Information and Privacy
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# FINAL ORDER P-1632

Appeal P_9700352

Ministry of the Attorney General

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## NATURE OF THE APPEAL:

This is my final order in respect of the outstanding arising issues from Interim Order P-1619.

## BACKGROUND:

The Ministry of the Attorney General (the Ministry) and the Ontario Native Affairs Secretariat (ONAS) received a request for access to specified records relating to the Emergency Planning for Aboriginal Issues Interministerial Committee and/or Ipperwash Provincial Park (Ipperwash Park). The Ministry represented both itself and ONAS throughout the request and appeal stages of this matter. The Ministry located several records and granted access in full to some and denied access in whole or in part to others. The requester appealed the denial of access. An inquiry was conducted, representations were received from both parties, and I issued Interim Order P-1619. All issues with the exception of the litigation privilege portion of section 19 of the Act were disposed of in Interim Order P-1619.

In Interim Order P-1619, I stated:

> Having reviewed the records, in my view, the issue of whether litigation privilege which may have been enjoyed by the Crown has been lost through the absence of reasonably contemplated litigation or the termination of litigation is relevant with respect to certain records at issue in this appeal. I have decided that the parties should be given the opportunity to provide representations on this issue before I make my determination on these records, and a Supplementary Notice of Inquiry will be sent to the parties coincidental with the issuance of this order.

Accordingly, a Supplementary Notice of Inquiry was issued, and representations were received from both parties.

The records which remain at issue consist of court documents and drafts (such as orders, affidavits, notices of motion, statements of claim) and various other related documents (such as legal opinions, precedents and background material relating to the then-anticipated litigation).

In its representations, the Ministry states that it has decided to withdraw its section 19 exemption claim for Records C58-62, C87-88, C110-111, C197-205, C219-226, C227-228, C229-233, C234-240, C244A-250, C274, C279, C286, C309, C310, M112-114, M350-357, M363-370, M371-376 and M378. It is not clear whether these records have in fact been disclosed and, because no other exemptions remain at issue with respect to these records, I will order the Ministry to disclose them to the appellant.

The records which remain at issue are C73-75, C77-79, C94-96, C97-99, C101-105, C106, C107, C113, C207, C208, C215-218, 241-244, 251-253A, C255-273, C275-278, C280, C282, C283, C284, C285, C287-308, C311-315, C316, J10-12, J210-211, J382-389, M147-148, M344-349, M358-362 and M377.

## PRELIMINARY MATTER:

### Adequacy of the Ministry's decision letter

The appellant submits that his representations are general because neither he nor his counsel have been able to review the records and make informed arguments on the application of the Act to them. He suggests that his counsel be allowed to view the records for the purpose of argument only, and subject to an undertaking that the contents would not be disclosed.

During the course of this appeal, the appellant received the original decision letter from the Ministry; the original Notice of Inquiry which described the records and explained the exemptions which had been relied on; severed copies of certain records which include references to the exemption claims relied on for withheld portions; and the Supplementary Notice of Inquiry which further describes the records and the issues to be decided. In my view, the appellant has been provided with sufficient information to enable him to address the remaining issues in this appeal.

## DISCUSSION:

### SOLICITOR-CLIENT PRIVILEGE

This exemption is set out in section 19 of the Act, which states:

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

Section 19 consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order P-1342]

**LITIGATION PRIVILEGE**

The scope of litigation privilege was described by Adjudicator Holly Big Canoe in Order P_1551, as follows:

> Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor_client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.
>
> The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation [Hickman v. Taylor 329 U.S. 495 at 508_511 (1947); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 424_425 (Alta. C.A.); General Accident Assurance Co. v. Chrusz (1997), 34 O.R. (3d) 354 at 370 (Gen. Div.), leave to appeal granted (1997), 35 O.R. (3d) 727 (Gen. Div.)]. As the Ontario Court (General Division) Divisional Court explained in Ottawa_Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 D.L.R. (4th) 742 at 748:
>
> > The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his

> opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter_productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research investigations and thought processes in the trial brief of opposing counsel.

Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection [R.J. Sharpe, "Claiming Privilege in the Discovery Process", Law Society of Upper Canada Special Lectures, 1984 (Richard DeBoo Publishers, 1984), pp. 175_177; In re Sealed Case, 676 F.2d 793 at 809_810 (U.S.C.A., Dist. Col., 1982); C.A.); Mancao v. Casino (1977), 17 O.R. (2d) 458 (H.C.)].

Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [Boulianne v. Flynn, [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [Carleton Condominium Corp. v. Shenkman Corp. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor_client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor_client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

The parties were asked to submit representations on whether the relevant litigation has been terminated or is no longer reasonably contemplated. Because the rationale for litigation privilege is, in essence, to protect the adversary system of justice, the parties were also asked to submit representations on whether the adversary system of justice would be harmed through disclosure of the records, notwithstanding the termination of litigation or the absence of reasonably contemplated litigation.

The Ministry acknowledges that Records C73-75, C77-79, C113, C255, C256, C257, C283, C284, C288, C298, C316, J10-12 and M377 do not qualify for litigation privilege, but claims

that they are exempt under the solicitor-client communication privilege portion of section 19. The Ministry relies on both solicitor-client communication privilege and litigation privilege for the remaining records. I will deal with litigation privilege first, then consider solicitor-client communication privilege for the records listed above (with the exception of Record M377), together with any records that I find do not qualify for litigation privilege.

As far as Record M377 is concerned, I found in Interim Order P-1619 that it did not qualify for exemption under the solicitor-client communication privilege portion of section 19. Because the Ministry now submits that the litigation privilege portion of section 19 does not apply to this record, I will order it disclosed to the appellant.

The Ministry submits that the records which remain subject to its litigation privilege claim all "... dealt with an application for injunctive relief as a mechanism to remove the occupiers from Ipperwash Provincial Park. To this day, there are several outstanding litigation matters."

The Ministry goes on to identify ongoing criminal and civil actions, and states that:

> ... the litigation that is ongoing is directly related to the application for the injunction and therefore the reason for the privilege subsists. It is also extremely significant that the occupation of the park still continues today. There still remains the issue of how to remove the occupiers from the park. The possibility of injunctive relief may still be an option to be considered.

According to the Ministry, all ongoing matters arose out of the same subject matter in which the Crown has an interest and, therefore, litigation privilege continues even though the application for the injunction in 1995 was discontinued at that time. However, the Ministry does not submit nor does my examination of the records indicate that any of these records comprise the opinion work product of Crown counsel.

The appellant submits that records relating to the government's application for an injunction to require the native people to vacate Ipperwash Park are no longer subject to litigation privilege. He adds that the later proceedings arising out of the occupation differ fundamentally from the application for the injunction.

There would appear to be no dispute that the specific litigation for which the records were prepared was terminated in September 1995 when the injunction application was abandoned by the government. The only remaining question is whether the policy reasons underlying the privilege remain, despite the end of that specific litigation. In other words, is it accurate to say that the current ongoing litigation arises from the same subject matter as the injunction. In my view, the answer is no.

The injunction application was brought for a specific purpose in September 1995. As court documents indicate, public access to Ipperwash Park was under blockade, and tensions among native people, police and neighbouring residents were intense. Public safety concerns had reached the point where the government concluded that legal action was required. Although Ipperwash Park may continue to be "occupied", as the Ministry maintains, more than three years have passed since the injunction application was withdrawn. The evidence before me does not

support the conclusion that any ongoing or contemplated litigation is sufficiently linked to the September 1995 injunction application that records produced in that context would be relevant in other subsequent litigation. Although I have been provided with no evidence of any ongoing interest or intent on the part of the Ontario Provincial Police or the government to take action of any kind involving Ipperwash Park, should an injunction be brought in future, in my view, it would be sufficiently remote from the circumstances that existed in September 1995 that it would represent a new matter rather than one continuing from or related to the September 1995 injunction application.

As far as any ongoing criminal matters are concerned, they arise from actions which are quite separate and distinct from the injunction application and, for the most part, post-date the application itself. Although they relate to events surrounding the September 1995 occupation of Ipperwash Park, in my view, they involve different subject matters from the injunction application. Similarly, although the ongoing civil law suits also involve matters related to the occupation, they deal with broader issues of liability for actions which took place during this period of time, and I am not persuaded, based on the evidence submitted by the Ministry, that they arise out of the same or sufficiently closely related subject matter as the injunction application that they should continue to be subject to litigation privilege. The Ministry has also not demonstrated how disclosure of these records, created more than three years ago, could have a chilling effect on a lawyer's preparation for any ongoing litigation or otherwise adversely affect the adversary system of justice.

Accordingly, I find that the records are not subject to litigation privilege.

**SOLICITOR-CLIENT COMMUNICATION PRIVILEGE**

As I noted above, the Ministry now submits that all records that remain at issue in this appeal are subject to solicitor-client communication privilege.

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 professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The Ministry has divided the records into several groups, as it did in Interim Order P-1619. I will use these categories in my discussion.

**Opinion: Criminal and civil proceedings to terminate the occupation of Ipperwash Park - Records C73-75, C77-79, C113, C255, C256, C257, C283, C284, C288 and J10-12**

Records C73-75, C77-79 and J10-12 are basically identical to each other, as are Records C113, C255, C256, C257, C283 and C288. The Ministry explains that they are all various iterations of the same basic document. I concur.

According to the Ministry, these records are a legal opinion produced by two Crown counsel during the course of preparing for the injunction application. The purpose of the opinion was to provide legal advice to the government (their client) regarding the application. The Ministry

submits that the records were prepared by Crown counsel for the purposes of giving confidential legal advice.

Although there is nothing on the face of the records to indicate that they are a direct communication between a solicitor and a client, the information contained in the records is clearly in the form of confidential legal advice and, in my view, disclosure of these records would reveal this legal advice. Accordingly, I find that these records qualify for exemption under section 19.

**Opinion: Effect of the injunction - Record C316**

This record contains a series of "bullet points" and, as its title indicates, sets out the various possible results or effects of the injunction application. The Ministry states that this record was prepared by a Crown counsel who was assisting another Ministry counsel with the injunction application. According to the Ministry, the record is a confidential legal opinion that provided background material to assist in the injunction application.

As with the previous records, although there is nothing on the face of the record to indicate that it is a direct communication between a solicitor and a client, the information contained in the document is clearly in the form of confidential legal advice and, in my view, disclosure would reveal this legal advice. Accordingly, I find that this record also qualifies for exemption under section 19.

**Counsel's work product: List of three items - Record C298**

The Ministry submits that the three very brief items that are listed on this record (four words and an address/phone number) were prepared by counsel "in order to remind her of certain things". The items consist of a reference to an office product; the name, address and phone number of a hotel; and the name of one party in a reported court case. The Ministry submits that this information represents counsel's working notes related to the giving or receiving of legal advice and they are, therefore, subject to communication privilege. In the Ministry's view, disclosure of the name of the party in the court case "could certainly reveal certain legal strategies being considered by the Crown".

Past orders of this office have found that notes made by a lawyer and retained in the lawyer's file are often prepared for use in giving legal advice at a later time, if necessary (see Order P-1409). However, as I stated in Interim Order P-1619, in order to qualify for exemption under section 19 there must be an established relationship between the notes and their potential subsequent use in providing legal advice, either from the content of the notes themselves or through representations provided by the Ministry. In my view, the listed items on Record C298 do not appear on their face to be related to the seeking, formulating or giving of legal advice, and the representations submitted by the Ministry are not sufficient to establish the relationship. Consequently, I find that this record does not qualify for exemption under section 19, and should be disclosed to the appellant.

**Draft court documents: Brief of Statutory Provisions (Record C282), Notices of Motion (Records C258-265, C276, C302-308, C311-315, C94-96, C97-99, C101-105, C106-107 and**

**C215-218), Order ( Records C241-244, C253, C266-269, C270-273, C278, M115, M344-349, M358-362 and M-379), Motion Records (Records C285, C287, C297 and C299-301), Notice of Action (Records C252 and C277), Statement of Claim (Records 253A, C280 and C289-295), Affidavit of [a named government employee] (Records C251, C275 and J382-389) and Statement to be read to Court (Records C207, C208, C296, J210-211 and M147-148)**

As I noted earlier, the Ministry has withdrawn its section 19 exemption claim for the following draft court documents: Records C87-88, C110-111, C219-226, C227-228, C229-233, C234-240, C244A-250, C274, C279, C286, C309, C310, M112-114, M350-357, M363-370, M371-376 and M378. Its stated reason for doing so is that these draft documents are either identical or virtually identical to the documents which were actually filed in court. The Ministry submits that the remaining draft documents were prepared by two Crown counsel in the context of finalizing the injunction application. According to the Ministry, several remedies or courses of action were under consideration at the time, and these draft documents contain information that did not find its way into the final versions of the various court documents. In the Ministry's view, these draft documents "... indicate a course of action proposed by counsel and revised based, in part, on instructions from clients." However, the Ministry does not provide any additional evidence or argument in support of these points in its representations and, based on my independent review of these records, I am unable to infer the role played by the "client" in this process.

Having carefully reviewed the remaining records, I find that Records C282, C276, C302-308, C311-315, C94-96, C97-99, C101-105, C106-107, C215-218, C241-244, C253, C266-269, C270-273, C278, M115, M358-362, M379, C287, C297, C299-301, C252, C253A, C280, C289-295, C251, C275, and portions of Records J383-389, M344-349 and C258-265, also contain information that is virtually identical to the content of the records the Ministry is prepared to disclose. Although there are differences among them (e.g. revisions to the order and/or content of some of the listed provisions and the addition or deletion of some factual information), in my view, these differences are not significant. When I compare the content of the "still-exempt" and "now-discloseable" versions of these records, I find that the different information contained in the "still-exempt" records does not satisfy the requirements of solicitor-client communications privilege. Specifically, based on the representations provided by the Ministry, I am not persuaded that the portions which differ are communications between a client and a legal advisor, nor that they are directly related to the seeking, formulating or giving of legal advice. Therefore, the records listed above do not qualify for exemption under section 19 of the Act, and should be disclosed to the appellant.

Page J384 of Record J382-389 and page M348 of Record M344-349 contain handwritten notes and markings that appear to be providing instruction on the content of these parts of the documents. I accept the Ministry's position that they were prepared for use in giving confidential legal advice and therefore, qualify for exemption under section 19. I will order that these handwritten notes and markings be severed from these records prior to disclosure.

Similarly, pages C-261 through C264 of Record C258-265 contain text of a draft Notice of Motion that appears to represent a proposed course of action by counsel that was not ultimately followed. I accept the Ministry's position that these portions of Record C258-265 were prepared for use in giving confidential legal advice and, therefore, qualify for exemption under section 19. I will order that these portions of pages C262 through 265 be severed prior to disclosure.

Records C207, C208, C296, J210-211 and M147-148 are identified as "Statement to be read to Court" and each of them are drafts of a statement that was ultimately read in court by counsel when the government decided to withdraw the injunction application. The Ministry submits that:

> [A]lthough this statement effectively put an end to the litigation, it is respectfully submitted that it was nevertheless in the context of litigation in that the matter was still outstanding and it was necessary to report to the court that the Government was not intending to proceed, and to thus bring closure to the matter.

Although the Ministry's position may have been relevant to a claim for litigation privilege while the injunction application was ongoing, in my view, these representations do not establish the requirements of solicitor-client communications privilege. The editorial changes made on the various versions of this statement are not significant, and appear to have been made by counsel himself. In my view, they are not accurately characterized as legal advice, nor do they appear to have been based on instructions received or advice given. Accordingly, I find that these records do not qualify for exemption under section 19 of the Act, and should be disclosed to the appellant.

Record C285 contains a zoning-like description of Ipperwash Park. This is strictly factual and very basic information. I find that this record does not represent a communication between a client and a legal advisor, nor has the Ministry demonstrated how it relates directly to seeking, formulating or giving advice, legal or otherwise. Accordingly, I find that Record C285 does not qualify for exemption under section 19 of the Act, and should be disclosed to the appellant.

**WAIVER OF PRIVILEGE**

The appellant submits that government officials have waived their ability to rely on solicitor-client privilege. He basis his position on the fact that these officials consistently indicated in legislative debates that they decided to seek an ex parte injunction to end the occupation of Ipperwash Park on an urgent basis, based on legal advice.

In Interim Order P-1619, I dealt with this issue as follows:

> I agree that certain high ranking government officials, such as the Minister Responsible for Native Affairs, made public reference to a legal opinion which recommended that the government proceed to obtain an ex parte injunction. The records already disclosed to the appellant make reference to this opinion. However, in my view, this reference does not constitute waiver of privilege as it relates to the records I have found qualify for solicitor-client communications privilege. The records I have found to qualify under section 19 contain information which pertains to legal advice on several other issues relating to the Ipperwash incident and/or other issues regarding the injunction which are not the direct subject matter of the legal opinion. Information related directly to the legal opinion and advice regarding the injunction has been disclosed to the appellant. In my view, an objective consideration of the Ministry's conduct with respect to

these exempt records does not demonstrate an intention to waive privilege, and I find that the solicitor-client privilege has not been waived in the circumstances.

For the same reasons, I find that solicitor-client privilege has not been waived with respect to the portions of records I have found qualify for exemption under section 19 of the Act in this order.

Although the appellant raised public interest arguments during the course of this appeal, section 23 of the Act, the so-called "public interest override", does not apply to records which qualify for exemption under section 19.

## ORDER:

1. I order the Ministry to disclose Records J210-211, C58-62, C87-88, C94-96, C97-99, C-101-105, C106-107, C110-111, C197-205, C207, C208, C215-218, C219-226, C227-228, C229-233, C234-240, C241-244, C244A-250, C251, C252, C253, C253A, C266-269, C270-273, C274, C275, C276, C278, C279, C280, C282, C285, C286, C287, C289-295, C296, C297, C298, C299-301, C302-308, C309, C310, C311-315, M112-114, M115, M147-148, M350-357, M358-362, M363-370, M371-376, M377, M378 and M379 in their entirety; and Records J382-389, M344-349 and C258-C265 in accordance with the highlighted copies of

   these records which I have attached to the Ministry's copy of this order (the highlighted portions are **not** to be disclosed) to the appellant by **January 21, 1999**, but not before **January 18, 1999**.

2. I uphold the Ministry's decision to deny access to the remainder of the records.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: December 15, 1998
Tom Mitchinson
Assistant Commissioner