The Five Most Significant Supreme Court Decisions of the Past Year

Justice Russell Juriansz
Court of Appeal for Ontario

SUMMER LAW INSTITUTE
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Ontario Justice Education Network

Case 1:
Does the Charter guarantee this woman can work safely?

Terri Jean Bedford:

14 years' experience working as a street prostitute, massage parlour attendant, escort, escort agency owner, and dominatrix

YES

Canada (Attorney General) v. Bedford

[2013] 3 S.C.R. 1101

The Applicants

Terri Bedford

- Said that women who worked for her rarely experienced violence after she implemented safety measures.
- Has been convicted and paid fines for violating prostitution laws.
- Would like to return to work as a dominatrix but fears she and anyone who assists her will be arrested.

Amy Lebovitch

- Worked as a street prostitute, escort, and in a fetish house.
- Moved to an escort agency to avoid the violence she saw other street prostitutes experience and now works from her home.
- Has never been charged but fears she will be and experienced one violent incident she did not report to avoid police scrutiny.

Valerie Scott

- Worked as a street prostitute, in massage parlours, from hotels and her home, and ran an escort service.
- Now the executive director of Sex Professionals of Canada.
- Experienced threats of violence, verbal and physical abuse while working on the street.

The Criminal Code

- The Criminal Code does not make prostitution itself illegal. Prostitution has been and is a legal activity.
- Rather, the Criminal Code regulates certain activities associated with prostitution ostensibly to shield the public from nuisance, and to protect prostitutes.
- The criminalization of bawdy houses protects communities and the property values of neighbours. The purpose of the prohibition is to prevent community harms in the nature of nuisance.
- The offence of communicating in public for the purpose of engaging in prostitution or hiring a prostitute protects men from being accosted by prostitutes and protects women from being propositioned by men.
- The offence of living on the avails of another's prostitution protects prostitutes from being exploited by pimps.

The Criminal Code Provisions

1. Keeping/Being an Inmate of a Bawdy House

Section 197: “common bawdy-house” means a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency.

Section 210 (1): Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Section 210 (2): Every one who (a) is an inmate of a common bawdy-house, (b) is found, without lawful excuse, in a common bawdy-house, or (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house, is guilty of an offence.

The Criminal Code Provisions

2. Living On the Avails

Section 212 (1): Every one … who lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

3. Communicating for the Purpose of Prostitution

Section 213 (1): Every person who in a public place or in any place open to public view… stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

The Argument

- The Criminal Code provisions prevent prostitutes from taking steps to protect themselves from violent clients, such as hiring security guards or "screening" potential clients.
- By denying them the right to implement safety measures the provisions deny their right to “security of the person” guaranteed by s. 7 of the Charter.

Section 7 of the Charter

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.

Two Questions:

1. Is the right infringed?
2. Is the infringement in accordance with the principles of fundamental justice?

The right to security is infringed.

"The prohibitions at issue do not merely impose conditions on how prostitutes operate.

They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks."

The Court Emphasized Prostitution is Legal.

"[I]t must be remembered that prostitution -- the exchange of sex for money -- is not illegal.

The causal question is whether the impugned laws make this lawful activity more dangerous.

An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. The challenged laws relating to prostitution are no different."

Is the infringement in accord with fundamental justice?

The principles of fundamental justice are the basic values underpinning our constitutional order.

Laws run afoul of our basic values when the means by which the state seeks to attain its objective are fundamentally flawed.

To deprive citizens of life, liberty, or security of the person by laws that violate these norms is not in accordance with the principles of fundamental justice.

The attributes of fundamental justice in this case.

1. arbitrariness (where there is no connection between the effect and the object of the law);
2. overbreadth (where the law goes too far and interferes with some conduct that bears no connection to its objective); and
3. gross disproportionality (where the effect of the law is grossly disproportionate to the state's objective).

Bawdy House

- The “bawdy house” rule infringes security because prostitutes must work on the street or in their clients’ homes instead of at a fixed indoor location which would be significantly safer.
- Not in accord with fundamental justice because the negative impact of the bawdy-house prohibition on the applicants' security of the person is grossly disproportionate to its objective of protecting the community from nuisance.
- Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes.

Living on the Avails

- The “avails” provision protects prostitutes from exploitive pimps, but infringes security because it also prevents them from reducing the risks they face by hiring security guards, drivers and receptionists.
- The law does not distinguish between those who exploit prostitutes and those who could increase the safety and security of prostitutes.
- Not in accord with fundamental justice as the law is overbroad because it captures conduct that is not related to its purpose.

Communication for the purpose

- The communicating prohibition infringes security because it prevents prostitutes from screening clients and pushes them to work in isolated areas.
- The provision's negative impact on the safety and lives of street prostitutes is grossly disproportionate to the possibility of nuisance caused by street prostitution and therefore not in accord with fundamental justice.

Conclusion

- The provisions violate s. 7 of the Charter and are not saved by s. 1 of the Charter.
- The Court granted a declaration that the provisions are void, but suspended the declaration's effect for one year to allow Parliament to enact new legislation.

Significance of Bedford

- The continued expansion of the scope of s. 7.
- “[The analysis does] not look to how well the law achieves its object, or to how much of the population the law benefits or is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.”

Points for Discussion

- What is the best social policy to deal with prostitution in Canada?
- Is the Court's expansion of its reliance on s. 7 to engage in substantive review of legislation inconsistent with Parliamentary democracy?
- What would be the analysis if prostitution were illegal?
- How will the court deal with the Prostitution Bill currently before Parliament? What if the Bill's objective is loftier than protecting the public from nuisance?

Case 2

Who owns this land?

The Tsilhqot'in Nation

v.

British Columbia

2014 SCC 44

Context

Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations of land and other promises.

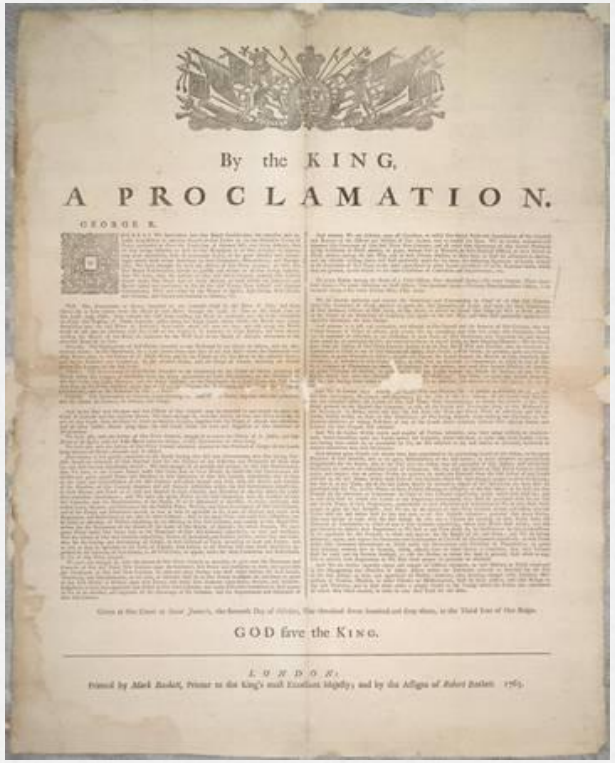
With minor exceptions, this did not happen in British Columbia.

The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

Facts

- The Xeni Gwet'in, one of 6 bands that make up the Tsilhqot'in Nation, claimed title to an area of approximately 4,380 square kilometres in the Chilcotin region of the west central interior of British Columbia.
- The Claim Area comprises only about five percent of what the Tsilhqot'in regard as their traditional territory.
- The Xeni Gwet'in Band has approximately 400 members, but only 200 live in the lands claimed.
- Long complex and tortuous course of the litigation began when the Province granted a timber licence in 1983 and then approved logging activity in the area in 1989. The Nation resisted with a blockade and went to court.

Royal Proclamation, 1763


By the KING,
A PROCLAMATION.
GEORGE R.
GOD save the KING.
LONDON:

After Seven Years War King George III claimed ownership over North America by Proclamation,

It provided that the Indians

> "... should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds."

Relevant Text of the Proclamation

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida. or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments. as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests. and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And we do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And we do further expressly conjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed, of which they stand accused, in order to take their Trial for the same.

Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.

GOD SAVE THE KING

s. 35(1) Canadian Constitution

- 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "Aboriginal Peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The Test for Aboriginal title

- Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty.
- To ground Aboriginal title occupation must possess three characteristics.
- It must be sufficient; it must be continuous (where present occupation is relied on); and it must be exclusive.

The trial judge's view of "sufficient" occupation?

- "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory.
- 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 Court of Appeal's view of "sufficient" occupation.

- The Court of Appeal applied a narrower test for Aboriginal title — site-specific occupation.
- 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.

The Supreme Court on "sufficient occupation".

- A strong presence on or over the land claimed manifested by acts of occupation that demonstrate the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.
- Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land are not essential to establish occupation.
- Sufficient occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.
- Sufficient occupation established in this case.

What are the attributes of Aboriginal Title?

- the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

But

- collective title held not only for the present generation but for all succeeding generations.
- cannot be sold except to the Crown.
- cannot be developed or misused in a way that would substantially deprive future generations of the benefit of the land.
- but land can be used in modern ways.
- can be overridden on the basis of the broader public good.

Justifying overriding the Aboriginal title

The government must show:

(1) that it discharged its procedural duty to consult and accommodate,

(2) that its actions were backed by a compelling and substantial objective; and

(3) that the governmental action is consistent with the Crown's fiduciary obligation to the group.

Provincial Laws of General Application Apply to Land Held Under Aboriginal Title

- Ordinarily provincial regulation of general application, such as the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land.
- However, s. 35 of the Constitution Act, 1982 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders.

Supreme Court's Expectation

Provincial laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right.

What about the many outstanding claims?

The Court placed a duty on the Crown to consult in good faith with Aboriginal groups who have asserted claims to aboriginal title about proposed uses of the land and, if appropriate, to accommodate the interests of groups.

The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

For Discussion

- How would you reconcile the duty to preserve the land for future generations with the right to use the land in modern ways?
- What are the implications for pipelines, mining, forestry, transportation and other resource development?
- How will disputes among the individuals of the group that holds aboriginal title be settled? What do you think about a hereditary chief making decisions that a majority of band members may not favour?
- Only 200 of the 400 members of the *Tsilhqot'in Nation* live on the lands. Should band members who live elsewhere participate in the decisions about the land's use? And share in the profits from the land?
- How small a number of people should be able to hold collective aboriginal title?

Case 3:
Do the police need a warrant to get a customer's identifying information from an Internet Service Provider?

YES

R. v. Spencer

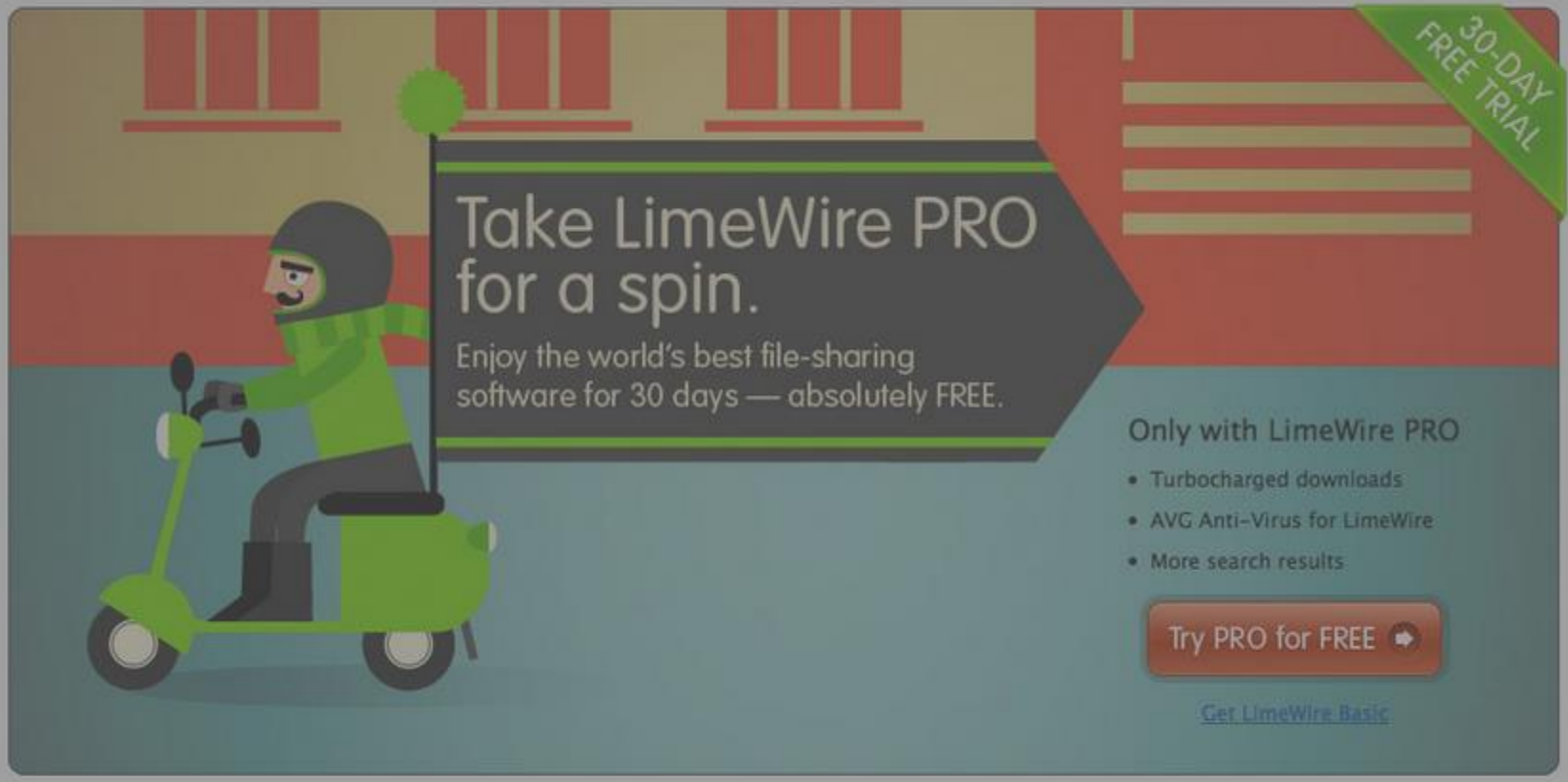
2014 SCC 43

Facts

- 18 year-old Michael David Spencer lived with his sister in Saskatoon, and used LimeWire, a free peer-to-peer file-sharing program.
- 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.
- Mr. Spencer used LimeWire to download child pornography.

LimeWire®

Home | How it Works | Product Features | Customer Support



What you can do with LimeWire

Smart & Fast
Find the files you want, and download them fast.

Easy Sharing
Connect with friends, family, and the LimeWire community.

Stay Organized
Our built-in library makes managing your media a snap.

The Police Investigation

- Det. Sgt. Parisien , a Saskatoon police officer, signed onto Limewire and had a look at what was available for sharing from the computers of other users.
- When Spencer's computer was connected to Limewire, Det. Parisien was able to browse the contents of his "shared folder" that was available to all Limewire users.
- Parisien saw what he believed to be child pornography in the shared folder, but from the IP address of the computer, he could only tell it was in Saskatoon and that Shaw was the ISP.

The Request

- Parisien made a "law enforcement request" to Shaw for the subscriber information including the name, address and telephone number of the customer using the Spencer IP address.
- The request indicated that police were investigating child pornography and that the subscriber information was being sought as part of an ongoing investigation.
- The request was purportedly made pursuant to s. 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (*PIPEDA*),

Courts Below

- At trial, Spencer argued the police had infringed his right under s. 8 of the Charter, which provides:

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

- He was convicted of possession of child pornography and sentenced to 9 months imprisonment followed by 3 years probation.
- Court of Appeal dismissed his appeal.

Is the police request a “search”?

- Spencer argued obtaining subscriber information was not a “search”, just simply a request for a name, address and telephone number matching a publicly available IP address.
- In examining the connection between the police investigative technique and the privacy interest at stake, the Court looked at not only the nature of the precise information sought, but also at the nature of the information that it reveals.
- The identity of a subscriber of an internet connection is linked to particular, monitored Internet activity and would reveal intimate details of the lifestyle and personal choices of the individual.
- Anonymity is particularly important in the context of internet usage.

It is a “search”

- There is a reasonable expectation of privacy in the subscriber information. The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search.
- A warrantless search, which this was, is presumptively unreasonable and the Crown has to justify it.

Shaw's Terms of Service?

- They are relevant in assessing the reasonableness of a subscriber's expectation of privacy.
- Here, Shaw's terms, taken as a whole, provided a confusing and unclear picture of what it would do when faced with a police request for subscriber information.
- The terms of service could not be relied on to justify disclosure.

Does PIPEDA allow the disclosure?

s. 7(3)(c.1)(ii) provides that an organization may disclose personal information without the knowledge or consent of the individual only if:

- the disclosure is made to a government institution
- that has made a request for the information
- identified its lawful authority to obtain the information and
- indicated that the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law"

It does not.

- Police had no lawful authority to obtain the information.
- while the police could ask, they had no authority to compel compliance with their request.

But

- ISP has a legitimate interest in preventing crimes committed through its services and entirely different considerations may apply where an ISP itself detects illegal activity and wishes to report this activity to the police. Such a situation falls under s. 7(3)(d).

For Discussion

Before *Spencer* it had become commonplace for police to obtain identifying information about Canadians from Internet service providers.

What is the harm in allowing the police to continue that practice in cases such as this?

Will police investigations be delayed and hampered because they must draft an information to apply for a warrant?

Will this decision lead to a more crime friendly internet?

Case 4

Will this place ever change?

Reference re Senate Reform

[2014] S.C.J. No. 32

Purposes of the Senate

- Sober second thought
- Regional representation, as opposed to representation in proportion to population
- Representation of groups under-represented in the House of Commons

Structure of the Senate

Section 22 of the Constitution provides for the following allocation of Senators:

- 24 for Ontario,
- 24 for Quebec,
- 24 for the Maritime provinces (10 each for Nova Scotia and New Brunswick, and four for Prince Edward Island),
- 24 for the western provinces (six each for Manitoba, British Columbia, Saskatchewan, and Alberta).
- 6 for Newfoundland and Labrador
- 1 each for the Northwest Territories, the Yukon, and Nunavut).

This allocation bears only a weak connection to population distribution.

Criticisms of the Senate

- Doesn't provide sober second thought or meaningfully represent the interests of the provinces
- Lacks democratic legitimacy
- Partisan, like the House of Commons
- Filled with political patronage appointments
- You can think of others

The Government of Canada asked the Supreme Court 6 questions on 4 key issues:

(1) Can Parliament unilaterally set fixed terms 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 from 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) Does the general amending formula apply to abolishing the Senate? Or is provincial unanimity required?

Section 38 sets out the General Amending Formula

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 7/50 Formula]

Unanimity Required for some matters

Section 41:

- The office of the Queen, Governor General and the Lieutenant Governors
- The right of a province to a number of MPs not less than the number of Senators to which a province is entitled
- The use of English or French
- The composition of the Supreme Court of Canada
- An amendment to the amending formula

Amendments that affect only some provinces

Section 43: If an amendment affects part of the Constitution that applies to some but not all of the provinces, the Senate, the House, and the affected provinces must all authorize the change.

The Unilateral Power

Section 44: 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.

Section 45: The legislature of each province may exclusively make laws amending the constitution of the province.

Consultative Elections?

If Prime Minister can appoint whomever he wants to the Senate, why can't he appoint a person who has won an "unofficial" consultative election?

Appointing in this manner would leave formal mechanism for appointing Senators - summons by the Governor General acting on the advice of the Prime Minister- untouched.

Section 42 provides the General Formula applies to:

- Proportionate representation of the provinces in the House
- Powers of the Senate and the method of selecting Senators
- The number of Senators each province is entitled to
- The residence qualifications of Senators
- The Supreme Court of Canada
- The extension of existing provinces into the territories
- The establishment of new provinces

Constitutional Interpretation

"[T]he Constitution should be viewed as having an "internal architecture", or "basic constitutional structure"... The notion of architecture expresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole""

The Architecture of the Constitution

The *Constitution Act* contemplates a specific structure for the federal Parliament, "similar in Principle to that of the United Kingdom"

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 that required unremitting consideration of short-term political objectives.

The Court said:

…the choice of executive appointment for Senators was also intended to ensure that the Senate would be a complementary legislative body, rather than a perennial rival of the House of Commons in the legislative process.

Appointed 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.

No Consultative Elections

- The implementation of consultative elections would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought.
- While the provisions regarding the appointment of Senators would remain textually untouched, the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered.
- The General Formula applies because section 42 says it applies to “the method of selecting Senators”.

What amending formula applies to abolishing the Senate?

- The Unanimity Rule applies.
- The General Rule only applies to Senate reform.
- Outright abolition is outside the scope of the General Rule.
- Abolition would change the amending formula itself. Currently, the Senate can veto amendments.

Senatorial Terms

- The federal government argued that s. 44 gave it the unilateral power to enact legislation defining fixed terms for Senators.
- Most provinces argued term limits would make it conceivable that a government might replace an entire Senate during its tenure, thus undermining the Senate's ability to conduct independent legislative review and provide sober second thought.
- Ontario argued that long senatorial terms of nine or ten years long would prevent this happening.

The General Formula applies, not the Unilateral Rule

- The General Rule applies to amendments that affect the interests of the provinces by changing the fundamental nature of the Senate as a body of sober second.
- The Unilateral Rule, as an exception to the general process, applies to changes to the Senate that do not alter its fundamental nature and role.
- Fixed terms would be a significant change and would affect the interests of the provinces by giving Senators less independence.

Property Qualifications:

- The Unilateral Rule applies (although getting rid of the real property requirement entirely would require Quebec's consent under the rule for amendments which only affect certain provinces)
- Removing the net worth requirement and the real estate requirement would not affect the interests of the provinces or the Senate's role as a chamber of sober second thought
- Removing the real estate requirement across the board would affect a section of the Constitution designed to ensure Quebec's Anglophone minorities would be represented

For Discussion

- Was the Senate originally designed to enable the appointed “elite” to temper the initiatives of the representatives elected by the masses?
- Does the Senate serve any useful purpose today?
- Could the SCC applied the principle that the Constitution is a “living tree” and taken a different view?
- What changes to the Senate would you propose?
- Will Canadians ever be able to agree on Senate reform?

What rights do suspected terrorists have before they are deported?

Case 5: *Canada (Citizenship and Immigration) v. Harkat*
2014 SCC 37

Background

- In 2001, Parliament enacted Division 9 of Part 1 of the *Immigration and Refugee Protection Act* (IRPA). In the wake of 9/11 it became a means of detaining suspected terrorists and eliminating the perceived threat posed by them.
- The scheme allows the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate declaring that a foreign national or permanent resident is inadmissible to Canada on grounds of security. The person is then detained.
- The certificate and the detention are both subject to review by a judge of the Federal Court sitting *in camera*. If the judge finds the certificate to be reasonable, it becomes a removal order, which cannot be appealed and which may be immediately enforced.

Mohamad Harkat

1995: entered Canada on a fake Saudi Arabian passport.

1997: IRB recognized him as a convention refugee.

2001: He marries Sophie Lamarche, who has become a tireless advocate.

2002: Minister of Immigration, acting on information from the Canadian Security Intelligence Service (CSIS), issues a national security certificate that declares him a threat to Canada. It alleges he is an al Qaeda sleeper agent.

2006: He is released on strict bail conditions, but remains under continuous surveillance by the Canada Border Services Agency and the RCMP.

Harkat's First SCC case

Harkat, Adil Charkaoui and Hassan Almrei challenged the *IRPA* scheme.

In 2007, the SCC found that the scheme breached s. 7 of the Charter because:

- parts of the court proceedings are closed to the named person
- the named person was not represented in the closed proceedings
- the government did not have to disclose its information to the named person

[*Charkaoui v. Canada,* [2007] 1 S.C.R. 350]

Harkat's Second SCC case

In response to *Charkaoui*, the Government revised the *IRPA* process so that "special advocates" represent the named person in the closed hearings and the person receives a summary of the case against him or her that can be disclosed publicly without harming national security.

The Minister then issued a new security certificate against Harkat.

Harkat claimed that, in spite of the changes, the process was still unfair and violated s. 7 of the Charter because

- it does not allow the special advocate to communicate freely with him
- it does not provide him enough disclosure – named persons need detail to defend themselves
- it allows the government to use hearsay evidence against him (ie. things people have said or written about him outside of court)

Special Advocates

- Special advocates are security-cleared lawyers whose role is to protect the interests of the named person and "to make up so far as possible for the [named person's] own exclusion from the evidentiary process"
- During the closed hearings, they perform the functions that the named person's lawyer (the "public counsel") performs in the open hearings. They do so by challenging the Minister's claims that information or evidence should not be disclosed, and by testing the relevance, reliability, and sufficiency of the secret evidence.
- Strict communication rules apply to special advocates, in order to prevent the inadvertent disclosure of sensitive information. After the special advocates are provided with the confidential information and evidence, they "may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization".

Disclosure

- The named person must be given summaries of the information and evidence which allow him to be reasonably informed of the case against him: ss. 77(2) and 83(1)(e), *IRPA*.
- The summaries must "not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed": s. 83(1)(e), *IRPA*.

Admissibility of Hearsay

- The usual rules of evidence do not apply to the proceedings. Instead, "the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence": s. 83(1)(h), *IRPA*.

- The *IRPA* scheme provides that the judge's decision can be based on information or evidence that is not disclosed in summary form to the named person: s. 83(1)(i). It does not specify expressly whether a decision can be based in whole, or only in part, on information and evidence that is not disclosed to the named person.

Conclusions on these issues

- Special advocates in closed hearings are a "substantial substitute" for personal participation by the named person in the closed hearings.

- The scheme provides sufficient disclosure to be constitutionally compliant. Information and evidence that raised a serious risk of injury to national security or danger to the safety of a person could be withheld from the named person.

- The scheme's provisions that could result in the admission of hearsay evidence and deny the special advocates the ability to cross-examine sources did not offend s. 7.

The Judges' Role as Gatekeeper

- The judge must be vigilant and skeptical about the Minister's claims that information cannot be disclosed. Courts have commented on the government's tendency to exaggerate claims of national security confidentiality.
- The restrictions on communications by the special advocates can be lifted with judicial authorization. The designated judge has a sufficiently broad discretion to allow all communications that are necessary for the special advocates to perform their duties.
- The designated judge can exclude hearsay evidence that is not "reliable and appropriate".

Other Issues In the Case

- Are CSIS human sources covered by privilege and can they be cross-examined?
- Did the designated judge err in refusing to exclude the summaries of intercepted conversations?
- Did the ministers breach their duties of candour and utmost good faith?
- Were the proceedings against Mr. Harkat fair?
- Did the designated judge err in concluding that the security certificate was reasonable?

Decision

The process was fair and the Federal Court judge committed no reviewable errors in finding that the Minister's decision to declare Mr. Harkat inadmissible to Canada was reasonable.

For Discussion

- What do you think about the SCC's strong reliance on the designated judges' ability to ensure the process is as fair as possible?
- Or, do you think it is too difficult and takes too long to remove non-citizens from Canada who are suspected of involvement with terrorist activity?
- Is there a danger that foreign intelligence agencies that provide information to CSIS might not distinguish between charitable and political activities?

The End