FTR Now

Government Institutions Should Take Note of a Recent Supreme Court of Canada Case on Access to Government Information

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On June 17th, the Supreme Court of Canada issued a significant judgement on access to government information. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII) (the "*CLA*" case), it held that the *Canadian Charter of Rights and Freedoms* (the "*Charter*") gives the public a limited right of access to government information – a right existing separate and apart from the rights currently granted by access to information legislation.

This *FTR Now* describes the decision and discusses its significance to government institutions.

THE NARROW FINDING – *FIPPA* PUBLIC INTEREST OVERRIDE PROVISION IS LAWFUL

The matter before the Court was about whether the Ontario *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") violates section 2(b) of the *Charter* (the guarantee of freedom of expression) because *FIPPA* does not allow for a "public interest override" of its law enforcement and solicitor-client privilege exemptions to its public right of access.

FIPPA gives the public a presumptive right of access to most information in an Ontario government institution's custody or control. This right is then subject to three mandatory exemptions and 12 discretionary exemptions. Seven of the exemptions are then subject to an override that applies if "a compelling public interest in the disclosure of the [requested] record clearly outweighs the purpose of the exemption." The override does not apply to the law enforcement and solicitor-client privilege exemptions. The Criminal Lawyers' Association claimed this limit was an unjustifiable breach of section 2(b) of the *Charter*.

The Supreme Court of Canada unanimously held that the limited override in *FIPPA* is constitutional. The Court stressed that both the law enforcement and solicitor-client privilege exemptions in *FIPPA* are based on recognized public interests and, furthermore, that *FIPPA* institutions must consider the public interest in favour of disclosure in deciding to apply these exemptions. This structure-based balancing precluded finding a section 2(b) violation, according to the Court, because an additional override based on a consideration of the public interest would "add little" to meaningful public discussion.

SIGNIFICANT FINDING ON THE EXERCISE OF DISCRETION UNDER ACCESS LEGISLATION AND ON SOLICITOR-CLIENT PRIVILEGE

The Court's message about the proper exercise of discretion is its second finding of significance. The Court made very clear that an institution must consider the public interest favouring disclosure in making a discretionary access decision. With reference to *FIPPA*'s discretionary law enforcement exemption, it said:

> …a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists

> the head would exercise the discretion conferred by the word “may” and order disclosure of the document.

That the Court seemingly limited this finding to the law enforcement exemption is the Court’s third finding of significance. The law enforcement and solicitor-client privilege exemptions are both discretionary, both requiring a consideration of all relevant factors, including the public interest favouring disclosure. Yet, at the same time that the Court stressed the proper application of discretion in applying the law enforcement exemption, it suggested solicitor-client privilege will always prevail over the public interest in disclosure.

Though this finding seems to blur the substantive (privilege) with the procedural (discretion), this is yet another indication of the strength of the Court’s commitment to maintaining a strong solicitor-client privilege doctrine. There is no question that, once established, solicitor-client privilege is almost absolute (subject to two recognized exceptions – in the words of the Court, “the narrowly guarded public safety and right to make full answer and defence exceptions”).

RECOGNITION OF A LIMITED RIGHT OF ACCESS TO GOVERNMENT INFORMATION

This leaves the Court’s broadest finding – its finding that section 2(b) of the *Charter* supports a right of access to government information. According to the Court, this right derives from the section 2(b) guarantee of freedom of expression and is akin to the long-recognized open-court principle:

> In sum, there is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded…
> If this necessity is established, a prima facie case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.

Though the judgement was about the legality of *FIPPA* and not a direct-to-court request for access, this statement appears to recognize a right of access that could be asserted by way of a court application.

WHAT DOES THIS MEAN TO GOVERNMENT INSTITUTIONS?

We do not expect the *CLA* case to radically change how the public seeks access to government information. The existing statutory access regimes grant a very broad statutory right of access. There is no reason to believe that the *Charter* right now recognized by the Supreme Court of Canada is significantly broader than the statutory rights already granted in a relatively uniform manner across Canada. In fact, *CLA* suggests the opposite. Moreover, Canadian access-to-information statutes typically place an onus of justifying non-disclosure squarely on government, whereas the burden of establishing a *Charter*-based right of access, according to *CLA*, is squarely on an applicant.

The *CLA* right, however, is something to be aware of and monitor. It may be a means by which well-funded requesters can attempt to seek faster access to government information. It also is a means by which requesters may challenge limitations in

specific access statutes in much the same manner as did the Criminal Lawyers' Association.

If you have any questions about this decision or access-to-information matters in general, please contact Paul Broad at 519.931.5604 or your regular Hicks Morley lawyer.

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