasonably informed about the process so that he or she can instruct lawyers and special advocates and to exercise discretion under the *IRPA* to ensure a fair process.

Reasons

Mr. Harkat argued that, in spite of the changes, the process was still unfair and violated s. 7 of the *Charter*. He submitted that the process did not allow the special advocate to communicate freely with him, did not provide him with enough disclosure of the Ministers' case to adequately defend himself, and permitted the government to use hearsay evidence against him (i.e. things people said or wrote about him outside of court).

Writing for the majority, Chief Justice McLachlin dismissed each of Mr. Harkat's arguments. First, she wrote that the *IRPA* scheme provides sufficient disclosure to the named person to be constitutionally valid. The Minister can only withhold information or evidence that would raise a serious risk of injury to national security or danger to the safety of a person if it was disclosed. Although "serious risk" is not defined, the Court noted the government's tendency to exaggerate claims of national security confidentiality. Thus, the SCC clarified that the judge has a legal duty to ensure that the named person is reasonably informed of the Minister's case throughout the proceedings. To do so, the judge must be vigilant and skeptical about the Minister's claims that information cannot be disclosed.

The SCC found that the special advocates in a closed hearing are a "substantial substitute" for direct participation by the named person. While the communication between the named person and the special advocate is significantly limited, these restrictions can be lifted with judicial authorization. The designated judge has enough discretion to allow all communications that are necessary for the special advocates to perform their duties. Accordingly, the restrictions on communication cannot be considered unconstitutional.

Finally, the *IRPA* scheme provides the designated judge with the ability to exclude evidence that he or she finds is not "reliable and appropriate". This broad discretion allows the judge to exclude not only the evidence that is unreliable, but also any evidence that may unreasonably weigh against the named person. The *IRPA* scheme is therefore constitutionally sound.

DISCUSSION

1. Why is it important to have access to all the evidence against you in court proceedings?

2. With very few exceptions, the Crown is required to disclose all evidence against an accused in a criminal trial. Why do you think the rule is different for immigration proceedings under the *IRPA*?

3. Does it make sense to give the government the power to remove people who are suspected of being involved with terrorism, or should it be required to bring criminal charges in response to actual criminal acts?

4. In *Harkat*, the SCC relies heavily on the hearing judge's ability to ensure the process is fair. What are some strengths or weaknesses with this obligation?

5. Due to recent changes under the *Citizenship Act*, the federal government has the ability to strip the citizenship of naturalized Canadian citizens (those who are born elsewhere but become Canadian citizens). How do you think this could interact with the *IRPA* rules?