Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1832

Appeal PA-990191-1

Ministry of Finance

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NATURE OF THE APPEAL:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Finance (the Ministry). The request was for access to records relating to the taxation of Gold Loans, hedging transactions, forward transactions and future sale transactions, as well as all documents relating to the calculation of "profit" and the determination of "proceeds" under the *Mining Tax Act* (the *MTA*). The Ministry located a number of responsive records and provided the appellant with an interim decision on access and a fee estimate.

Upon payment of the requested fee, the Ministry granted access, in whole or in part, to some of the responsive records and denied access to the remainder, pursuant to the following exemptions contained in the *Act*:

- advice or recommendations - section 13(1)
- intergovernmental relations - section 15(a)
- third party information - section 17(1)
- tax return information - section 17(2)
- solicitor-client privilege - section 19
- information available to the public - section 22(a)

The Ministry also indicated that parts of several records were severed as they are not responsive to the appellant's request.

The appellant appealed the denial of access to the records. This office provided the appellant and the Ministry with a Notice of Inquiry requesting that the parties make representations on the issues identified therein. Submissions were received from both parties. In its representations, the Ministry has claimed the application of the discretionary exemptions in sections 13(1) and 19 to additional records beyond those referred to in its decision letter.

After the receipt of the parties submissions in response to the Notice of Inquiry, I became aware of a recent decision of the Ontario Court of Appeal, *General Accident Assurance Co. v. Chrusz* [now reported at (1999), 45 O.R. (3d) 321]. This decision dealt extensively with the subject of litigation privilege under section 19, which is also an issue in the present appeal. Accordingly, I provided the parties with the opportunity to make supplementary representations on the impact, if any, which the Court of Appeal's decision in *General Accident* may have in the circumstances of this appeal.

In addition, the Supplementary Notice of Inquiry also requested that the parties make submissions on the appropriateness of the late raising of the discretionary exemptions in sections 13(1) and 19 to some of the records at issue by the Ministry.

Additional representations were submitted by both parties to the appeal.

RECORDS:

The records consist of memoranda, correspondence, e-mail messages and notes of telephone conversations.
During mediation, the appellant confirmed he is not seeking access to Records II-1, II-3, II-13, II-18, II-19, II-24, II-29, II-30, III-1, III-2, III-4, III-6, III-7, III-8, III-9, IV-1 to IV-6. The appellant also confirmed that he is not seeking access to Records I-1, I-2 and I-3 as they are duplicates of documents found elsewhere.

The Ministry has clarified that the exemption claimed in respect of Records II-25, II-26 and II-27 is section 19, not section 17 as indicated in the index of records forwarded to the appellant.

Those records which are responsive to that portion of the request relating to the taxation of hedging transactions, forward transactions and future sale transactions are designated with the prefix II. Records which are responsive to that portion of the request relating to the calculation of "profit" under the *MTA* are designated with the prefix III. Records relating to the taxation of Gold Loans (Prefix I) and the determination of "proceeds" (Prefix IV) are no longer at issue in this appeal.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

The Ministry provided this office with two sets of written representations, which it refers to as the public and private submissions. It would appear that the Ministry expected that the public submissions would be shared with the appellant in accordance with the practice adopted by the Commissioner's office for appeal files opened after July 1, 1999. Because this appeal was received prior to the date for the implementation of the new appeals process by this office, it was processed under the then-existing rules which did not allow for the exchange of representations between the parties, except in unusual circumstances. The Ministry argues that because its public submissions were to be shared with the appellant, he would be put on notice and would suffer no prejudice if the Ministry claimed additional discretionary exemptions to certain of the records.

In fact, since the appeal was processed under the "old" rules, the Ministry's "public" submissions were not shared with the appellant and he was not notified that the Ministry intended to claim additional discretionary exemptions for some of the records.

In the present case, the appeal was received by the Commissioner's office on May 31, 1999. A Confirmation of Appeal was provided to the Ministry by this office on June 17, 1999 advising that should the Ministry wish to claim additional discretionary exemptions, it would only be permitted to do so by July 22, 1999. No additional discretionary exemptions were claimed during this period. On September 2, 1999, the Mediator assigned to this appeal forwarded to the appellant an Index of records describing the records, the severances made to them and the reasons why the Ministry had denied access to them, with specific reference to the exemptions claimed. Again, no additional discretionary exemptions were claimed beyond those referred to in the decision letter to the appellant.

The Ministry provided its submissions in response to the Notice of Inquiry on October 28, 1999. While the Index referred to above claimed the application of the exemptions in sections 13(1), 19 and 17(2) to some of the records, the Ministry's representations sought to broaden the scope of these exemption claims to include other records.

The Ministry's submissions recognize that there is a difference between mandatory and discretionary exemptions. It suggests that "While s.19 is not worded as a mandatory exemption, the solicitor and client privilege which is incorporated within it is mandatory in the sense that it cannot be challenged if it applies." The Ministry goes on to argue that "the privilege, while discretionary, is only discretionary on the part of the claimant, not on the part of the IPC to accept it." Insofar as section 13(1) is concerned, the Ministry submits that "there is no longer any administrative reason to read down or render the statutory provision nugatory if there ever was authority to do so. The IPC has never read down the mandatory exemptions claimed at appeal, as if the distinction between mandatory and discretionary exemptions applied to the IPC."

The Ministry further submits that:

> If I were not to bring these new exemptions and arguments before the IPC, the full case would not be presented. If the IPC were not to read and listen to the further argument, arguably they would commit the administrative flaw of deciding without hearing.

The appellant objects to the inclusion of additional discretionary exemptions to the records. He argues that "the late raising of discretionary exemptions has the potential to substantially delay your decision in this matter."

In Order P-658, former Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, she made the point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

Previous orders issued by this office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new

discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case. This approach was upheld by the Ontario Court (General Division) Divisional Court in the judicial review of Order P-883 *(Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

In determining whether to allow the Ministry to claim this discretionary exemption at this time, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and to the appellant in the outcome of my decision.

In my view, the interests of the appellant would be seriously prejudiced if the Ministry is allowed to raise and rely on additional discretionary exemptions at this late stage of the appeal. I was required to send the parties a Supplementary Notice of Inquiry seeking their submissions on whether the Ministry ought to be entitled to claim the additional discretionary exemptions to these records. This necessitated further delay in what has already been a lengthy appeal process. If I were to find that the Ministry is entitled to claim the application of the additional discretionary exemptions which it has claimed, I would be required to provide the parties with yet another Supplementary Notice of Inquiry seeking their submissions on the application of the exemptions to these additional records.
I find that the need to maintain the integrity of the appeals process outweighs the interests of the Ministry including additional exemption claims at this stage of the appeal. I will not, accordingly, consider the application of the discretionary exemptions beyond those reflected in the Ministry's September 2, 1999 Index. However, because section 17(2) is a mandatory exemption, I am required to consider its application to the additional records claimed despite the fact that it was not applied to some of the records until the inquiry stage of the appeals process.

DISCUSSION:

TESTS AND EXEMPTIONS CLAIMED FOR THE RECORDS

Section 13(1)

The Ministry has claimed the application of section 13(1) to Records II-8, II-9, II-10 and II-12. This section provides:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must reveal a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363 and P-883].

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

Section 15

The Ministry has applied the exemption in section 15 to Records II-4, II-5, II-6, II-11 and II-28. This section states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (b) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution; or
>
> (c) reveal information received in confidence from an international organization of states or a body thereof by an institution,
>
> and shall not disclose any such record without the prior approval of the Executive Council.

In order for a record to qualify for exemption under section 15(a), the parties resisting disclosure, in this case the Ministry, must establish that:

1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and

2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[Reconsideration Order R-970003]

For a record to qualify for exemption under section 15(b), the Ministry must establish that:

1. the records reveal information received from another government or its agencies; **and**

2. the information was received by an institution; **and**

3. the information was received in confidence.

The words "could reasonably be expected to" appear in the preamble of section 15, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a Areasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Section 17

The Ministry claims the application of section 17(1) of the *Act* to Records II-17 and II-20 and section 17(2) of the *Act* to Records II-6, II-7, II-8, II-9, II-12, II-14, II-15, II-16, II-17, II-20, II-22 and II-23.

Section 17(1) and (2) provide:

> (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.
>
> (2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

In order to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry must satisfy each part of the following three-part test:

1. The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. The information must have been supplied to the Ministry in confidence, either implicitly or explicitly, **and**

3. The prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 17(1) will occur.

In *Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.), the Court of Appeal for Ontario upheld a decision of Assistant Commissioner Tom Mitchinson in Order P-373. In that judgment the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

Section 19

The Ministry has claimed the application of section 19 of the *Act* to Records II-2, II-6, II-7, II-8, II-9, II-10, II-12, II-13, II-14, II-20, II-21, II-22, II-23, II-25, II-26, II-27, III-3 and III-5 on the basis that each document is either privileged at common law or was prepared in contemplation of litigation by the Ministry. Section 19 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 counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

The Ministry relies on both solicitor-client communication privilege and litigation privilege. Where applicable, I will consider the application of solicitor-client communication privilege and then, if necessary, litigation privilege, to the records. In my analysis, I will apply common law principles of solicitor-client privilege, without differentiating between the two branches, for the reasons set out above.

ANALYSIS:

Record II-2

The undisclosed portions of Record II-2, entitled Special Cases, consist of a set of facts relating to a named taxpayer, the legal arguments put forward on behalf of that taxpayer and an abridged version of a legal opinion prepared by Ministry counsel in response to the taxpayer's position.

I find that the sections titled Facts and Taxpayer's Position are properly exempt under the mandatory exemption in section 17(2) of the *Act* as their disclosure would reveal information which was gathered by the Ministry from a taxpayer for the purpose of determining tax liability of that particular corporation.

The section entitled Legal Opinion is exempt from disclosure under section 19 of the *Act* as it contains information which was part of a confidential written communication from a solicitor to his client made for the purpose of providing legal advice.

The undisclosed portions of Record II-2 are, accordingly, exempt under sections 17(2) and 19.

Record II-4

Record II-4 is an e-mail message dated November 27, 1998 describing in detail a telephone conversation between a Ministry employee and a representative of another province. The e-mail sets out a series of questions posed by the out-of-province official and the answers provided by his Ontario counterpart. The e-mail also makes reference by name to several taxpayers and the positions they have taken regarding the taxation of hedging losses and gains.

I find that the disclosure of the references in Issue 3 and Answers 2 and 3 to individual taxpayers would reveal information which was gathered by the Ministry for the purpose of determining the tax liability of the named taxpayers. As such, this information is properly exempt under section 17(2).

The Ministry submits that the content of the record itself speaks to the issue of its confidentiality between Ontario and the other province. It maintains that if communications of this nature between governments "are intercepted by taxpayers, governments will not be able to have such communications and intergovernmental relations on tax interpretation issues are thereby prejudiced." Based on my review of the record and in light of the information which it contains, I find that the disclosure of this document could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario with respect to the tax interpretation issues addressed in the record. This record addresses an area of common concern between Ontario and another province and the resolution (or non-resolution) of this question has far-reaching financial ramifications for both provinces and taxpayers. Record II-4 is, accordingly, exempt from disclosure under both sections 17(2) and 15(a).

Record II-5

Record II-5 is a two-page letter dated November 18, 1998 from an official with the Ministry's Corporations Tax Branch to his counterpart in another province. The letter outlines the Ministry's position with respect to a specific taxation issue and refers to a number of legislative provisions in support of that position. The first two paragraphs of the letter outline the nature of the request for information made by the other province and Ontario's position regarding this taxation issue. The purpose of the first two paragraphs of the letter appears to be an attempt to clarify Ontario's position and to persuade the other province's finance ministry to adopt an approach similar to that taken by Ontario. The remainder of the letter simply refers to the legislative provisions referred to above. In my view, the disclosure of the first two paragraphs of Record II-5 could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario in the area of tax interpretation and this record is, accordingly, exempt under section 15(a).

Such is not the case, however, with the remainder of the record, which I will order disclosed to the appellant.

Record II-6

Record II-6 is a three-page memorandum dated November 16, 1998 in which the author sets out various options available to the Ministry with respect to the treatment of a specific taxation problem raised by the taxpayer named therein. Each of these options has a significant interprovincial component involving

agreement and coordination, as well as a significant financial impact, between Ontario and at least one other province.

Accordingly, I am satisfied based on my review of the record that its disclosure could reasonably be expected to prejudice the conduct of interprovincial taxation policy by the Government of Ontario. Record II-6 is, therefore, exempt from disclosure under section 15(a).

Record II-7

Record II-7 is a seven-page memoranda dated October 27, 1998 from a Ministry official to the Tax Division's Assistant Deputy Minister setting out in great detail the assessment dispute regarding the tax liability of two named taxpayers. The record sets out the positions taken by each taxpayer with respect to their tax assessments and the Ministry's stance on the issue. The record also contains a recommendationas to how the Ministry should proceed on the reassessment of one of the taxpayers.

In my view, Record II-7 is exempt in its entirety under section 17(2). The disclosure of this document would reveal information regarding the determination of tax liability for both taxpayers as well as information gathered by the Ministry for the purpose of collecting tax.

Record II-8, II-9 and II-10

These records are three e-mails which passed between various responsible Ministry staff on October 20, 1998 soliciting and responding to a number of questions relating to the issue of the taxation of hedging with futures or forward contracts. The questions arose following a meeting on October 19, 1998 involving the Assistant Deputy Minister and other senior Ministry staff, including counsel.

Each of these records contains the names of various taxpayers and the positions they have taken with respect to the taxation of futures contracts. I find that the disclosure of the names of the taxpayers would reveal information which the Ministry has gathered for the purpose of collecting a tax. The names of the taxpayers are, accordingly, exempt from disclosure under section 17(2).

The Ministry has claimed the application of sections 13(1) and 19 to these records on the basis that they contain the advice and recommendations of a public servant and were included in the litigation brief of Ministry counsel. In my view, these records do not contain advice or a suggested course of action within the meaning of section 13(1). Rather, they simply recount the factual underpinnings of the dispute between the Ministry and various taxpayers. I further find that the disclosure of these records would not reveal any advice which was given by the Ministry staff. Accordingly, section 13(1) has no application in the present circumstances.

Records II-8, II-9 and II-10 are not communications between a solicitor and client and, accordingly, they do not qualify for exemption under the "solicitor-client communications" aspect of solicitor-client privilege. The question of when documents that are not solicitor-client communications can qualify for litigation privilege was taken up in Order MO-1337-I where Assistant Commissioner Mitchinson discussed the

scope of litigation privilege, particularly in light of a recent landmark decision of the Court of Appeal for Ontario in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

> In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege . . .
>
> . . . . .
>
> In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:
>
> > The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
> >
> > > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
> >
> > It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
> >
> > The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* - meaning that there is a reasonable contemplation of litigation.
> >
> > Thus, there must be more than a vague or general apprehension of litigation.

Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:

1. The record must have been created with existing or contemplated litigation in mind.

2. The record must have been created for the dominant purpose of existing or contemplated litigation.

3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.

> In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

Based on my review and applying the test enunciated by Assistant Commissioner Mitchinson above, I have determined that Records II-8, II-9 and II-10 were created following a meeting of senior Ministry staff. They provide factual background information to assist in the formulation of Ministry policy with respect to the taxation of hedging contracts. The Ministry was aware at the time the records were created that at least one of the affected taxpayers was likely to litigate the assessment question discussed in the records. The Ministry is of the view that the records were, accordingly, prepared for the "dominant purpose" of this anticipated litigation and that they were provided to counsel for inclusion in the brief relating to it.

However, in my view, these records are analogous to the document discussed in *Waugh*, which was a report in relation to an accident that led to litigation, "prepared in part to further railway safety and in part for submission to the railway's solicitor for liability purposes." The result in that case was that, while the court acknowledged that the document had been prepared in part for the purpose of obtaining legal advice in anticipated litigation, that was not its dominant purpose and it was therefore not privileged. Similarly, in the case of Records II-8, II-9 and II-10, although I accept that anticipated litigation was a factor in the drafting of these e-mails, I cannot agree that it was the dominant purpose for their creation. Rather, I find that the dominant purpose for their creation was to assist in the formulation of the Ministry's policy on this complex taxation issue. For this reason, and based on the analysis in *General Accident* and the test set forth in Order MO-1337-I, I find that these records do not meet the dominant purpose test.

In Order MO-1337-I, Assistant Commissioner Mitchinson also found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief. This aspect of litigation privilege arises from a line of cases that includes *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) and *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.). As the Assistant Commissioner points out in his analysis, the test for this aspect of litigation privilege from *Nickmar* was quoted with approval by two of the three judges in *General Accident*. As a result, the Assistant Commissioner concluded that this aspect of privilege remains available after *General Accident*, and he adopted the test in *Nickmar*:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

The Assistant Commissioner then elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose".

As noted previously, anticipated litigation was a factor in the drafting of Records II-8, II-9 and II-10, and, therefore, in my view, they were created with anticipated litigation in mind. Accordingly, the appropriate test to apply to them is dominant purpose, which I have already concluded they do not meet. They cannot qualify under the *Nickmar* test.

Therefore, I find that these records do not qualify for litigation privilege, that they are not subject to solicitor-client privilege and cannot qualify for exemption under section 19.

I find that, with the exception of the names of taxpayers listed in Records II-8, II-9 and II-10, which are exempt under section 17(2), the remaining portions of these records are not exempt under sections 13(1) and 19 and should be disclosed to the appellant.

Record II-11

Record II-11 is a one-page memorandum dated July 30, 1998 in which a Ministry official records the contents of a telephone conversation which he had with his counterpart in the taxation section of another province's finance ministry.

In its submissions, the Ministry concedes that this record contains no tax analysis but, rather, simply records a telephone conversation between the provincial officials. I agree with the Ministry's contention that the reference to a particular taxpayer would reveal information which it collected on a tax return and that this reference is exempt under section 17(2). I have not been provided with any evidence, however, as to any prejudice to the conduct of the Ministry's intergovernmental relations which could reasonably be expected to result from the disclosure of the remaining portions of this record. I find, accordingly, that it is not exempt under section 15(a).

Record II-12

Record II-12 is a ten-page memorandum dated July 8, 1998 from the Director of the Ministry's Corporations Tax Branch to the Assistant Deputy Minister of the Tax Revenue Division setting out this official's views on the tax treatment of hedging gains and losses under the *MTA*. The document sets out in great detail the positions taken by several taxpayers, the Ministry and other provinces and recounts the legal advice given to the Ministry by one of its counsel on this subject.

The background section on pages 1 and 2 and the discussion at pages 7, 8 and 9 contain very specific information regarding the arguments raised by several taxpayers with respect to the taxation of hedging losses and gains. I find that the disclosure of this information would reveal information collected by the Ministry on a tax return and that it is, accordingly, exempt under section 17(2).

Pages 2, 3, 4 and 6 of the record contain a summary and various references to a legal opinion provided by Ministry counsel to its officials on this subject. In my view, this portion of the record qualifies for exemption under section 19 as it reveals a confidential communication of legal advice between a solicitor and his client.

The remaining portions of Record II-12 are comprised of an analysis by the Director of the legal opinion given to the Ministry by its counsel and a number of recommendations and suggested courses of conduct available to the Ministry. I find that this information qualifies for exemption under section 13(1) as its disclosure would reveal the recommendations of the Director to the Assistant Deputy Minister.

In summary, I find that Record II-12 is exempt from disclosure in its entirety under sections 13(1), 17(2) and 19.

Record II-14

Record II-14, dated June 17, 1998, is a 6-page review of a legal opinion rendered by a Ministry solicitor on May 1, 1998. The document makes reference to the legal advice given in the opinion and the conclusions contained therein. I find that the disclosure of this record would reveal the contents of a confidential communication between a solicitor and his client which relates directly to the giving of legal advice. As such, I am of the view that it is properly exempt from disclosure under the section 19 exemption, in its entirety.

Record II-15

This document is a one-page memorandum dated May 22, 1998 to which was attached a letter from a taxpayer seeking a ruling from the Tax Advisory Branch on the subject of hedging gains and losses. The Ministry acknowledges that, after removing the name of the taxpayer, which had been gathered by it for the purpose of determining tax liability, the remainder of the record may be disclosed. I agree with the approach, and will order that Record II-15 be disclosed to the appellant, with the name of the taxpayer severed under section 17(2).

Records II-16 and II-17

Record II-16 is a two-page memorandum dated February 9, 1998 from a Ministry official to another setting out the position taken by a particular taxpayer with respect to the taxation of hedging losses and gains issue. Record II-17 is a letter from that taxpayer setting out its submissions with respect to this issue in great detail. In my view, these records are exempt in their entirety under section 17(2) as their disclosure would reveal information that was gathered by the Ministry from the taxpayer for the purpose of determining tax liability.

Record II-20

Record II-20 is a six-page memorandum dated February 14, 1995 from a Ministry Appeals Officer to the Assistant Deputy Minister of its Tax Division setting out in detail the position taken by a taxpayer on the issue of the assessment of taxation on certain aspects of its business. The document concludes at pages 5 and 6 with a recommendation from the Tax Appeals Branch to the Assistant Deputy Minister as to a future course of action.

I find that the disclosure of the information contained in Record II-20 would reveal information which the Ministry had gathered from the taxpayer for the purpose of determining tax liability and it is, accordingly, exempt under section 17(2).

Record II-21

Record II-21 is a two-page memorandum dated August 3, 1987 from the Ministry's Senior Manager, Mining Tax to the Director of the Ministry's Legal Services Branch. In the memorandum, the Manager is seeking a legal opinion from the director on four distinct issues. I find that this record is exempt under section 19 as it represents a confidential communication between solicitor and client which is directly related to the seeking of legal advice.

Records II-22 and II-23

These records are memoranda prepared by one of the Ministry's Mining Tax Auditors for the Senior Manager of Mining Taxation on May 13 and 12, 1987, respectively. The memoranda deal with the taxation treatment of a specified taxpayer and set out that taxpayer's position regarding the taxation of certain aspects of its business activities. Again, because the records describe in detail the tax treatment of a specific taxpayer, I find that they are exempt from disclosure under section 17(2) on the basis that their disclosure would reveal information gathered by the Ministry from the taxpayer for the purpose of determining tax liability.

Records II-25, II-26 and II-27

Record II-25 is a two-page memorandum dated February 23, 1984 from the Ministry's Senior Manager of Appeals Review to the Senior Manager of Audits for the Ministry's Corporations Tax Branch. The memorandum quotes extensively from a legal opinion provided by the Ministry's Legal Services Branch on a contentious issue involving a named taxpayer. I find that because this record quotes from the legal opinion

given by Ministry counsel to his client in the program area of the Ministry, it is exempt from disclosure under section 19 as it refers to a confidential communication between a solicitor and client which was directly related to the giving of legal advice.

Record II-26 is the actual legal opinion referred to in Record II-25. For the reasons described above, I find that this record is also exempt from disclosure under the solicitor-client communication privilege portion of section 19.

Record II-27 is another memorandum dated March 26, 1984 commenting on the legal opinion which is the subject of Record II-26. Again, for the reasons set out in my discussion of Record II-25, I find that this document is also exempt from disclosure under Branch 1 of section 19.

Record II-28

Record II-28 is a three-page letter dated October 27, 1982 from the Ministry's Senior Manager, Audit to his counterpart in the finance ministry of another province. The Ministry has claimed the application of section 15(a) to this record on the basis that its disclosure would result in prejudice to the conduct of its intergovernmental relations. The Ministry submits that:

> The release of this document even now would show disrespect for the intimacy of the of the relationship between the two provinces, and would prejudice future confidential communications between them. This in turn would prejudice the conduct of beneficial intergovernmental relations between the two revenue ministries.

I cannot agree that the disclosure of a record of this vintage would, per se, result in prejudice to the conduct of intergovernmental relations. The record simply sets out Ontario's position with regard to the tax treatment of a particular kind of business activity. I cannot agree that its disclosure would result in the kind of harm contemplated by section 15(a) and, therefore, this record must be disclosed.

Record III-3

This document is a two-page memorandum dated February 22, 1990 from the Director of the Ministry's Legal Services Branch to the Deputy Minister reporting on the impact of a decision of the Court of Appeal for Ontario. I find that this record represents a confidential communication from a solicitor to his client which is directly related to the giving of legal advice. The record is, accordingly, exempt from disclosure under section 19.

Record III-5

Record III-5 is a covering memorandum dated September 28, 1987, to which is attached, without further comment, a decision of the Divisional Court. The Ministry has indicated that it is prepared to disclose this record and I will, therefore, order it to do so.

By way of summary, I find that portions of Records II-5, II-8, II-9, II-10, II-11 and II-15, as well as Records II-28 and III-5 in their entirety, are not exempt from disclosure under the exemptions claimed by the Ministry. I have provided the Ministry with a highlighted copy of these records indicating those portions which are **not** to be disclosed.

ORDER:

1. I uphold the Ministry's decision to deny access to Records II-2, II-4, II-6, II-7, II-12, II-14, II-16, II-17, II-20, II-21, II-22, II-23, II-25, II-26, II-27 and III-3 as well as the highlighted portions of Records II-5, II-8, II-9, II-10, II-11 and II-15.

2. I order the Ministry to provide the appellant with access to those portions of Records II-5, II-8, II-9, II-10, II-11 and II-15 which are **not** highlighted, as well as Records II-28 and III-5 in their entirety by November 28, 2000.

3. In order to verify compliance with Provision 2, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

Original Signed By: November 7, 2000
Donald Hale
Adjudicator