Ontario (Public Safety and Security) v. Criminal Lawyers' Association (2010) – Freedom of Expression and Access to Government Documents

On June 17, 2010, the Supreme Court of Canada recognized for the first time that freedom of expression, as guaranteed by the *Canadian Charter of Rights and Freedoms*, constitutionally protects access to government documents in some circumstances. The case concerned the way police had handled evidence in a criminal trial. The judge in that trial concluded that the police had deliberately failed to disclose evidence to the defence and negligently failed to maintain original evidence. As a result, the judge ordered a stay of proceedings.[1] A follow-up police investigation concluded that the officers had *not* withheld or mishandled evidence. The police and provided no public explanation for the discrepancy between the two findings.[2] As a result, the Criminal Lawyers' Association – an advocacy group representing criminal defence lawyers – requested access to the records of the investigation into the officers' conduct.[3] Their request was based on provincial freedom of information legislation.[4] The minister responsible for the police refused to disclose any of the records. He cited exceptions in the legislation for certain categories of information: information pertaining to a law enforcement investigation; information protected by solicitor-client privilege; records that could threaten an individual's health and safety; and personal information about an individual.[5] The Criminal Lawyers' Association then appealed that decision to the Information and Privacy Commission. At that point, reliance on the health and safety exception was withdrawn. The Commission ruled that the personal privacy exception did not apply because it was subject to an override if there is a compelling public interest in disclosure. However, the public interest override does not apply to the law enforcement and solicitor-client privilege exceptions, so the Commission upheld the minister's refusal to disclose the records.[6] The Criminal Lawyer's Association appealed this decision, arguing that the law on information and privacy was unconstitutional. They took the view that the lack of a public interest override for the two exceptions interfered with freedom of expression.[7] This aspect of the case was eventually appealed to the Supreme Court of Canada. The case therefore required the Court to answer two questions. First, does freedom of expression include a right to receive government records? And, if so, is the legislation unconstitutional for not allowing access to the records of the investigation?

Freedom of Expression and Access to Government Records

The Court began by reiterating the basic framework for freedom of expression cases, which involves a three-step analysis. First, does the activity in question have expressive content, which would bring it within the scope of freedom of expression? Second, is there something about the expression – such as its form or location – that negates constitutional protection? And third, if the activity is protected, does the government action in question infringe upon that protection? Although this analysis was developed for activities that express meaning, the Court ruled that an adapted version applies when a court must determine whether the*Charter* requires that government documents be produced.[8] The Court adapted the freedom of expression framework as follows. To demonstrate expressive content in access to documents, it must be shown that, by denying access to documents, meaningful commentary on an issue of public or political importance is precluded.[9] If so, then the first stage of the analysis is satisfied. At the second stage, however, constitutional protection for access to documents can be defeated by countervailing considerations. These considerations would apply, for example, if the documents are protected by a recognized privilege (such as solicitor-client privilege), or if producing the documents would interfere with the proper functioning of a government institution.[10] If there are no such countervailing considerations, then the final question is whether a government action interferes with access to the documents. If so, that interference amounts to a breach of freedom of expression. The Court recalled earlier cases dealing with the open court principle, which states that it is not sufficient for justice to be done by the courts; the courts must also be publicly accessible so that justice may be *seen* to be done. In those cases, the Court recognized that access to information is "inextricably tied" to freedom of expression.[11] Such access, however, has always been limited to ensure the proper functioning of the courts. The memos and notes leading to a judicial decision, for example, are not made publicly accessible, as access would impair the proper functioning of the courts.[12]

Is the Lack of a Public Interest Override Unconstitutional?

Having established the basic framework for analysis, the Court then considered whether the legislation at issue in this case is constitutional. The Criminal Lawyers' Association argued that the legislation was unconstitutional to the extent that the exceptions for records prepared in the course of law enforcement and records protected by solicitor-client privilege are not subject to the public interest override. The Court, however, rejected this argument, stating that a proper interpretation of the legislation already includes such considerations. The Court pointed out that concepts such as privilege for police informants and prosecutorial discretion already take into account the strong public interest in protecting records prepared in the course of law enforcement.[13] As well, the legislation gives the minister the *discretion* to refuse to disclose these records – it does not require that he refuse to disclose these records.[14] Since this discretion must be exercise consistently with the purposes of the legislation, the minister is already required to weigh the public interests in allowing or refusing disclosure.[15] In making that decision, the minister must consider "the public interest in open government, public debate and the proper functioning of government."[16] As a result, adding a public interest override to this exception would "add little to the process."[17] The Court therefore concluded that legislation already provides for

adequate consideration of the public's interest in disclosure of law enforcement records.[18]

The Court applied similar reasoning to the exception for solicitor-client privilege. The Court pointed out that there is a high public interest in maintaining the confidentiality of the relationship between lawyers and their clients, and so this is a nearly absolute privilege.[19] Given this near-absolute nature of the privilege, and its grounding in protecting a public interest, the Court said that it could not see how adding a public interest override to this exception could ever serve to require the disclosure of a protected document.[20] Since subjecting these exceptions to a public interest override would not change the process by which the minister must decide whether or not to disclose a document falling within either of these categories, the Court concluded that the legislation is constitutional.[21] The Court did, however, observe that it appeared the Commissioner did not take into account his discretion to allow for disclosure when he reviewed the minister's decision.[22] The Court was particularly concerned that no reasons were given for the decision to exclude this information, and that no part of the lengthy documents was disclosed.[23] As a result, the Court ordered the Information and Privacy Commission to reconsider this part of the decision in light of their comments about the need to consider the public interest in disclosing the documents.[24] The case is therefore not the final word on whether the Criminal Lawyers' Association will gain access to some to the records. Adam Badari (July 13, 2010)

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[1] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at paras. 9-10. [2] *Ibid.* at para. 11. [3] *Ibid.* at para. 12. [4] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. [5] *Supra* note 1 at para. 13. [6] *Ibid.* at para. 15. [7] *Ibid.* at paras. 16-18. [8] *Ibid.* at para. 32. [9] *Ibid.* at paras. 33-37. [10] *Ibid.* at paras. 33, 38-40. [11] *Ibid.* at para. 36, citing: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326;*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480. [12] *Ibid.* at para. 40. [13] *Ibid.* at para. 44. [14] *Ibid.* at para. 45. [15] *Ibid.* at paras. 46-47. [16] *Ibid.* at para. 48. [17] *Ibid.* at para. 49. [18] *Ibid.* at para. 52. [19] *Ibid.* at para. 53. [20] *Ibid.* at para. 54. [21] *Ibid.* at paras. 57-61. [22] *Ibid.* at para. 72. [23] *Ibid.* at para. 74. [24] *Ibid.* at para. 76.