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R. v. SPENCER AND THE AFFIRMATION OF INTERNET PRIVACY RIGHTS IN CANADA

Christopher Cornell*

This article looks at the Supreme Court of Canada's June 13, 2014 opinion in R. v. Spencer (Spencer) holding that the Canadian public enjoys certain privacy rights and expectations in regard to their use of the Internet.1 It begins by presenting the background information and lower court rulings that led to this case the Supreme Court of Canada. Continuing, the article presents an analysis of the Supreme Court's ruling in Spencer. The last section of the article looks at developments in the Federal Parliament since Spencer, in particular, legislative proposals that most likely need to be modified in light of the Supreme Court's ruling.

I. R. V. SPENCER: BACKGROUND AND LOWER COURT RULINGS

Before Spencer, police in Canada investigating crimes on the Internet traditionally would request information about an Internet user suspected of committing a crime from their internet service provider (ISP) via the use of general investigative police powers listed in section 487.014 of the Canadian Criminal Code (Criminal Code) or through requests to an ISP made via what is known as the “lawful authority exception” in section 7(3)(c.1)(ii) of the Personal Information Protection and Electronic Documents Act (PIPEDA).2 One such criminal case arising from a request made through the PIPEDA procedure ultimately reached the Supreme Court and led to the opinion in Spencer.3

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A. BACKGROUND

In 2007, police in Saskatoon, Saskatchewan, investigating child pornography distribution on the Internet, contacted Shaw Communications, a Canadian ISP—without first obtaining a warrant—and requested that Shaw hand over information relating to one of their users as part of the police investigation. This eventually led to the arrest of Matthew Spencer for child pornography charges. On August 31, 2007, then-Constable (now Detective Sergeant) Darren Parisien, using file sharing software similar to the LimeWire software program, discovered child pornography in the shared folder of a computer at the internet protocol address (IP address) 70.64.12.102. LimeWire and similar software programs function by allowing individuals to search the Internet for files and then download them to their own computers where, by default, they are stored in a shared folder and made available for other users of the software to download.

After finding the IP address, Parisien then used a police database to determine that the particular address he had detected was assigned to Shaw Communications for use in Saskatoon. Following Parisien’s discovery, Saskatoon Police Sergeant Deb Altrogge wrote to Shaw requesting information under section 7(3)(c.1)(ii) of PIPEDA as part of an ongoing child pornography investigation. Shaw complied by providing the name, address, and other identifying information for the account holder assigned to the IP address in question, Spencer’s sister. Following Shaw’s disclosures, Parisien obtained a warrant to search the residence listed on the account, where Matthew Spencer also happened to reside. The Saskatoon Police Service executed the warrant and found “441 distinct images and 112 videos” of graphic child pornography on Spencer’s computer. Spencer had used the LimeWire software to download the child pornography onto his computer.

B. THE TRIAL COURT

At the time of his arrest, Spencer was eighteen years old and was tried before Justice Peter Foley of the Saskatchewan Court of Queen’s Bench. At trial, it was revealed that the summer before his arrest Spen-

6. Id. para. 5.
7. Id. para. 6.
8. Id. para. 7.
9. Id. para. 8.
10. Id. para. 9.
11. Id. para. 4.
12. Id. para. 4.
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... had worked as a children’s swimming instructor, though there was no evidence of him acting against any child. Crown Prosecutor, Michael Segu, however, thought it prudent to ask the court to bar Spencer from any position of trust or authority with any child under the age of sixteen.

Spencer was charged with two offenses: possession of child pornography and making child pornography available to others through the Internet. At trial, Segu argued for a nine-month sentence and three years of probation based on the large quantity of material Spencer had collected and caused to be shared over the Internet for seven months. Spencer’s attorney, Mark Brayford, argued instead for the minimum forty-five-day jail sentence and agreed with the three years’ probation requirement.

Segu maintained that the longer sentence would serve as an appropriate denunciation of Spencer and a deterrent to others who might commit the same crime, while Brayford argued that the shame he had brought down on himself and his family should be considered in sentencing. Spencer had admitted that he had sought out to download and keep the files he had downloaded but claimed that he did not realize he was sharing the files that he had downloaded. After weighing all of the evidence, arguments, and Spencer’s claim of not knowing that he was sharing the files he had downloaded, Justice Foley convicted Spencer on the charge of possession of child pornography and acquitted him on the charge of making child pornography available after finding that he did not have the requisite intent to commit that crime.

Both Spencer and the Crown appealed Foley’s decision.

C. The Court of Appeal

1. Spencer’s Appeal

On appeal to the Court of Appeal for Saskatchewan, the only issue raised by Spencer was a claim under section 24(2) of the Charter of Rights and Freedoms (Charter) that the request from the Saskatoon Police to Shaw for the IP address information constituted an unreasonable search and seizure under section 8 of the Charter and therefore, the child pornography files should have been excluded from evidence.

At the earlier trial, Justice Foley had dismissed that claim and Spencer’s appeal rested on his assertion that the earlier Charter claim should
not have been dismissed by Foley.\textsuperscript{24} Justice Caldwell, writing for the court,\textsuperscript{25} stated that the proper way to evaluate Spencer’s claim would be to “follow the two step inquiry set out in \textit{R. v. Tessling}, 2004 SCC 67, [2004] 3 S.C.R. 432, for assessing (1) whether the police conduct constituted a ‘search’ within the meaning of §8 of the \textit{Charter}, and (2) if so, whether the search was reasonable.”\textsuperscript{26} On the first step, Caldwell held that nothing in Shaw’s services agreement with Spencer’s sister or PIPEDA prevented it from giving what information it did to the police but rather that under the agreement and PIPEDA, Shaw was expressly authorized to hand over that information.\textsuperscript{27} Because of this there was a strong presumption against Spencer having a reasonable expectation of privacy in the information disclosed by Shaw.\textsuperscript{28} Justice Caldwell then weighed the reasonableness of the search itself and determined that in light of the other factors and the minimally intrusive nature of the police search seeking to trace his IP address, Spencer did not have a reasonable expectation of privacy with respect to the information disclosed by Shaw.\textsuperscript{29}

Caldwell then stated that because Spencer had no reasonable expectation of privacy in the information disclosed by Shaw, it was not necessary to determine the reasonableness of the police search.\textsuperscript{30} Caldwell, however, opined that even if Spencer had possessed an expectation of privacy, then the search by the police would have been permissible because it would have been authorized by a law that was itself reasonable and because the search that was carried out was reasonable in manner.\textsuperscript{31} Therefore, because Spencer had no expectation of privacy, and even if he had possessed such an expectation, the search carried out was reasonable, the court dismissed Spencer’s appeal of his conviction for possession of child pornography.\textsuperscript{32}

2. \textit{The Crown’s Appeal}

The Crown appealed Spencer’s acquittal on the charge that he made child pornography available, arguing that Justice Foley made a mistake by: (1) finding that Spencer’s unintentional allowance of the child pornography files to be shared failed to satisfy the \textit{mens rea} requirement of the crime; (2) failing to look into whether willful blindness could have satisfied the \textit{mens rea} requirement; and (3) “by failing to consider all of the evidence before him or by misapprehending that evidence.”\textsuperscript{33}

\textsuperscript{24} Id.
\textsuperscript{25} Id. para. 95.
\textsuperscript{26} See id. para. 16.
\textsuperscript{27} Id. para. 42.
\textsuperscript{28} Id.
\textsuperscript{29} Id. paras. 44-45.
\textsuperscript{30} Id. para. 46.
\textsuperscript{31} Id.
\textsuperscript{32} Id. para. 47.
\textsuperscript{33} Id. para. 48.
The Crown’s appeal required the Court of Appeal to answer two questions. First, it had to determine if Justice Foley erred by concluding that the mens rea element of the crime under section 163.1(3) of the Criminal Code means that only one who knowingly made child pornography available could be guilty. Second, it had to determine whether or not some positive activity on Spencer’s part would have been required to prove the specific intent element of acting knowingly. On the first question, Justice Caldwell held that “the mens rea element of the offence may be met by sufficient evidence of intention or actual knowledge, recklessness coupled with knowledge of the consequences, or willful blindness, but not mere negligence,” and therefore upheld the trial court’s conclusion that the crime required that the distribution of child pornography be done knowingly. On the second question, Caldwell reversed the trial court by holding that one knowingly commits the crime of making child pornography available by downloading such material through file sharing programs and then continuing to share the files with others. In reversing the trial court, Caldwell stated that there was no positive activity requirement but added that by continuing to share downloaded files of child pornography, a defendant would in any case have satisfied a positive activity requirement under the Criminal Code had one existed. Caldwell also ruled that the trial court made a substantive error of law by misconstruing the requirement of knowingly committing the crime, and further opined that even if the requirement of acting knowingly had not been satisfied, the Crown only had to prove willful blindness to the file sharing activity to satisfy the elements of the crime. Caldwell elaborated that by acquitting Spencer of the “making child pornography available” charge by inaccurately concluding that the knowledge requirement was unsatisfied, the trial court had failed to take into account evidence of willful blindness to making child pornography available—which, if proven, also could have satisfied the knowledge requirement of the crime. Justice Caldwell therefore granted the Crown’s appeal and ordered a new trial for Spencer on the charge of making child pornography available. Spencer proceeded to appeal the rulings on both charges by the Court of Appeal for Saskatchewan to the Supreme Court of Canada and the Court accepted his application for leave to appeal.

34. Id. para. 50.
35. Id.
36. Id. paras. 64–65.
37. Id. para. 80.
38. See id. para. 81.
39. Id. para. 93.
40. Id.
41. Id. para. 95.
42. See R. v. Spencer, 417 Sask. R. 323 (Can.).
II. R. V. SPENCER: THE SUPREME COURT CASE

On appeal, the Supreme Court of Canada was tasked with answering four questions: (1) did the police obtaining the subscriber information from Shaw constitute a search; (2) if it was a search was it authorized by any law, (3) if there was a search and it was not authorized by a law, should the evidence obtained be excluded; and (4) did the trial judge make an error in his ruling on the fault aspect of the charge of making child pornography available.43

A. WAS THERE A SEARCH?

Under section 8 of the Charter, Canadians are granted a right to be secure against unreasonable searches or seizures.44 The first question asks the Court to determine if the protection against unreasonable searches comes into play in regard to the police obtaining the subscriber account information from Shaw.45 In order to answer that question, the Court had to determine if the police request and receipt of that information constituted a search under section 8 of the Charter.46 If, in the totality of the circumstances, Spencer had a reasonable expectation of privacy in the information Shaw handed over to the police, then there was a search.47

In answering this question, the Court first determined that the police request was essentially a request to connect a specific person or persons to specific online activities, and that in this case, the request engaged an "anonymity aspect" of online usage that the Court had held in other instances to have involved substantial privacy interests.48 The Court agreed with the Court of Appeal that Spencer had an expectation of privacy with respect to the information handed over to the police by Shaw.49 The Court then determined that under the contractual provisions of the ISP agreement and PIPEDA, in order for a disclosure request from the police to be honored, it must have been made with "lawful authority."50 Because under PIPEDA the police could ask the ISP to provide subscriber information, but not compel them to do so, the police have no "lawful authority" with regard to making such requests.51 Thus, through a weighing of the totality of the circumstances, including the relevant contractual and statutory provisions, the Court determined that a request from the police to an ISP to voluntarily disclose subscriber information constitutes a search.52

43. See Spencer, 2014 SCC para. 5.
44. Id. para. 15.
45. Id. para. 16.
46. Id.
47. Id.
48. Id. para. 50.
49. Id. para. 51.
50. See id. para. 65.
51. See id.
52. See id. paras. 65–66.
B. WAS THE SEARCH AUTHORIZED BY LAW?

In this case, the search carried out by the police (i.e., the police request for subscriber information from the ISP) was warrantless, and warrantless searches are presumed to be unreasonable and the burden of rebutting the presumption falls on the Crown. For such a search to be reasonable it must: (1) be authorized by law; (2) the authorizing law must be reasonable; and (3) the search must be carried out reasonably. As Spencer did not challenge the constitutionality of the laws alleged to have authorized the search, and the Court considered his contentions about the reasonableness of how the search was carried out to be groundless, the Court only had to determine if the search was authorized by law. After analyzing section 487.014 of the Criminal Code and section 7(3)(c.1)(ii) of PIPEDA, the Court determined that neither grants search and seizure powers to the police; therefore, the police search of the subscriber information was unlawful. The Court also explained that it then follows that because the police could not have obtained a warrant to search Spencer's residence without the earlier unlawful search information, that the search of the residence unlawfully violated the Charter. The Court also stressed that nothing in its ruling prevented the police from obtaining information without a warrant if the information were immediately required in emergency situations, such as to prevent imminent bodily harm; while also stressing that in this case, there was no such emergency.

C. BECAUSE THE SEARCH WAS NOT AUTHORIZED BY A LAW, SHOULD THE EVIDENCE BE EXCLUDED?

Because there was evidence obtained in violation of the Defendant's Charter rights, the Court had to determine under section 24(2) of the Charter whether or not allowing the use of the illegally obtained "evidence would bring the administration of justice into disrepute." The Court applied its own test from R. v. Grant, [2009] 2 S.C.R. 353, to determine whether or not the evidence would be allowed or should be excluded under section 24(2) of the Charter. The Grant test requires that the Court weigh and balance the effects of allowing the use of the illegally obtained evidence on society's confidence in the administration of justice by considering: (1) the seriousness of the Charter violation, (2) the impact of the violation of the Charter rights of the defendant, and (3) society's interest in the case being decided on its own merits. With regard to the seriousness of the Charter violation, the Court determined that because

53. Id. para. 68.
54. Id.
55. Id.
56. Id. paras. 71, 74.
57. Id. para. 74.
58. Id.
59. Id. para. 75.
60. Id. para. 76.
61. Id.
the police believed that their request to Shaw was authorized by law and both the trial and appeals courts shared that belief, it was reasonable for the police to think that they were acting lawfully to carry out a law enforcement action. The Court further determined that the police conduct in this instance would not bring the administration of justice into disrepute. With regard to the impact of the violation of Spencer's rights, the Court determined that the impact was serious because anonymity is an important privacy safeguard for people online and exposure of his anonymity subjected Spencer to police action, stating that this factor "weighs in favor of excluding the evidence." On the third prong of the Grant test, the Court stated that "[s]ociety undoubtedly has an interest in seeing a full and fair trial based on reliable evidence, and all the more so for a crime which implicates the safety of children." The Court also noted that without the child pornography evidence, the Crown would have no case, and that the defense at trial had owned up to the existence of the child pornography evidence. After weighing the three factors of the Grant test, the court determined that the exclusion of the evidence would bring the administration of justice into disrepute, and thus upheld its admission at trial.

D. DID THE TRIAL JUDGE ERR BY ACQUIETING ON THE CHARGE OF MAKING CHILD PORNOGRAPHY AVAILABLE?

When it came to the issue of whether the trial judge erred in his ruling as to the necessity of a positive act on Spencer's part to secure a conviction for the crime of making child pornography available, the Court agreed with the Court of Appeal's analysis of the issue. The Court ruled that whether Spencer was willfully blind to his file sharing was a pertinent issue at trial, and that the trial judge's error in ruling that a positive act is a requirement of the mens rea of the crime led to the willful blindness issue not being addressed at trial. Because of the trial judge's error, the Court upheld the Court of Appeal's order that a new trial be held on the charge of making child pornography available.

The Court also dismissed Spencer's appeal and affirmed his conviction for possession of child pornography. Those actions would appear to have been assured by the upholding of the admission of the evidence earlier in the opinion. There were five noticeable practical effects of the Court's ruling in Spencer, the first of these being that the police (and by

62. Id. para. 77.
63. Id.
64. Id. para. 78.
65. Id. para. 80.
66. Id.
67. Id. para. 81.
68. Id. para. 82.
69. Id. para. 86.
70. Id. para. 87.
71. Id.
72. See discussion supra Part II.C.
implication, the Government) need a warrant to obtain personally identifiable subscriber information relating to the activities of Canadians on the Internet.73 Second, in an emergency situation, the police can still demand that information necessary to resolve the emergency be handed over without a warrant.74 Third, the internet privacy right outlined by the Court does not give criminals freedom to act with impunity, rather, it just requires that police investigators take the extra step of obtaining a warrant from a judge before requesting information from an ISP. Further the typical ISP will likely have an uptick in the number of warrants it has to process.75 Fourth, while Spencer was a child pornography case, the ruling that mandates the obtaining of warrants applies to all cases where the police seek identifying information about Canadian's online activities.76 Lastly, for any cases pending when the Spencer ruling was issued, where the police had acted in good faith based on a belief that a warrant was not necessary to obtain subscriber information from an internet user's ISP, the prosecution can continue while the warrant requirement will apply to all future cases.77

III. FEDERAL LEGISLATIVE DEVELOPMENTS SINCE R. V. SPENCER

Prior to the Court's ruling in Spencer, the Canadian Government introduced into both chambers of Parliament two pieces of legislation ostensibly designed to offer Canadians enhanced online privacy and crime protections.78

The first of these, House of Commons Bill C-13, the proposed Protecting Canadians from Online Crime Act, would criminalize the non-consensual online posting of pictures of an intimate nature while simultaneously granting police several new enforcement powers.79 In terms of the Spencer ruling, at least one clause in Bill C-13, which purports to give companies (such as telecom operators) that voluntarily surrender subscriber information to the police immunity from suit, has been described by Canada's new Privacy Commissioner, Daniel Therrien, as "essentially meaningless" in light of Spencer.80 In Parliament, Bill C-13

74. See id.
75. Id.
76. See id.
77. Id.
79. Id.
languished for months in committee at the House of Commons committee for some time with no new actions being taken on it since the day after the Spencer ruling came down, before clearing the Commons on October 20, 2014, being introduced to the Senate the next day, clearing the Senate on December 4, 2014, and signed into law by the Governor General on December 9, 2014.81 Notably, Bill C-13 was passed and signed into law despite Therrien's continued misgivings82 and consistent calls for increased privacy protections to be added to the legislation.83

The second piece of legislation, Senate Bill S-4, the proposed Digital Privacy Act, would allow companies in certain situations to share data about their users with other companies without disclosing the sharing to anyone whose data is being shared.84 While this corporate sharing has some investigatory potential on top of that already afforded by the Bill C-13 police data sharing provision, it also raises significant privacy concerns about what data corporations might share and how they would use it.85 These concerns, however, did not stop the Senate from passing Bill S-4 on June 16, 2014 (after Spencer) and sending it to the House of Commons.86 Bill S-4 was introduced into the Commons on June 17, 2014, and referred to committee on October 20, 2014.87

After Spencer, Therrien called on the Government to review, and possibly revise, Bills S-4 and C-13 because they both contain clauses allowing internet user subscriber data to be shared without a warrant in certain circumstances; actions that in light of Spencer would likely be unconstitutional.88

IV. CONCLUSION

At its core, Spencer stands for the principal that before an individual's privacy rights may be sacrificed by the disclosure or monitoring of their personally identifiable information over the Internet, no matter how noble or significant the investigation, the rights of those under investigation dictate that a judge must issue a warrant to authorize the internet moni-

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84. See Wingrove, supra note 78.
85. See id.
87. Id.
88. See Wingrove, supra note 80.
toring and gathering of evidence on the suspect. Through its *Spencer* ruling, the Supreme Court of Canada has carefully balanced the constitutional Charter rights of those under investigation against the police duty to investigate crime. The Court has struck a sensible balance where cases believed to be constitutional and already in the judicial system at the time of the decision may continue unabated, and where new investigations by the police into Charter-protected identifying information will only pass constitutional muster if accomplished through the use of a warrant issued by a judge.

89. See Butt, *supra* note 73.