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Litigation & Dispute Resolution

Supreme Court of Canada Creates Limited Right to Access Government Documents

PAUL SCHABAS, RYDER GILLILAND AND SUZIE CHIDO (SUMMER LAW STUDENT)

The Supreme Court of Canada (the Court) has recognized a limited constitutional right to access government documents. In the case of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, which was released on June 17, 2010, the Court held that the scope of s. 2 (b) of the *Charter* (freedom of expression) includes a right to access government documents, but only where access is necessary to permit meaningful discussion. The Court did not elaborate on what would constitute meaningful discussion, and has left unanswered many other questions about when and how the constitutional right to access government information can be enforced.

BACKGROUND

The case has a long history. In 1997, a judge of the Ontario Superior Court stayed murder charges arising from a mob "hit" in 1983, because of abusive conduct by police and prosecutors, issuing a scathing judgment critical of the police and the Crown. The Ontario Provincial Police (OPP) conducted a review of the investigation and subsequent prosecution. Nine months later, in a terse press release, the OPP declared it had found "no misconduct" on the part of state officials.

The stark contrast between the Court's decision and the OPP press release prompted the Criminal Lawyers' Association (CLA) to request the OPP report and records underlying the OPP's investigation, pursuant to the Ontario *Freedom of Information and Protection of Privacy Act (FIPPA)*.

The Ministry of the Solicitor General refused the request, stating that the records were exempt from disclosure under law enforcement and solicitor-client privilege exemptions in the *FIPPA*. Although s. 23 of the *FIPPA* contains a "public interest override" whereby exempt records may be disclosed if "a compelling public

interest in the disclosure of the record clearly outweighs the purpose of the exemption", the override does not apply to the law enforcement and solicitor-client privilege exemptions.

The Information and Privacy Commissioner of Ontario upheld the Ministry's decision. The case went to the Ontario Divisional Court, where the CLA argued that the non-disclosure infringed freedom of expression under section 2(b) of the *Charter*. The Divisional Court rejected the CLA's arguments and upheld the non-disclosure, stating that there is no constitutional "right to know."

The Ontario Court of Appeal overturned the Divisional Court decision. A majority of the court held that s. 23 infringed s. 2(b) of the *Charter* and should extend the public interest override to records related to law enforcement and solicitor-client privilege. In a strong dissent, Juriensz J.A. stated that s. 2(b) does not create a right of access to information in the possession or under the control of a government.

SUPREME COURT DECISION

The Supreme Court decision gives and takes. The Court has recognized that a right of access exists "only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints". On the other hand, the Court refused to recognize a "general right of access", treating "access [as] a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government." It found that s. 23 of the *FIPPA* was constitutional, but seemed to do so on the basis that the public interest must be considered when considering the law enforcement and privilege exemptions, which are discretionary. As a result, the Court ruled that the matter should be reconsidered by the Information Commissioner, suggesting that at least some of the report and records should be released. As the Court stated:

"The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated

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by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised."

CONCLUSION

The decision is significant in that it recognizes at least a limited constitutional right to access government information. However, it gives little guidance as to how or when that right is triggered. The Court is clearly concerned that the access right not be so broad that it extends into traditionally secret areas, such as cabinet deliberations or the inner workings of courts, and this may have motivated the unusual step it took in carving out limits within s. 2(b) of the *Charter* rather than analyzing exceptions under the reasonable limits clause in s. 1.

More cases will need to be brought before the many practical questions flowing from the decision can be answered. Some of those questions may come up this fall when the Court hears the *Information Commissioner of Canada v. Prime Minister of Canada (et al.)* case.

This appeal raises the issue of whether information held by ministers (including the Prime Minister) and their immediate political staff is subject to public disclosure. In the *Information Commissioner* case, Paul Schabas will represent a media coalition consisting of the Canadian Newspaper Association, the Canadian Association of Journalists and the Canadian Media Lawyers' Association, and Ryder Gilliland will represent the Canadian Civil Liberties Association.

Paul Schabas and Ryder Gilliland were counsel for the Canadian Newspaper Association, the Canadian Association of Journalists and the Canadian Media Lawyers' Association in the *Criminal Lawyers' Association* case. Catherine Beagan Flood and Iris Fischer acted for the British Columbia Civil Liberties Association.

For further information, please contact:

Paul Schabas 416-863-4274

Ryder Gilliland 416-863-5849

or a member of our Litigation & Dispute Resolution Group.

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