Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3780

Appeal PA16-573

Ministry of Transportation

October 26, 2017

Summary: At issue in this appeal is a request for access to meeting notes taken by two ministry lawyers that the ministry claimed to be subject to solicitor-client privilege and thereby qualify for exemption under section 19 of the *Act*. In this order, the Adjudicator finds that the two records at issue are subject to solicitor-client privilege which has not been waived and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815: *Alberta (Information and Privacy Commissioner v. University of Calgary*, [2016] 2 SCR 555, 2016 SCC 53; *Ontario (Ministry of Community and Social Services) v. Cropley*, 2004 CanLII 11694 (Ont. Div. Crt.); *Burns v. Kelly Peters & Assoc. Ltd.*, 1988 CanLII 3095 (BCSC); *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27.

OVERVIEW:

[1] The Ministry of Transportation (the ministry) received the following access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for the period of January 1, 2010 to May 5, 2016:

> Please provide all documentation, personal handwritten notes, emails, correspondences, meeting notes, letters regarding anything to do with

> [specified company], [name of requester], [specified name] or the property identified as part of Lot [specified number] Concession [specified number], [specified city]. Such public records to include, but not be limited to:
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> > 427 Extension Environmental Assessment process documents, discussion notes with the [specified conservation authority], any and all communications with the [specified conservation authority], retainer letters and correspondences with Appraisers, Planners or expert consultants, terms of reference. Discussions or notes or emails with any external landowners. Any notes or letters or emails of the planners or appraisers or external consultants to anyone whatsoever including the [specified conservation authority], [specified city] or [specified region] or external landowners.

[2] The requester subsequently clarified his request to be a request for access to:

> All documentation, personal handwritten notes, emails, correspondences, meeting notes, letters regarding anything to do with [specified company], [requester's name] [specified name] or the property identified as Part of Lot [specified number] Concession [specified number], [specified city].
>
> Including, but not limited to:
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> > • Discussions, handwritten notes or emails with any landowners
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> > • Terms of Reference for external consultants, retainer letters and correspondences with Appraisers, Planners, expert consultants, [specified conservation authority], [specified city] [specified region] or landowners
> >
> > • Appraisal reports
> >
> > • Purchase and Sale Agreements
> >
> > • Planning Justification Reports
> >
> > • Internal reporting documents

[3] The ministry issued a fee estimate to process the request and advised that its preliminary review of responsive records indicated that some information may qualify for exemption under sections 17(1) (third party information), 18(1) (economic and other interests), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*. The requester paid the requested fee deposit and after extending the time to respond to the request under section 27(1)(a) of the *Act*, and notifying two companies whose interests may be affected by the disclosure, the ministry issued its access decision.

[4] As set out in its access decision, the ministry granted partial access to the responsive records, relying on sections 13(1) (advice or recommendations), 17(1), 18(1), 19 and 21(1) of the *Act* to deny access to the portions it withheld.

[5] The requester (now the appellant) appealed the ministry's access decision and the within appeal file was opened. One of the notified companies also appealed the ministry's decision to release some of its information and appeal file PA16-561 was opened to address that appeal.

[6] In the course of mediation, a number of issues were addressed and resolved including the matters raised in appeal file PA16-561, resulting in that file being closed. In addition, the ministry conducted a further search for responsive records and issued a supplementary decision letter providing additional information to the appellant. At the close of mediation, the only matter remaining at issue in this appeal was access to two specified separate handwritten meeting notes taken by two specified ministry lawyers dated May 4, 2016, identified as documents 1 and 2 on the index of records that accompanied the supplementary decision letter. The ministry asserted that section 19 applied to those records.

[7] As mediation did not fully resolve the appeal it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] I commenced my inquiry by sending the ministry a Notice of Inquiry setting out the facts and issues in the appeal. I added to the Notice of Inquiry the possible application of section 49(a) of the *Act*, in conjunction with section 19, as an issue in the appeal. The ministry provided responding representations. I then sent the appellant a Notice of Inquiry along with a copy of the ministry's representations. The appellant provided responding representations.

[9] In this order, I find that the records at issue are subject to solicitor-client privilege which has not been waived and I dismiss the appeal.

RECORDS:

[10] The records remaining at issue in the appeal consist of two specified separate handwritten meeting notes taken by two specified ministry lawyers dated May 4, 2016, identified as documents 1 and 2 on the index of records that accompanied the supplementary decision letter.

ISSUES:

A. Does section 19 apply to the records?

B. Did the institution exercise its discretion? If so, should this office uphold the exercise of discretion?

DISCUSSION

Preliminary matter

[11] The legislative scheme established by the *Act* contains different procedures for processing requests for information, depending on whether the request is for an individual's own personal information, or for general records. In the former situation, requests would be processed under Part III of the *Act*. In the latter case, requests would be treated under Part II of the *Act*.[1]

[12] As set out above, I added the possible application of section 49(a), in conjunction with section 19, as an issue in the appeal. Section 49(a) applies if a record contains the requester's own information. If it does, the analysis is conducted under part III of the *Act*. If a record does not contain the requester's own information the analysis is conducted under part II of the *Act*, and, in the circumstances of this appeal, only section 19 of the *Act* is considered. The ministry submits that the record does not contain the personal information of the appellant and the information appears in the records in a business context only. It submits that the discussions relate to a property owned by the appellant's company and that:

> … the discussions are not about the appellant's property as an individual, but about the property of his business, and there is nothing in the records which reveal anything of a personal nature about him.

[13] The appellant provided no representations on this issue.

[14] In the circumstances, I will conduct my analysis under Part II of the *Act*.

Issue A: Does section 19 apply to the records?

[15] Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
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> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

[1] M-352.

> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[16] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[17] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[18] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[2] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[3] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[4] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[5]

[19] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[6] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[7]

Litigation privilege

[20] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[8] Litigation privilege protects a lawyer's work product and covers material going

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[2] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[3] Orders MO-1925, MO-2166 and PO-2441.
[4] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[5] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[7] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[8] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

beyond solicitor-client communications.[9] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[10] The litigation must be ongoing or reasonably contemplated.[11]

Loss of privilege

Waiver

[21] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[12]

[22] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[13]

[23] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[14] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[15]

Termination of litigation

[24] Common law litigation privilege generally comes to an end with the termination of litigation.[16]

Branch 2: statutory privileges

[25] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for

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[9] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[10] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[11] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[12] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[13] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[14] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[15] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[16] *Blank v. Canada (Minister of Justice)*, cited above.

similar reasons.

[26] The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.[17]

[27] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[18]

The ministry's representations

[28] The ministry submits that the records are notes of discussions at meetings that took place on a specified date taken by two ministry lawyers, concerning the compensation due to the appellant as a result of an expropriation of property. The ministry states that there has been no agreement on compensation. The ministry submits that the notes reflect discussions to arrive at a settlement, failing which the matter will require a hearing before the Ontario Municipal Board.

[29] The ministry submits that:

> … the first three pages of Record 2 as well as the segment on the last page of Record 2 marked "private meeting" are covered by common law solicitor-client privilege. These are notes of a meeting between Lawyer B and ministry staff, and neither the appellant nor his counsel was present at these meetings. The notes concern ministry strategy in its dispute with the appellant over compensation for his company's land. Accordingly, it is clear that such information meets all three parts of the test for common law solicitor client privilege:
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> - a communication between solicitor and client;
> - which entails the seeking or giving of legal advice; and
> - which is intended to be confidential.

[30] Relying on *Ontario (Ministry of Community and Social Services) v. Cropley*[19], the ministry submits that the test for what constitutes legal advice should be applied broadly.

[31] The ministry further asserts that with respect to those portions of the records that reflect notes taken where the appellant was present, they qualify as the "work product" or "working papers" of the two lawyers. The ministry adds:

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[17] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[18] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[19] 2004 CanLII 11694 (Ont. Div. Crt.). The ministry references paragraph 22 of the decision.

> … The two ministry lawyers were there as legal representatives of the ministry, not as stenographers or minute takers. The notes were not taken for the purpose of providing a record of the meeting available to all participants, but as part of both lawyers' work product in order to provide advice to ministry clients.
>
> While the appellant and his counsel were present, they were not privy to the contents of the notes. Rather, the notes were intended to gather information in order to support communication with ministry clients and were intended to be kept confidential. Access to these notes would accordingly give the appellant a window on how ministry counsel perceived and communicated the matters raised during the meeting.

[32] The ministry submits that its position with respect to the character of the notes taken in the presence of the appellant is consistent with the principles relating to privilege set out in *Susan Hosiery Ltd. v. M.N.R.*[20], which it submits were described in *Burns v. Kelly Peters & Assoc. Ltd.*[21], in the following terms:

> In *Susan Hosiery* Mr. Justice Jackett, President of the Exchequer Court, analysed the principles which apply on a claim of solicitor-client privilege for correspondence between the appellant's auditor and its solicitor. At p. 33 of his judgment, Jackett P. discussed the nature of solicitor-client privilege and stated:
>
> > (a) all communications, verbal or written, of a confidential character, between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and
> >
> > (b) all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated, are privileged.

[33] The ministry submits that counsel's notes clearly are their working papers, and are directly related to the provision of legal advice.

[34] The ministry further submits that both records are subject to common law settlement privilege in their entirety. The ministry adds:

> … Both records, whether or not the appellant was present during their creation, contain notes of ministry counsel prepared during meetings to

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[20] [1969] 2 Ex. C.R. 27.
[21] 1988 CanLII 3095 (BCSC). The ministry references paragraph 13 of the decision.

> resolve a dispute which, if it is not settled, must be resolved before the Ontario Municipal Board. The records meet the test endorsed by the Ontario Court of Appeal in *Losenno v. Ontario Human Rights Commission*, 2005 CanLII 36441 (ONCA), at para. 21:
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> > [...] Sopinka, Lederman and Bryant summarize the conditions for recognition of the privilege as follows at 14.207 [in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999)]:
> >
> > (a) a litigious dispute must be in existence or within contemplation;
> >
> > (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and,
> >
> > (c) the purpose of the communication must be to attempt to effect a settlement.

[35] The ministry submits that all three parts of the foregoing test are met in this appeal explaining that:

> … The matter is poised to proceed to the Ontario Municipal Board; the notes were taken with the intention that they not be produced before the Board; and the notes were made as part of an attempt to effect a settlement. The fact that opposing counsel was present during some portions of the meetings reflected in the notes does not change the fact that the records were part of counsel's notes made in confidence for the purpose of arriving at a settlement of the dispute. The ministry would certainly resist any attempts to have these notes disclosed to the Board.

[36] The ministry further submits that all of the contents of the records are clearly eligible for the statutory privilege:

> … in that they were prepared by Lawyer A and Lawyer B for the purpose of giving legal advice. The two ministry counsel were not present to make an official record of the meetings, but to take notes to gather information for the purpose of giving legal advice. As such, the records were "prepared by [...] Crown counsel for use in giving legal advice[...]".

[37] The ministry submits that at no time did it take any express or implied steps to waive its privilege in the records. It states that the records have not been disclosed to anyone outside of the ministry, and there are no fairness considerations that lead to the conclusion that the privilege has been waived.

[38] Finally, the ministry submits:

> In the circumstances of this appeal, the appellant is seeking information that will advance the position he has taken in his dispute with the ministry. He is entitled to get much of this information under the *Act*, even where the information may not be of assistance to the ministry's position. But the ministry has consistently declined to waive solicitor-client privilege in responding to access requests, and is even more determined to assert the exemption where the appellant is in a legal dispute with the ministry, a dispute that could at any time proceed to a hearing. The fact that some of the exempted information relates to a meeting at which the appellant was present does not, in the ministry's submission, constitute a circumstance that negates the confidential nature of the information such as to warrant waiver of the privilege.

The appellant's representations

[39] The appellant submits that if he was present at the meeting "anything in relation to that meeting is not covered under privilege". He adds:

> … Just because the note taker was a solicitor, doesn't make the notes privileged as I was present. Attempting to characterize the note taker after the fact to serve an attempt to shelter defies the very nature of the meeting itself. Are the words said during that meeting sheltered because they were spoken to me from a solicitor? That is not logical. How could there be privilege if I was present at the meeting? If there was any privilege, it was waived by my presence at the very meeting.

[40] He further submits that if the notes are not providing advice, "but are of some other nature (stating of facts for example), such notes are not privileged". He asserts that the content of the note matters and that there can be partial disclosure of the portions that are not subject to solicitor-client privilege.

[41] He further submits that:

> … Just because documents flow through a solicitor's office does not automatically exempt them. The origination of that document, what the document says exactly, are they professional consulting opinions, discussions between ministry staff and external agencies (not legal opinions or advice), etc... . All such details are important distinguishable things in determining if a document is exempt under the *Act*. The ministry is attempting to broadly shelter all documents, notes etc... that clearly do not meet the test under the *Act*.

[42] The appellant states that, in any event, disclosing the records would not advance his position as "[t]he ministry is required to disclose all documents not subject to solicitor client privilege anyways as part of document disclosure in that expropriation

proceeding." He qualifies this however, by acknowledging that this is irrelevant, because his appeal relates to an adjudicator deciding if the documents are required to be disclosed under the *Act*.

Analysis and finding

[43] As set out above, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[22] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[23]

[44] I find that the information in the records that is claimed to be subject to section 19, falls within the scope of section 19 of the *Act* because disclosure of this information would reveal the nature of a confidential communication provided in the context of a confidential solicitor-client communication or would reveal the substance of the confidential communication or legal opinion provided (notes of meetings between lawyers and ministry staff), and/or would qualify as a solicitor's working papers and/or would qualify as a record "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation" (notes of meeting involving appellant and/or his lawyer). In light of this finding, it is not necessary for me to consider if they are also subject to settlement privilege. I am satisfied that although the appellant and/or his lawyer may have been present at a meeting where notes were taken, he was never provided with the notes and in my view no waiver of privilege has occurred with respect to any of the information at issue. Accordingly, I find that the withheld information qualifies for exemption under Branch 1 of section 19.

[45] I have also considered whether the records at issue can be severed and portions provided to the appellant. In my view, in light of the appellant's familiarity with underlying matters in the records at issue, I am satisfied that the records cannot be severed without disclosing information that I have found to fall within the scope of section 19 of the *Act*. Furthermore, as identified in previous orders, an institution is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information.[24]

[46] Therefore, I find that the withheld information is solicitor-client privileged information and qualifies for exemption under Branch 1 of section 19.

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[22] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[23] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[24] See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

Issue B: Did the institution exercise its discretion? If so, should this office uphold the exercise of discretion?

[47] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[48] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[49] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[25] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[50] The ministry submits that it properly exercised its discretion in applying section 19. It submits that the appellant is a person whose company is in an adversarial position in relation to the ministry as a result of the dispute over compensation for the expropriation of his company's property. It submits that there can be no question of waiving the exemption in these circumstances, and relying on *Alberta (Information and Privacy Commissioner v. University of Calgary*[26]*,* submits that there is an important public purpose served by solicitor client privilege.

[51] The appellant provided no specific representations on this issue.

Analysis and finding

[52] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.

[53] I am satisfied overall that the ministry properly exercised its discretion under section 19 of the *Act.* It should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of

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[25] Order MO-1573.
[26] [2016] 2 SCR 555, 2016 SCC 53. The ministry references paragraph 34 of the decision.

discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[27].

[54] I find that there is insufficient evidence before me to establish that the ministry exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations or that the ministry was withholding the information for a collateral or improper purpose.

[55] With respect to other relevant considerations, I am satisfied that the ministry was aware of the reason for the request, why the appellant wished to obtain the information, and the appellant's arguments as to why it should disclose the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the ministry considered why the appellant sought access to the information, whether the appellant had a sympathetic or compelling need to receive the information as well as the nature of the information and the extent to which it is significant and/or sensitive to the institution and the appellant. In addition, the ministry considered whether the appellant was an individual or an organization. The information was relatively recent, so, in my view, the age of the information was not a relevant factor. In all the circumstances and for the reasons set out above, I uphold the ministry's exercise of discretion.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: October 26, 2017
Steven Faughnan
Adjudicator

[27] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.