Supreme Court Upholds a Constitutional Right to Information

On 17 June 2010, the Supreme Court issued a decision with very important implications for access to information in Canada, *Ontario (public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (available at: http://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html). The decision recognises a limited right to access information held by public bodies as part of the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms.

The case had its basis in a murder trial in which a judge granted a stay of proceedings after finding "many instances of abusive conduct by state officials". This prompted the Ontario Provincial Police (OPP) to investigate the matter. In a press release, the OPP completely absolved the police officers involved of any wrongdoing, although they did not release the report of the investigation, or provide any reasons for their conclusions. The Criminal Lawyers' Association then made a request under Ontario's Freedom of Information and Protection of Privacy Act for the OPP report and two other documents containing legal advice. The request was refused and the case eventually came before the Supreme Court of Canada as a constitutional claim that the refusal to grant access to the documents breached the applicants' right to freedom of expression.

The Court recognised the right of access as "a derivative right", specifically where it is "a necessary precondition of meaningful expression on the functioning of government". It is not clear why the Court limited the scope of the right in this way, and it provided no reasons for this. The underlying right to freedom of expression is not limited to "meaningful expression" or to discussions on the "functioning of government", so it is not clear why the derivative right to information should be limited to these types of expressions.

The next stage of reasoning is even more problematical from the perspective of constitutional interpretation. The Court seriously misapplied the established test for deciding whether the right to freedom of expression applies in the first place, and held that the right to information does not extend to situations involving privileged information or information the disclosure of which could undermine the functioning of a public body. Again, no reasoning was provided. Instead of building these limitations into the scope of the right, the Court should have left the question of exceptions to the section 1 of the Charter assessment of restrictions on rights. This follows a strict test, which ensures that restrictions are not arbitrary or overbroad. This rigorous analysis needs to be applied to exceptions to the right to information.

The Court also held that the fact that the Ontario law did not apply a public interest override to the two exceptions under consideration – solicitor-client privilege and law enforcement – was not a constitutional problem. An important part of the reasoning of the Court here was based on the fact that both exceptions were discretionary in nature, as many exceptions in Canadian laws are. Specifically, the provisions start with the phrase: "A head *may* refuse to disclose …".

For many Winston Report readers, this may be the most immediately relevant aspect of the decision. The Supreme Court held that discretion such as this "must be exercised consistently with the purpose underlying its grant". The head of a public body, in assessing whether or not to apply such an exception, must first consider whether the exception is engaged (in that case, specifically whether release of the information "could

reasonably be expected" to harm law enforcement). He or she must then "weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly." In effect, this means that any discretionary exception should be read as incorporating a public interest override.

While this is a very useful clarification, the Court's reasoning here is still problematical because requiring the exercise of discretion to take into account the public interest does not obviate the need for a public interest override. While the initial assessment by the public body may be similar, the standard of review (for example by an information commissioner or court) is very different. Specifically, a reviewer may only assess whether discretion was exercised reasonably, whereas in most cases a reviewer can assess whether the public interest override was applied properly, a much stricter standard.

In the end, the Court remitted the matter back to the Commissioner, to decide whether the Minister properly exercised his discretion in refusing to release the OPP report. The Court noted that the fact that not a single page of the 318-page report was released, and that no reasons were given for this, should have raised concerns. Hopefully this will help to limit the practice of simply declaring whole documents confidential, which has undermined the right to information in the past.

Notwithstanding the criticisms, this decision will have important implications for Canadians, as it provides a constitutional framework for access to information laws. At a practical level, we can expect to start seeing constitutional arguments being introduced in legal challenges to refusals to provide access to information. And hopefully the application of discretionary exceptions will take into account wider public interest considerations than has been the case in the past.

Toby Mendel is the Executive Director of the Centre for Law and Democracy, an international human rights organisation based in Halifax, Canada, which promotes respect for foundational rights for democracy. Toby can be reached by email at toby@law-democracy.org or by phone on 902 431-3688.