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Citation Information

Gilliland, Ryder L.. "Supreme Court Recognizes (a Derivative) Right to Access Information." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 51. (2010).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/9>

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Supreme Court Recognizes (a Derivative) Right to Access Information

Ryder L. Gilliland*

I. INTRODUCTION

On June 17, 2010, the Supreme Court of Canada released its long-awaited decision in *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)*.¹ The unanimous judgment of the Court, co-written by McLachlin C.J.C. and Abella J., is significant in that it recognizes, for the first time in Canada, that section 2(b) of the *Canadian Charter of Rights and Freedoms*² protects a right to access government information. Prior to the *Criminal Lawyers* decision, courts, including the courts below, had repeatedly rejected the notion of a constitutional right to access government information, despite widespread recognition by courts and legislators of the central role access to government information plays in fostering democracy. In a short and direct judgment, the Court has swept away the analytical barriers that stood in the way of the constitutionalization of a right of access. The decision represents a sea change from an analytical perspective.

It remains to be seen, however, what impact the *Criminal Lawyers* decision will have from practical perspective. The limited guidance provided by the Court is that there is a right to access information where it is “necessary to permit meaningful discussion on a matter of public interest”.³ The word “meaningful”, a new addition to the matrix of section 2(b) Charter analysis, leaves uncertainty respecting when a right to access information can be invoked. The upshot of the Court’s parsimonious reasons is that the scope of the right of access will be decided in future

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¹ [2010] S.C.J. No. 23, 2010 SCC 23 (S.C.C.) [hereinafter “*Criminal Lawyers*”].

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

³ *Id.*, at para. 31.

cases, the focus of which will no doubt be on the extent to which the words “necessary” and “meaningful” should limit the right of access.

The view developed in this paper is that having established a toehold in Canadian law, the scope of the right of access will necessarily expand over time. This is so for two principal reasons. First, the freedom expression right from which the right of access derives has always been very broadly construed. A narrow construction of the words “necessary” and “meaningful” is inconsistent with the approach to section 2(b) developed since *Ford*.⁴ Second, as access to information and freedom of expression are recognized as fundamental to democracy, undue constraint of either right is inconsistent with modern national and international societal values. There is a clear trend in the case law towards increased openness and transparency.

II. BACKGROUND

In 1983 Graham Court and Denis Monahan were charged with participating in the murder of Domenic Racco in an alleged “mob hit”. Fourteen years later, Glithero J. of the Ontario Superior Court stayed the charges on the basis of abusive conduct by police and prosecutors. His judgment was a scathing indictment of the police and Crown. As an example:

As previously indicated, I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. That prejudice is completed. The improper cross-examinations and jury address would not be repeated at a new trial and the completed prejudice with respect to those issues would not therefore be perpetuated in a new trial. The effects or prejudice caused by the abusive conduct in systematic non-disclosure, deliberate revision of materials so as to exclude useful information to the defence, and the unexplained loss, or breach of the duty to preserve, of so much original evidence would be perpetuated through a future trial in that the defence cannot be put back into the position they would originally have been, and which in my view they were entitled to maintain throughout the trial process. That evidence is gone, either entirely or to the extent of severely diminishing the utility of the evidence, and the prejudice thereby occasioned has only been

⁴ *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.).

exaggerated by the passage of time since the 1991 trial and prior to the belated disclosure of this information in 1996.⁵

Justice Glithero's criticism of the conduct of state officials prompted a review by the Ontario Provincial Police ("OPP") of the investigation and subsequent prosecution. Nine months later, the OPP issued a terse press release, in which it stated that it had found "no misconduct" on the part of state officials and "no evidence" that they systematically suppressed vital evidence in the Racco case.

In light of the stark contrast between Glithero J.'s judgment and the OPP press release, the Criminal Lawyers' Association ("the CLA" or "the Association") submitted a request under the *Freedom of Information and Protection of Privacy Act*⁶ for the records underlying the OPP's investigation. In particular, the CLA sought a 318-page police report, an internal memorandum, and a letter, all relating to the OPP investigation.

The Ministry of the Solicitor General, now the Ministry of Public Safety and Security ("the Ministry"), denied the CLA's FIPPA request on the basis that the records were exempted from disclosure under sections 14, 19, and 21 of FIPPA, which pertain to law enforcement records, solicitor-client privilege and personal privacy, respectively. On appeal, the Office of Information and Privacy Commissioner of Ontario upheld the non-disclosure.

The CLA appealed to the Divisional Court, arguing that its freedom of expression under section 2(b) of the Charter had been infringed. In particular, the Association argued that section 23 of FIPPA, which is the public interest override provision of the Act, was unconstitutional because although it allows the Minister to invoke the public interest to grant access to documents that are exempted from disclosure under the Act, it does not apply to records exempted under the law enforcement (section 14) or solicitor-client (section 19) privilege exemptions. The Divisional Court rejected this argument centrally on the basis that there was no constitutional "right to know".⁷

Although a majority of the Court of Appeal (Laforme and MacFarland JJ.A.) found that there had been a section 2(b) violation, it did so without finding that there is a free-standing right to access government information under section 2(b) of the Charter. Instead, it found

⁵ *R. v. Court*, [1997] O.J. No. 3450, 36 O.R. (3d) 263, at para. 130 (Ont. Gen. Div.).

⁶ R.S.O. 1990, c. F.31 [hereinafter "FIPPA"].

⁷ *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)*, [2004] O.J. No. 1214, 237 D.L.R. (4th) 525, at para. 34 (Ont. Div. Ct.) [hereinafter "CLA Trial Decision"].

that having created a public interest override, the legislature was obliged to extend it to all provisions.⁸ In other words, the section 2(b) right in this case was generated from within the four corners of the Act. In a strong dissent, Juriensz J.A. tackled head on the question of whether there was a right of access under section 2(b) of the Charter, concluding that no such right existed.⁹

A central tension in the Divisional Court judgment, as well as in the majority and minority decisions in the Court of Appeal, was on the distinction between rights and freedoms. In particular, the courts below had difficulty reconciling the CLA's position with the principle, first articulated by the Court in *Haig v. Canada (Chief Electoral Officer)*,¹⁰ that section 2 of the Charter does not, as a general rule, impose positive obligations on government.

III. THE SUPREME COURT DECISION

The Supreme Court dealt summarily with cases such as *Haig* by stating as follows:

The courts below were divided on whether the analysis should follow the model adopted in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. In their argument before this Court, some of the parties also placed reliance on *Dunmore* and on this Court's subsequent decision in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673. In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 967-68, and in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141.¹¹

Having set aside the analytical framework that was developed to limit the circumstances in which positive obligations could be imposed on government under section 2(b) of the Charter, the Court proceeded to apply the *Irwin Toy* framework as follows:

⁸ [2007] O.J. No. 2038, 280 D.L.R. (4th) 193, at para. 62 (Ont. C.A.).

⁹ *Id.*, at paras. 99-167.

¹⁰ [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.) [hereinafter "*Haig*"]. See also *Native Women's Assn. of Canada v. Canada*, [1994] S.C.J. No. 93, [1994] 3 S.C.R. 627 (S.C.C.); *Siemens v. Manitoba (Attorney General)*, [2003] S.C.J. No. 69, [2003] 1 S.C.R. 6 (S.C.C.); *Delisle v. Canada (Deputy Attorney General)* (a s. 2(d) case), [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.).

¹¹ *Criminal Lawyers*, *supra*, note 1, at para. 31.

The *Irwin Toy* framework involves three inquiries: (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(b)? (2) Is there something in the method or location of that expression that would remove that protection? (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect? These steps were developed in *Montréal (City)* (at para. 56) in the context of expressive activities, but the principles animating them equally apply to determining whether s. 2(b) requires the production of government documents.

This leads us to more detailed comments on the scope of s. 2(b) protection where the issue is access to documents in government hands. To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2(b) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged. The only remaining question is whether the government action infringes that protection.¹²

The Court proceeded to apply this test in reverse order, finding first that the failure to extend the public override exemption to the law enforcement and privilege provisions of the Act would not infringe section 2(b) protection. The basis for this conclusion was that the public override provision adds very little to the Act, as under sections 14 and 19 the head already has discretion as to whether or not to apply an exemption.¹³ As the Court summarized:

We conclude that the CLA has failed to establish that the inapplicability of the s. 23 public interest override significantly impairs its ability to obtain the documents it seeks. Sections 14 and 19 already incorporate, by necessity, the public interest to the extent it may be applicable.¹⁴

The Court went on to find that in any event, the information sought by the CLA was not necessary for meaningful public discussion of the

¹² *Id.*, at paras. 32 and 33.

¹³ *Id.*, at paras. 48 and 55.

¹⁴ *Id.*, at para. 56.

investigation into the murder of Domenic Racco, as there was already much information in the public domain.¹⁵ It also noted that even if necessity were established, the CLA would face a further hurdle of demonstrating that access would not impinge on the proper functioning of government.¹⁶

Despite these findings, the Court remitted the law enforcement claim back for reconsideration by the Commissioner on the basis that the volume of the withheld record suggested that the head may not have disclosed as much as the record as possible, as is required under the Act.¹⁷

IV. ANALYSIS

1. The Meaning of “Meaningful”

The approach of the Court in *Criminal Lawyers* is not identical to what was prescribed in *Irwin Toy*, where the Court summarized the test it had established under section 2(b) as follows:

When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff’s activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government’s purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the

¹⁵ *Id.*, at para. 59.

¹⁶ *Id.*, at para. 60.

¹⁷ *Id.*, at para. 67.

activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.¹⁸

Two things stand out about this summary.

First, the definition of expressive activity is very broad, excluding only activity that conveys no meaning or violent activity.

Second, the Court in *Irwin Toy* distinguished between situations where the purpose of legislation is to restrict freedom of expression, in which case there is a *prima facie* breach of section 2(b), and cases where the purpose is not to limit freedom of expression but the legislation nonetheless has that effect, in which case only where the meaning being conveyed relates to the values underlying section 2(b) will there be an infringement. The Court in *Criminal Lawyers* referenced the purpose/effect distinction in *Irwin Toy*, but did not explain how it applied in the access to information context.

It is hard, at first glance, to reconcile the broad approach to section 2(b) endorsed by the Court since *Irwin Toy* with the statement in *Criminal Lawyers* that the right to access information is only granted when necessary for "meaningful discussion" on matters of public interest. The approach in *Criminal Lawyers* is also hard to reconcile with general principles underlying access legislation. It appears that government can now respond to an access to information request by asking what the information will be used for. This is not a welcome development.

It seems most likely that in using the words "meaningful discussion", the Court intended to refer to discussion that advances the freedom of expression values. This conclusion is based on the fact that in most cases, legislation that limits access to information will not do so for the purpose of preventing speech. Rather, it is more likely to be the case that legislation is intended to protect the proper functioning of government but has the effect of limiting speech. This was precisely the situation before the Court in *Criminal Lawyers*, where the alleged limitation on access was prescribed by exemptions designed to protect communications relating to law enforcement and solicitor-client communications. Pursuant to *Irwin Toy*, where the unintended effect of legislation is to limit speech, the

¹⁸ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at para. 55 (S.C.C.) [hereinafter "*Irwin Toy*"].

party asserting a section 2(b) right must demonstrate that the meaning being conveyed relates to “the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing”.¹⁹ As is illustrated, for example, by the findings of the Supreme Court in *Montréal (City) v. 2952-1366 Québec Inc.*, a broad range of communications fit within this category:

The electronically amplified noise at issue here encouraged passers-by to engage in the leisure activity of attending one of the performances held at the club. Generally speaking, engaging in lawful leisure activities promotes such values as individual self-fulfillment and human flourishing. The disputed value of particular expressions of self-fulfillment, like exotic dancing, does not negate this general proposition: *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 489. It follows that the By-law has the effect of restricting expression which promotes one of the values underlying s. 2(b) of the *Canadian Charter*.²⁰

It is consistent with both *Irwin Toy* and *Criminal Lawyers* that “meaningful discussion” is discussion that promotes the values underlying section 2(b) of the Charter. As *City of Montréal* illustrates, a broad variety of expression promotes these values. If broadcasting loud music to attract club patrons is an activity that promotes section 2(b) values, the desire to comment on a criminal prosecution necessarily is also. It is worth noting that although the Court in *Criminal Lawyers* rejected the section 2(b) claim, it did not give any indication that the discussion that the CLA wished to advance was not meaningful.

More troubling, perhaps, for those advocating a broad interpretation of the *Criminal Lawyers* decision, is the use of the word “necessary” and, in particular, the Court’s finding that as similar information was available through other sources, access was not necessary to foster meaningful discussion. This is, however, a fact-specific finding that appeared to overlap somewhat in the Court’s reasoning with the fact that the information sought might impinge on privileges designed to protect the proper functioning of government institutions. It would be a mistake to think that these findings will be an insurmountable impediment to the future expansion of the scope of the access to information right available under section 2(b).

¹⁹ *Irwin Toy, id.*

²⁰ [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141, at para. 84 (S.C.C.) [hereinafter “*City of Montréal*”].

2. The Law Develops Incrementally

The Court was cautious in this first foray into recognizing a constitutional right to access government information. It emphasized the derivative nature of the right and also the fact that the right will not extend so far as to impair the proper functioning of government institutions. It has nevertheless recognized a derivative right of access, and the importance of this first step should not be understated. Prior to this decision, the government could have revoked the Act without any remedy being available under the Charter. This is no longer the case.

There is reason to believe that the scope of the right to access information will expand over time. While the connection between access to government information and democracy has long been recognized, the movement towards the recognition of a legal right of access, whether constitutionally entrenched or otherwise, is a more recent phenomenon. The provinces implemented freedom of information legislation through the 1990s and after.²¹ The federal *Access to Information Act* was conceived, debated and legislated at nearly the same time as the Charter, becoming law in June 1982, and taking effect on July 1, 1983.²² Only since then have courts elaborated on the importance of a right of access²³ and accorded access legislation quasi-constitutional status.²⁴ The recognition of a derivative constitutional right of access was a logical next step in the evolution of this area of the law, as will be, in time, the expansion of the scope of the right.

²¹ *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1; *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20; *Access to Information and Protection of Privacy Act*, S.N.W.T. (Nu.) 1994, c. 20; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01; 2000, c. F-25; *Freedom of Information and Protection of Privacy Act*, C.C.S.M. c. F175; FIPPA, *supra*, note 6; *An Act respecting Access to Documents held by public bodies and the Protection of personal information*, R.S.Q., c. A-2.1; *Right to Information Act*, S.N.B. 1978, c. R-10.3; *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5; and *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1.

²² R.S.C. 1985, c. A-1.

²³ *Dagg v. Canada (Minister of Finance)*, [1997] S.C.J. No. 63, [1997] 2 S.C.R. 403, at para. 61 (S.C.C.).

²⁴ See, e.g., *Canada (Attorney General) v. Canada (Information Commissioner)*, [2004] F.C.J. No. 524, 2004 F.C. 431, at para. 20 (F.C.); *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2008] F.C.J. No. 939, 2008 FC 766, at para. 45 (F.C.); and *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773, at para. 24 (S.C.C.) (considering the *Privacy Act*, but commenting on the provision in the *Privacy Act* granting individuals with a right of access to personal information about themselves).

The evolution of the law in Canada is mirrored by developments abroad. According to a worldwide survey conducted in 2006, more than 80 countries had by then adopted constitutional provisions that recognize a “right to know”.²⁵ Most newly written constitutions include a right to access, and some older constitutions have recently been amended to include right to access provisions.²⁶

As many countries have recognized the right to access government information at either the domestic or international level — and in many cases, both — the international jurisprudence relating to the right to access government information has also developed.

For example, in the case of *Sdruženi Jihočeské Matky v. Czech Republic*,²⁷ the European Court of Human Rights considered whether the Czech government had an obligation to disclose documents and information relating to a proposed nuclear plant. The governmental authority that had been solicited to provide the documents had resisted the request by an environmental NGO. The European Court decided that it would not require the governmental authority to disclose the documents at issue, noting that the balancing of interests required by the case rendered the non-disclosure acceptable. However, in considering the utility of article 10 of the ECHR, the Court confirmed that the refusal to disclose the documents did amount to an interference with the requesting NGO’s “right to receive information”.²⁸

The Inter-American Court of Human Rights (“IACHR”) has more directly recognized a “right to know”. In *Claude Reyes and others v. Chile*,²⁹ the IACHR considered whether the Chilean government was required to disclose information about a proposed government deforestation project. The IACHR held unequivocally that article 13 of the ACHR

²⁵ David Banisar, “Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Law” (Privacy International, 2006), at 17. Available online: <<http://www.privacyinternational.org/foi/foisurvey2006.pdf>>.

²⁶ *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, Article 32(1); *Constitution of the Republic of Bulgaria*, Prom. SG 56/13 Jul 1991, Article 41. Available online: <<http://www.parliament.bg/?page=const&lng=en>>; *Constitution of the Republic of Poland*, April 2, 1997, Article 61. Available online: <<http://www.senat.gov.pl/k5eng/dok/konstytu/konstytu.htm>>; *Constitution of the Kingdom of Thailand*, B.E. 2550 (2007), Part 10. Available online: <<http://www.asianlii.org/th/legis/const/2007/1.html>>; *Constitution of Finland*, June 11, 1999, Section 12. Available online: <<http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>>.

²⁷ E.C.H.R. July 10, 2006, Court Application No. 19101/03 [hereinafter “*Sdruženi*”].

²⁸ *Id.*, at 9.

²⁹ Judgment of September 19, 2006. Available online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf>.

protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the [ACHR], the State is allowed to restrict access to the information in a specific case.³⁰

These examples are illustrative rather than exhaustive. There is, in short, a worldwide trend towards facilitating access to government information.

V. CONCLUSION

Criminal Lawyers does not define the scope of the derivative right of access, and the decision adopts what might be characterized as a cautious approach to this new-found right. However, from the perspective of those favouring a broad right of access to government information, the glass is half full. The Supreme Court has set out a framework from which the scope of access rights can be developed and expanded.

³⁰ *Id.*, at para. 77.

