



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

# **ORDER PO-2277**

**Appeal PA-030119-1**

**Ontario Native Affairs Secretariat**



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## **BACKGROUND:**

This appeal deals with records created in the context of land claim negotiations between the Teme-Augama Anishnabai and the Temagami First Nation (Temagami) and the governments of Ontario and Canada. These negotiations stem from outstanding obligations of the Crown under the 1850 Robinson Huron Treaty (the Treaty).

According to the Ontario Native Affairs Secretariat (ONAS), in 1885, following complaints by members of the Temagami community that a reserve had not been set apart for them as promised under the Treaty, Ontario surveyed a reserve but did not transfer lands to Canada for the purpose of establishing it. In 1943, Ontario provided one square mile of land, Bear Island in Lake Temagami, to establish a community, and this land became a reserve in 1971.

In 1973, the Bear Island Foundation, an organization representing members of the Temagami First Nation and non-status descendants of the original Temagami Indians, placed a caution on all lands covered by the Treaty, claiming that they were not a party to the Treaty and therefore had not ceded their traditional lands. Ontario then brought an action seeking a declaration that the lands covered by the cautions were public lands and not subject to aboriginal title. After a number of hearings in lower courts, the Supreme Court of Canada issued a judgment in August 1991, finding that the Temagami Indians did not have unextinguished title to the lands claimed as their traditional territory and also that the Crown had outstanding treaty obligations owed to Temagami [*Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570].

In what appears to have been a process separate from the Bear Island Foundation litigation, Temagami, Ontario and Canada had begun negotiating issues related to the land claim in 1990, prior to the Supreme Court judgment. These negotiations continued after the decision was issued. In 1993, the parties concluded an agreement in principle on the settlement of the claim. However, Temagami failed to ratify that agreement and the government of Ontario withdrew the offer in 1995.

In 1997, Temagami commenced proceedings in the Federal Court of Canada and the (then) Ontario Court (General Division) against Ontario and Canada, claiming damages for breach of contract and fiduciary duty based on the outstanding treaty obligations. Following the commencement of these proceedings, the parties agreed to resume negotiations. In 2002, Temagami, Ontario and Canada reached consensus on a framework agreement that would settle the land claim as it relates to Ontario. Since that time, the parties have been refining the elements of the settlement. The proceedings commenced in 1997 are being held in abeyance pending the outcome of these negotiations.

## **NATURE OF THE APPEAL:**

ONAS received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for 51 identified records. Subsequently, the requester narrowed the request to the following three records:

1. A land appraisal report on two properties (Austin Bay and Bear Island), prepared by a real estate firm dated July 7, 1993 (117 pages)
2. A record entitled "Austin Bay Evaluation Working Document" prepared by a named consulting firm dated June 24, 1992 (19 pages)
3. A record entitled "Austin Bay Evaluation Working Document" prepared by Ministry of Natural Resources staff dated July 10, 1992 (91 pages)

ONAS denied access to the records on the basis of the following exemptions in the *Act*:

- |                 |   |   |
|-----------------|---|---|
| Records 1 and 3 | - | section 12(1)(d) (Cabinet records)              |
|                 | - | section 13(1) (advice or recommendations)       |
|                 | - | section 18(1)(d) (economic and other interests) |
| Record 2        | - | section 12(1)(d)                                |
|                 | - | section 18(1)(d).                               |

The requester, now the appellant, appealed ONAS's decision.

During the course of mediation (and in accordance with this office's established procedures and timelines), ONAS identified two new discretionary exemption claims for all three records:

- section 15(a) (relations with other governments)
- section 19 (solicitor-client privilege).

Mediation efforts were not successful and the appeal was transferred to me for adjudication.

I started my inquiry by sending a Notice of Inquiry to ONAS, which set out the facts and issues in the appeal, and ONAS responded with representations. ONAS withdrew the section 12(1)(d) exemption, but continued to rely on the introductory words of section 12(1) as one basis for denying access to all three records. I then sent the Notice to the appellant, along with a copy of the non-confidential portions of ONAS's representations. The appellant responded with representations, which I in turn shared with ONAS. ONAS submitted reply representations.

## **RECORDS:**

The three records at issue in this appeal are described above.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

#### **General principles**

Section 19 of the *Act* reads:

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 contains two branches. Branch 1 applies to a record that is subject to “solicitor-client privilege” at common law and includes two common law privileges:

- solicitor-client communication privilege
- litigation privilege

Branch 2 contains two analogous statutory privileges that apply in the context of Crown counsel giving legal advice or conducting litigation.

ONAS relies on the statutory solicitor-client communication privilege in Branch 2 of section 19.

#### **Statutory solicitor-client communication privilege**

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in giving legal advice”. The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

#### ***General principles***

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 [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to “a continuum of communications” between a solicitor and client:

Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and

given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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 [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

### ***Representations***

In its representations, ONAS describes the role of Crown counsel in general in land claim negotiations:

. . . Counsel involved with a land claim negotiation will provide legal advice at many stages during a land claim negotiation. Before a land claim is accepted for negotiation, a legal opinion is prepared based on historical research and evidence . . .

The conclusions expressed in that legal opinion play a critical role in the determination as to whether the claim will be accepted or rejected. After decisions are made regarding the acceptance or rejection of the claim, further legal advice is necessary regarding more discrete issues (*e.g.*, Ontario and Canada's precise potential for exposure or liability)). Again, counsel determines what information is necessary in order to provide the legal advice that is being requested. That information is then provided to counsel so that the appropriate advice can be given. The free flow of information between the person providing the information to counsel and counsel is critical to the effective provision of that information. The factual information needed by counsel to provide legal advice must be provided with the expectation that such information will be kept confidential . . .

ONAS then explains how the records at issue in this case were created:

[Named individual], counsel for Crown Law Office Civil, was litigation counsel on the Temagami file from 1974 on and was involved in the litigation of these matters before the Ontario courts and before the Supreme Court of Canada. He prepared the legal opinion regarding the claim and several subsequent legal opinions on issues as they arose. At the time the records were created, [named individual] was Crown counsel with Crown Law Office Civil. He was responsible for providing legal advice to the negotiators and the Ontario government regarding the claim. [He] advised the negotiating team and the Ontario government that in order for him to provide legal advice regarding the development of a settlement offer, he required technical valuation work done by

land economists and appraisers. Subsequently that work was prepared for [him] for use in giving legal advice.

ONAS then turns to a more focussed description of the circumstances surrounding the creation of each record:

*Record 1*

Record 1 is a land appraisal prepared by an accredited appraiser retained by Ontario for the purposes of providing an appraisal of the value of the lands at issue in the land claim negotiations.

This record was prepared for [counsel] for use in giving legal advice regarding land valuation issues in the claim.

...

*Record 2*

Record 2 is document developed by a forensic accounting firm in relation to the valuation of resources at issue in the land claim negotiations:

Record 2 was prepared for [counsel] for use in giving legal advice. [Counsel] used the information in Record 2 to provide legal advice regarding natural resource valuation issues.

...

*Record 3*

Record 3 is a document prepared by the Ministry of Natural Resources and provides the information requested by the consultants in Record 2.

Record 3 was prepared for [counsel] for use in giving legal advice. [Counsel] used the information in Record 3 to provide legal advice regarding valuation issues in the claim.

...

ONAS provides an affidavit in support of these submissions.

Finally, ONAS submits that previous decisions of this office and the courts support its section 19 claim:

In the case of *Ontario (Attorney General) v. Hale*, [1995] O.J. No. 1143 [(Div. Ct.)], the Court found that under Branch 2 of section 19, a document is entitled to

exemption if it was prepared for use in giving legal advice. In that case, Crown counsel requested that certain work be done by a forensic accounting firm so that she could provide legal advice with respect to certain legal issues. The forensic accounting firm prepared a report in response to the request. A request was then made [under the *Act*] for the disclosure of that report and the head claimed an exemption under Branch 2 of section 19. On appeal, the inquiry officer determined that Branch 2 of section 19 did not apply to the report. The Court in this case determined that it was clear that the purpose of the preparation of the document was for use in the giving of legal advice and therefore the report was properly exempt under Branch 2 of section 19.

...

... In Order P-949, a historical research report that was considered to the primary source or historical basis for a legal opinion was held to be exempt under Branch 2 of section 19 as the report was prepared for Crown counsel for use in giving legal advice. In that case it was held that legal advice regarding land claims must necessarily have a basis in historical research and evidence.

...

... [I]n the same way as legal advice regarding land claims must have a basis in historical research, as was held to be the case in Order P-949, legal advice regarding liability issues in a land claim must necessarily have a basis in land and resource valuation information.

The appellant disagrees with ONAS's position, and submits:

... [T]he records at issue were not in fact prepared "for Crown counsel". ...

The descriptions of the records themselves reveal that they were prepared for Ministry officials not legal counsel. The land appraisal was "prepared for Management Board Secretariat" and the questions and answers were for officials who would ultimately be making recommendations and providing advice to Cabinet.

Crown counsel may have suggested an examination of potential land and resource value but that does [sic] classify these records as being prepared for counsel. Furthermore, even if Crown counsel reviewed and used these records, this is still insufficient to prove that they were prepared for Crown counsel (Order P-454). ... ONAS' submissions only state that "that work was prepared for [counsel] for use in giving legal advice." This statement does not support the allegation that the records at issue were prepared for use in providing legal advice, or that [counsel] in fact did use the records for providing legal advice.

Order P-210 states that the second part of s.19 requires that the record be prepared for use in giving legal advice (or in contemplation or for use in litigation).

The term “legal advice” is not so broad as to encompass all information given by counsel for an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed (Order P-210) [appellant’s emphasis].

ONAS submits that Order P-949 is authority for exemption. In that case, the Commissioner found that the legal advice must necessarily have a basis in historical research, and therefore a report of such research forwarded to Crown counsel was protected under s.19. [The appellant submits] that this is not precedential authority for the present appeal. The historical research in land claims goes directly to determining whether there is any Crown liability. In this way, the historical research forms part of the essential facts required by counsel in giving his or her legal opinion on the matter. The type of information at issue in this appeal is of an entirely different nature. It is not essential information for a determination of Crown liability, or even apportionment of Crown liability.

The information at issue in this appeal does not in any way go to the question of liability, but rather forms part of the information that technical advisors, rather than legal counsel, would use to assess the value of the claim. Assessing the value of the claim should not be regarded as within the purview of “legal advice” in a land claims context. The effect of this characterization is to defeat the purpose of the *Act* by permitting any evaluative factual analysis to be described as “legal advice” [appellant’s emphasis].

Furthermore, it should be noted that despite the conclusion in Order P-949, the Commissioner in Order P-454 came to the opposite conclusion on very similar facts.

It is further submitted that ONAS has not presented any evidence of a recommended course of action, based on legal considerations, where a legal opinion is expressed directly related to these records as required by Order P-210.

This appeal is entirely unlike that in [*Hale*]. In that case, the Crown agency’s director of legal services requested an investigation of foreign currency transactions “in order to assist me in rendering advice.” Further she stated that: “I am interested in having your firm carry out a forensic accounting investigation of all activities conducted by the former Treasurer over the last three-year period with a particular view to determining what evidence there may be of wrong-doing ...”. This case is clearly distinguishable since there was a direct relationship



between counsel and the producer of the record, and the production of the records was necessary for counsel to provide legal advice on breaches of the law.

In reply, ONAS responds to the appellant's assertion that the records were prepared for Ministry officials, not legal counsel:

[ONAS] submits that the records at issue were prepared for Crown counsel for use in giving legal advice to the government of Ontario and the Ontario negotiating team. At the time the records were created, [named individual], Counsel, Crown Law Office Civil, was responsible for providing legal advice to the government of Ontario and the Ontario negotiating team regarding the land claim and related litigation matters. [He] advised the negotiating team that he required certain expert advice and analysis in order to continue providing legal advice regarding the claim. Subsequently, the records at issue were prepared for [counsel's] use in giving legal advice.

ONAS then makes the following submissions regarding Order P-210, relied on by the appellant:

... [T]he principles in Order P-210 regarding the application of the section 19 exemption were overturned on judicial review in 1995 by the [*Hale*].

In [*Hale*], the test formulated in Order P-210 was rejected as being too narrow an interpretation of Branch 2 of section 19. The Court found that the application of the exemption was not limited to "communications of a confidential nature between a client and a legal advisor which are directly related to seeking, formulating or giving legal advice". The Court held that under Branch 2, a document is entitled to exemption if it was prepared for use in giving legal advice. In that case, it was clear that the dominant purpose in the preparation of the document was for use in the giving of legal advice.

[ONAS] submits that [*Hale*] broadened the scope of the Branch 2 exemption to include the application of the exemption to any record that was prepared for use in giving legal advice.

In this case, [ONAS] has provided affidavit evidence indicating that the records were prepared for Crown counsel for use in giving legal advice regarding the land and resource valuation matters at issue in the negotiations.

ONAS then responds to the appellant's argument that "assessing the value of the claim should not be regarded as within the purview of 'legal advice' in a land claims context":

[ONAS] submits that assessing the value of a claim goes to the very heart of the question of liability in the land claim context.

As [ONAS] has stated in its original representations ..., the role of counsel does not end in a land claim as soon as it is determined on the basis of the facts in the

historical report that there is a potential for Crown liability. Instead, further work is typically required regarding the precise nature of that liability. In order to determine the precise nature and extent of liability, counsel requires certain information, in particular expert advice and analysis regarding the valuation of lands and resources. [ONAS] submits that land and resource valuation information is the most essential information required by crown counsel to provide legal advice regarding the precise nature and extent of liability.

[ONAS] submits that the type of information in the records at issue is just as important for Crown counsel as the historical research report. The only distinction is that it is factual information that is required by counsel at a later stage in the land claim negotiation process.

Finally, ONAS responds to the appellant's submissions on the application of Order P-454 and *Hale*:

The appellant cites Order P-454 as an example of a situation where Branch 2 of section 19 was not applied to exempt a historical research report from disclosure. [ONAS] submits that Orders subsequent to the decision of the Divisional Court in 1995 should be relied on when interpreting and applying Branch 2 of section 19. Order P-949 (discussed in [ONAS]'s original representations), which exempted a historical research report from disclosure on the basis of Branch 2 of section 19, was decided after the decision of the Divisional Court.

Finally, the appellant asserts that the present situation can be distinguished from the situation in [*Hale*] because the information in that case was necessary to counsel to provide legal advice on breaches of law. [ONAS] submits that when an examination is made of the type of information required by counsel in that case, the similarity between that case and the present situation becomes evident. Specifically, counsel indicated in that case that she needed to know not just evidence of wrongdoing but also the **value of any losses** that were suffered as a result of that wrongdoing [ONAS's emphasis]. As this appeal relates to records that deal with land and resource valuation matters, this appeal relates to exactly the type of information at issue in [*Hale*] (that is, the nature and extent or value of the loss). Further, the Ministry has provided affidavit evidence regarding the connection between the records and counsel's requests for the information in the records .... [*Hale*] cannot be distinguished from this case and the reasoning applied in that decision should be applied here.

### ***Findings***

I accept ONAS's submission, supported by affidavit evidence, that all three records were prepared for Crown counsel for his use in giving legal advice to the Crown for the purpose of the land claim negotiations and the litigation that was anticipated to arise should the negotiations not be fully successful in resolving the dispute. As in *Hale*, I accept that Crown counsel required the detailed land appraisal information, from both outside consultants acting as agents (Records 1

and 2) and government officials (Record 3) in order to be in a position to provide informed legal advice to the Crown on the nature and extent of the Crown's liability, and how this would impact the Crown's position in the negotiations and anticipated litigation. On this basis, the records fit within the *Descôteaux* framework of solicitor-client communication privilege. As well, in my view, these records clearly are in the nature of the "continuum of communications" described in *Balabel*.

The appellant submits that "legal advice" is "not so broad as to encompass all information given by counsel for an institution to his or her client", and relies on Order P-210 in this regard. I agree with ONAS that the restrictive approach in Order P-210, where it was suggested that to qualify for solicitor-client communication privilege a record must contain or reveal "a recommended course of action" or "legal advice", has been superseded by Ontario Court decisions (such as *Hale*) and more current orders of this office.

Finally, I am satisfied that in the circumstances the records were treated in a confidentially manner, which is underscored by notations to this effect on the cover of two of the records (Records 2 and 3).

To conclude, I find that all three records qualify for statutory solicitor-client communication privilege under Branch 2 of section 19 of the *Act*.

In the circumstances, it is not necessary for me to consider whether the records qualify for exemption under any other aspect of section 19, or under the exemptions at sections 12, 13, 15 and 18. Because section 19 is not included among the exemptions listed in section 23, it is also not necessary for me to consider the "public interest override" submissions made by the parties.

**ORDER:**

I uphold ONAS's decision and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ May 5, 2004