



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2749

Appeal PA07-242

Ontario Securities Commission



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BACKGROUND OF APPEAL:

The Ontario Securities Commission (the OSC) administers and enforces securities legislation in the Province of Ontario.

The *Securities Act* provides the OSC with the power to recognize Self-Regulatory Organizations (SROs). SROs are entities that are organized for the purpose of regulating the operations and the standards of practice and business conduct of its members and their representatives with a view of promoting the protection of investors and the public interest. One of the four SROs recognized by the OSC is the Market Regulation Services Inc. (RS).

RS administers and enforces the Universal Market Integrity Rules (UMIR) on behalf of the Toronto Stock Exchange Inc. (the TSX). The UMIR consist of a harmonized set of rules that prescribe trading practices in Canadian Equity marketplaces.

RS conducts market surveillance, responds to complaints, and conducts investigations relating to compliance with the UMIR. Investigations can lead to disciplinary proceedings which can result in a hearing before a RS panel.

At a RS panel hearing, an allegation was made against a corporate organization and its executive members (the Requesting Parties) that they failed to comply with certain provisions of the UMIR. In response, counsel representing the Requesting Parties brought a motion challenging the validity of the UMIR.

The RS panel adjourned proceedings and counsel for the Requesting Parties agreed to bring the matter before a different venue, the OSC Review and Hearing Panel (OSC Hearing Panel). The matter was addressed by an OSC Hearing Panel which conducted a hearing and issued its Reasons and Decision.

NATURE OF THE APPEAL:

The OSC received a 14-part request from counsel representing the Requesting Parties under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all records relating to the RS panel and OSC Hearing, along with records relating to certain amendments to the Rules and Policies of the TSX.

In a subsequent letter, counsel for the Requesting Parties specified that the requested items encompassed either “external records” or “external and internal records” and explained the meaning of those classifications.

The OSC located responsive records and issued a decision granting partial access to the requester. The OSC denied access to 72 documents pursuant to section 19 of the *Act* (solicitor-client privilege). The Requesting Parties (now the appellant) appealed the OSC’s decision.

During mediation, the OSC provided the appellant with a detailed Index of Records. The Index of Records totaled 11 pages and identified the date, document type, author or source of document

and the recipient of the document, along with a general description of the records. In addition, the OSC advised that all of the records were exempt under section 19(b) and that section 19(a) of the *Act* also applied to Records 25, 44 and 67. The OSC also indicated that Records 36, 38, 40, 43, 45, 49, 60 and 68 were not responsive to the request.

No further mediation was possible and the file was moved to the adjudication stage of the appeals process. This office commenced its inquiry by seeking representations from the OSC, initially. The OSC's representations were shared in their entirety with the appellants, who were given an opportunity to respond. The appellants provided representations which were provided to the OSC. In their representations, the appellants confirmed that they no longer seek access to 15 records (Records 3, 5, 6, 7, 8, 35, 51, 55, 56, 58, 63, 65, 68, 71 and 72). The appellants' representations were provided to the OSC, who in turn, provided reply representations to this office.

RECORDS:

The Notice of Inquiry sent to the OSC sought representations in support of their position that some portions of Records 36, 38, 40, 43, 45, 49, 60 and 68 were not responsive to the request. The OSC submits that upon its receipt of the request it wrote to the appellants seeking clarification. The appellants, in turn, provided the OSC with an explanation distinguishing between "external" and "internal" records. The appellants' definition of "internal records" included a caveat indicating that they were not seeking access to records in which the OSC makes a "bona fide claim of solicitor-client privilege". The OSC claims that the withheld portions of the records they identified as non-responsive relate to issues which counsel sought legal advice from senior counsel or refer to broad policy matters on which counsel would be providing internal advice. The appellants do not accept the OSC's evidence.

Given that the OSC claims that the solicitor-client exemption at section 19 applies to all of the records, my view is that an analysis as to whether some portions of these records fall within the scope of the appellant's definition of "bona fide claim of solicitor-client privilege" is redundant. Accordingly, I will go on to consider whether the solicitor client privilege exemption at section 19 applies to all of the records at issue, including those identified by the OSC as non-responsive. No further mention about the parties' submissions regarding the responsiveness of the records will be addressed further in this Order.

As previously stated, the appellants indicated that they no longer seek access to 15 of the 72 records located by the OSC. One of these records (Record 56) is duplicated. Accordingly, the records remaining at issue total 56 documents which consist of handwritten and typewritten notes to file, e-mails, memos and correspondence.

The OSC advises that the records at issue originated from the Capital Markets Branch, the Enforcement Branch, and the General Counsel's Office. Each branch has its own team of lawyers. In its representations, the OSC explains that:

The Capital Markets Branch, which has since been divided into the Market Regulation Branch and the Compliance and Registrant Regulation Branch, administered the regulatory framework for financial intermediaries, marketplaces, and self-regulatory organizations

...

The Enforcement Branch investigates potential breaches of Ontario Securities laws. The Branch's Litigation Group evaluates evidence, initiates enforcement proceedings when appropriate, and represents OSC Staff in various legal proceedings, including Hearing a Review proceedings before OSC Hearing Panels.

The General Counsel's Office is an in-house legal, policy, and risk management resource which provides senior legal advice to the OSC's Executive, its Commissioners, and to Staff.

The following chart summarizes the records remaining at issue described in the 11-page Index of Records prepared by the OSC and provided to the appellants. The OSC claims that all of the 56 records are exempt under section 19(b) and that Records 25, 44 and 67 are also exempt under section 19(a) of the *Act*.

Category	Description	Record No.	Exemption
Group A	Notes to file prepared by the Senior Litigation Counsel, Enforcement regarding meetings with TSX counsel and RS counsel and staff, telephone calls with TSX and RS counsel and e-mails to RS counsel and counsel/staff in Capital Markets, Enforcement and General Counsel Office	2, 4, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 34, 36, 37, 38, 41, 45, 46, 47, 48, 49, 50, 54, 60, 61, 62, 66, 67, 69, 70	19(b) and 19(a) (only Records 25 and 67)
Group B	Note to file prepared by the Chief Litigation Counsel and Senior Manager, Enforcement regarding a meeting with RS counsel and staff	15	19(b)
Group C	Notes to file prepared by the Senior Legal Counsel, Capital Markets regarding meetings with RS counsel and staff and telephone calls with TSX and RS counsel and e-mails to Capital Markets staff	1, 32, 33, 39, 40, 57, 59 and 64	19(b)
Group D	E-mail from the Associate General Counsel, General Counsel's Office to Capital Markets, Enforcement and General Counsel Office staff	44	19(b) and 19(a)
Group E	Notes to file prepared by the Senior Legal Counsel, General Counsel's Office regarding meetings with OSC counsel RS counsel and staff and telephone call with RS counsel	16, 17, 28, and 43	19(b)
Group F	Notes to file prepared from Legal Counsel, General Counsel's Office regarding a meeting and telephone call with RS counsel and staff	42 and 52	19(b)

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

As previously stated, the OSC claims that the solicitor-client privilege exemption at section 19(b) applies to all of the records at issue. The OSC also claims that section 19(a) applies to Records 25, 44 and 67. These sections read:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) 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 as described below. The institution must establish that one or the other (or both) branches apply.

The appellants submit that the OSC cannot rely on the solicitor-client privileges under section 19 of *Act*. The appellants argue that their Request for a Hearing and Review does not amount to litigation against the OSC. The appellants take the position that the OSC's role in such proceedings is to act as the appellate body, not a party to the proceeding. Accordingly, I will address this issue before turning to the issue of whether the records qualify for exemption under section 19 of the *Act*.

Was the OSC a party to the litigation?

As previously described, the RS panel adjourned proceedings and the appellants' counsel agreed to bring the matter before the OSC Hearing Panel. In its representations, the OSC states that on the same day the RS hearing was adjourned, the Capital Markets Branch contacted the Enforcement Branch and requested that a litigator be assigned to handle the anticipated OSC proceedings. Three days later, Senior Litigation Counsel was assigned and a litigation file was opened. Shortly after, the appellants' counsel brought a Request for a Hearing and Review before the OSC Hearing Panel.

The OSC states that "OSC Staff attended and made full argument before the OSC Hearing Panel during an all day hearing". In support of their position, the OSC attached a copy of the OSC Hearing Panel's Reasons and Decision. The OSC also provided a copy of the RS panel transcript relating to the adjournment, along with a copy of the appellant's Notice of Appeal to the Divisional Court. All of these documents identify the OSC as a party to the proceedings, and not solely as the adjudicative body determining the issues.

The OSC's representations were shared with the appellants, who made representations in response. The appellants concede that OSC staff participated in the OSC Hearing. The appellant's take the position that OSC's role in the proceedings before the OSC Hearing Panel

was not appropriate given that both RS and the TSX are regulated by the OSC. The appellants state:

There is no doubt that the OSC Staff and RS counsel and staff were acting in common, but the Appellants take the position that this was not appropriate given that RS and the TSX, like the Requesting Parties, are parties regulated by the OSC, and was also not within common or joint interest privilege.

Having regard to the representations provided by the parties, I am satisfied that the OSC was a party to the litigation before the OSC Hearing Panel. Though I appreciate that the appellants take issue with the OSC's participation in the proceedings, it is clear that the OSC Hearing Panel treated the OSC as a party. In making my decision, I reviewed the panel's Reasons and Decision and note that they identified the OSC as one of the parties, along with the appellants, the TSX and RS. In my view, there is no doubt that the OSC was a party and presented evidence in response to litigation commenced by the appellants. Accordingly, I find that the appellants' submission that the OSC cannot rely on the solicitor-client privileges because it was not a party to the related litigation has no merit.

I will now go on to consider whether the solicitor-client exemptions under section 19 apply to the records at issue. As the Ministry has claimed that all of the records are exempt under section 19(b) of the *Act*, I will first consider whether the statutory privileges in Branch 2 apply to the records at issue.

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

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."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Representations of the parties

The OSC submits that the records falling within Groups A, B and C were prepared in contemplation of litigation. The vast majority of these records fall within Group A, which comprise the records the OSC advises were located in the files of the Senior Litigation Counsel in the Enforcement Branch. This is the individual who was assigned to handle the litigation on

behalf of the OSC and who appeared before the OSC Hearing Panel. For the remainder of this Order, I will refer to this individual as the assigned Crown.

The OSC's position is that the records falling within Groups A, B and C fall within the ambit of Branch 2 of the statutory litigation exemption aspect of section 19(b) of the *Act* because they were prepared by or for Crown counsel "in contemplation or for use in litigation". The OSC argues that these records were "clearly generated and/or assembled for the predominant purposes of conducting litigation and providing legal advice to the OSC with respect to the litigation and issues relating to it." In support of its position, the OSC submits that these records were assembled by OSC counsel after it became apparent that the appellants would be seeking a Hearing and Review before an OSC Hearing Panel and that there was a reasonable prospect that litigation would ensue.

With respect to the records falling within Groups B, C, D, E and F, the OSC submits that these records were generated for use in providing internal legal advice with respect to the issues relating to or arising from the proceedings involving the appellants, or were prepared by or for Crown counsel "for use in giving legal advice". In support of its position, the OSC states:

All of the records in Groups D, E, and F were generated by counsel in the General Counsel's Office. As indicated, the mandate of the General's Counsel Office includes providing strategic, legal advice to the OSC's Executive. It is submitted that all of these records were generated precisely to assist the counsel in question in providing such advice.

The sole record in Group B which consists of notes taken by the OSC's Chief Litigation Counsel was generated for use in providing legal advice both to [the assigned Crown], who was handling the litigation file, and to the OSC Executive with respect to issues arising from the litigation.

The ... records in [Group] C were compiled by Senior Counsel in the Capital Markets Branch for use in providing advice to OSC litigation counsel with respect to matters arising in the Hearing and Review and more generally for providing internal advice with respect to matters arising from these proceedings.

The appellants argue that the OSC failed to discharge its burden of proof with respect to the applicability of the statutory privileges under Branch 2. In support of their position, they argue:

- The Group C records cannot be the subject of any claim of privilege as the responsibilities of the Senior Legal Counsel in the Capital Markets Branch do not encompass litigation matters nor is there any evidence that this counsel was involved in the provision of legal advice in connection with their Request for Hearing and Review;
- There is no basis for the statutory privilege in relation to calls, correspondence or meetings with RS or TSX counsel or staff; and

- In the alternative, any such statutory privilege has been waived.

The OSC made the following arguments in its reply representations:

- All of the Group C records were generated after Capital Markets contacted and requested that the Enforcement Branch assign a litigator to the anticipated proceedings. Accordingly, the records were created in response to the issues raised by the litigation and for the purpose of enabling the Senior Legal Counsel in the Capital Markets Branch to provide legal advice to matters relating to the litigation; and
- The records relating to calls, correspondence or meetings with RS or TSX counsel or staff fall within the scope of the statutory privilege.

Decision and Analysis

I will first consider the OSC's submission that the statutory litigation privilege applies to the records in Groups A, B and C. I will then go on to consider the OSC's submission that the statutory solicitor-client communication privilege applies to the records in Group B, C, D, E and F.

If I find that the statutory privileges apply to any of the records, I will go on to consider the appellants' argument that any privilege that applies to these records have been waived.

Statutory Litigation Privilege

The statutory litigation privilege applies to records that were prepared by or for Crown counsel "in contemplation of or for use in litigation." The OSC claims that the records falling within Groups A, B and C qualify for exemption as they were created by or used by individuals holding the position of OSC counsel for use in litigation.

- a) *Group A – Records 2, 4, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 34, 36, 37, 38, 41, 45, 46, 47, 48, 49, 50, 54, 60, 61, 62, 66, 67, 69, 70*

I have carefully reviewed the Group A records and am satisfied that, but for Record 48, these records meet the definition of records prepared by Crown counsel "in contemplation of or for use in litigation" under Branch 2.

Record 48 is a memorandum prepared by the assigned Crown distributing a letter from RS counsel to the appellants' counsel. The writer of the letter copied the assigned Crown, who then distributed the letter to other OSC counsel with the memorandum she prepared.

I am satisfied that Record 48 was prepared by the assigned Crown and thus fit the definition of being prepared by the assigned Crown "... in contemplation of or for use in litigation".

However, I find that this records falls outside any reasonable “zone of privacy” as it does not reveal any information relating to the assigned Crown’s preparation of the litigation matter. In my view, Record 48 cannot be described as forming part of the assigned Crown’s work product.

In making my decision, I adopted the Divisional Court’s reasoning in *Ontario (Correctional Services) v. Goodis*, (2008), 89 O.R. (3d) 457 and *Ontario (Attorney General [2006] O.J. No. 1812 (Div. Ct.))*, where it considered whether records prepared by opposing counsel were exempt under Branch 2. In *Ontario (Correctional Services) v Goodis*, the Divisional Court found that such records are not exempt under Branch 2 and stated:

I see no basis to conclude that the IPC [Information and Privacy Commissioner of Ontario] erred in holding that the letter from plaintiff’s counsel and the list of undertakings ... were not exempt from disclosure. These records were prepared by opposing counsel. At common law, communications between opposing parties are not considered privileged (*Flack v. Pacific Press Ltd.* (1971), 14 D.L.R. (3d) 334 (B.C.C.A.) at 358). Nor are these records part of the work product of Crown counsel, prepared by it or for it by third parties, in order to assist Crown counsel in the litigation. Therefore, they are not privileged under Branch 2 of s.19.

This conclusion is consistent with the decision of this Court in *Ontario (Attorney General) v. Big Canoe*, supra, which held that letters from defence counsel to Crown counsel in the course of a prosecution were not “prepared ... for Crown counsel ... for use in litigation”.

The appellants take the position that the Divisional Court’s decision in *Ontario (Attorney General v Big Canoe* does not apply to the circumstances of this appeal. However, in my view the Divisional Court’s decision in *Big Canoe* supports the appellants’ position that the statutory litigation privilege does not apply to all of the records at issue. In particular, I adopt the finding of the Divisional Court which held that letters from opposing counsel that fell within the definition would have been an unreasonable interpretation for the words “prepared ... for Crown counsel ... for use in the litigation”. In addition, although the Divisional Court found that the letters prepared by the Crown counsel and provided to opposing counsel fell within the definition of being “prepared ... by Crown counsel ... for use in the litigation”, it found that disclosure of these letters to the requester was reasonable as they were “outside any reasonable zone of privacy”.

In this appeal, it appears that Record 48 was prepared to facilitate the distribution of correspondence sent to or received by the appellants’ counsel. I have reviewed the memorandum prepared by the assigned Crown and am satisfied that this records does not contain any notations or comments made by the assigned Crown which would demonstrate her analysis of the information contained in the letter.

For the reasons stated above, I find that Record 48 does not qualify for the statutory litigation privilege under Branch 2. As the OSC has not claimed that any other privilege or exemption under the *Act* applies to this record, I will order the OSC to disclose it to the appellants' counsel.

The remaining records in Group A are described in the Index of Records prepared by the OSC as the assigned Crown's handwritten notes to file relating to meetings, telephone calls between OSC counsel and TSX counsel and/or RS counsel and staff or emails to OSC staff or counsel.

The appellants argue that the statutory litigation privilege cannot apply to records prepared in relation to telephone calls, correspondence and meetings between OSC counsel and TSX and RS counsel and staff. Underlying this argument, are the appellants' concerns that the OSC's role in the OSC hearing was not appropriate. In particular, they question how the exemption at section 19 could attach to communications which, in their view, should have never taken place. Despite the appellants' position, it appears that the OSC Hearing Panel treated the OSC as one of the parties and, in the words of the appellants "there is no doubt that the OSC staff and RS counsel and staff were acting in common". The fact that records documenting telephone calls, correspondence and meetings between the OSC, TSX and RS exist is further evidence that these parties acted in common. I am not charged with determining whether the collaboration between the OSC, TSX and RS was appropriate, but whether records documenting the telephone calls, correspondence and meetings qualify for exemption under section 19 of the *Act*.

I have carefully reviewed the remaining records in Group A and am satisfied that they represent the assigned Crown's work product relating to the litigation. Having regard to the records themselves, I am satisfied that the discussions captured in the records between OSC counsel and TSX counsel and/or RS counsel and staff were made in contemplation of or in preparation of the response to the litigation commenced by the appellants. Accordingly, I find that these records fit the definition of Branch 2 as they were prepared by Crown counsel "in contemplation of or for use in litigation".

The OSC claims that two of the records in Group A (Records 25 and 67) also qualify for exemption under Branch 1. However, given my finding above it is not necessary for me to determine whether these records also fall within the ambit of Branch 1.

b) *Group B - Record 15*

I am satisfied that the one record comprising of Group B meets the definition of a record prepared by Crown counsel "in contemplation of or for use in litigation" under Branch 2.

Record 15 is a handwritten note to file prepared by Crown counsel in the Enforcement Branch whose title is Chief Litigation Counsel/Senior Manager. The Index of Records prepared by the OSC indicates that the note to file relates to a meeting with RS counsel and staff. I have reviewed the record and am satisfied that it represents the work product of Crown counsel. In particular, the record reflects issues the Chief Litigation Counsel/Senior Manager identified during the meeting relating to the litigation. In my view, this record fits the definition as it was prepared by Crown counsel "in contemplation or for use in litigation".

c) *Group C - Records 1, 32, 33, 39, 40, 57, 59 and 64*

I am satisfied that the records in Group C, but for records 57, 59 and 64, meet the definition of records prepared by Crown counsel “in contemplation of or for use in litigation” under Branch 2.

Records 1, 32, 33 and 40 are handwritten notes to file prepared by the Senior Legal Counsel in Capital Markets. The Index of Records prepared by the OSC indicate that the notes relate to meetings with RS counsel and staff and telephone calls with TSX and RS counsel. Records 39, 57, 59 and 64 are e-mails from the Senior Legal Counsel to Capital Markets staff.

The appellants argue that the notes and e-mails located in the Senior Legal Counsel’s file cannot be the subject of any claim of privilege as her responsibilities do not encompass litigation matters. The OSC submits that it was this particular Crown counsel’s department which initially contacted the Enforcement Branch once litigation was anticipated. The OSC argues that the Group C records were generated after a litigator was assigned to the litigation matter and were generated for the purpose of enabling the Senior Legal Counsel in Capital Markets to provide legal advice relating to the conduct of the litigation. In my view, Records 1, 32, 33, 39 and 40 constitute the Senior Legal Counsel’s notes or e-mails of matters relating to information she gathered or issues she identified relating to the litigation. Though, her role differs from the assigned Crown and other counsel in the Enforcement Branch, it appears that the Senior Legal Counsel in the Capital Markets Branch, nonetheless, had a role to play in the litigation and participated in related meetings and telephone calls. Having regard to the above, I am satisfied that these records were prepared by Crown counsel “in contemplation of or for use in litigation” and that these records represent her work product relating to the litigation.

However, I am not satisfied that the e-mails comprising of Records 57, 59 and 64 qualify for exemption under the statutory litigation privilege under Branch 2 though they appear to have been prepared by Crown counsel “in contemplation of or for use in litigation”. These records comprise of e-mails prepared by the Senior Legal Counsel and sent to Capital Markets staff. The e-mails are part of an e-mail exchange which commenced with communication between the appellants’ counsel and the OSC’s Secretary.

Attached to the e-mail at Record 57 is a letter from the OSC’s Secretary to the appellants’ counsel which was copied to the assigned Crown and RS and TSX counsel. Attached to the e-mail at Record 59 is a letter from the appellants’ counsel to the OSC’s Secretary’s office which was also copied to the assigned Crown and RS and TSX counsel. Though no letter or document is attached to Record 64, the e-mail appears to have attached PDF documents originating from the appellants’ counsel. In all three cases, it appears that upon her receipt of these documents, the assigned Crown forwarded the e-mails and their attachments to the Senior Legal Counsel in Capital Markets Branch, who in turn, circulated them to staff in Capital Markets.

In my view, Records 57, 59 and 64, fall outside of any reasonable “zone of privacy” as these records do not constitute the Senior Legal Counsel’s work product, nor would their disclosure reveal information relating to her involvement in the litigation matter. Rather, the e-mails sent to

staff in the Capital Markets Branch appear to have been distributed for circulation purposes and do not contain any notes or comments relating to the litigation matter.

Having regard to the above, I find that Records 57, 59 and 64 do not fall within the ambit of Branch 2. However, the OSC submits that the statutory solicitor-client communication privilege also applies to these records. Accordingly, I must go on to consider whether the statutory solicitor-client communication privilege applies to Records 57, 59 and 64.

Statutory Solicitor-Client Communication Privilege

The statutory solicitor-client communication privilege applies to records that were prepared by or for Crown counsel “for use in giving legal advice.” The OSC claims that the records falling within Groups B, C, D, E and F qualify for exemption as they were created by or used by individuals holding the position of OSC counsel for use in giving legal advice. However, I found that all of the records in Groups B and C, but for some e-mails and their attachments in Group C (Records 57, 59 and 64) already fall within the ambit of Branch 2. Accordingly, I need only consider whether Records 57, 59 and 64 along with the records in Groups D, E and F meet the definition of being prepared by or for Crown counsel “for use in giving legal advice.”

a) Group C - Records 57, 59 and 64

As described above, Records 57, 59 and 64 comprise of e-mails the Senior Legal Counsel in the Capital Markets Branch forwarded to Capital Markets staff. The e-mails were forwarded to her as a result of the assigned Crown circulating the e-mails and attachments to other OSC counsel and staff. Attached to the e-mails are letters representing communications between the OSC’s Secretary and the appellants’ counsel. Having reviewed these records, I am not satisfied that the e-mails and the attachments contain legal advice being sought from or given by Senior Legal Counsel or any other OSC counsel, nor were they prepared by or for Crown counsel for use in giving legal advice. In making my decision, I took into account that it appears that the records do not contain any notations or comments which would demonstrate any analysis of the information contained in the attached letters.

Accordingly, I find that the statutory solicitor-client communication privilege does not apply to Records 57, 59 and 64. As the OSC has not claimed any further privilege or exemption applies to these records, I will order it to disclose these records to the appellants’ counsel.

b) Group D - Record 44

I am satisfied that the one record comprising of Group D meets the definition of a record that was “prepared by or for Crown counsel for use in giving legal advice” under Branch 2.

Record 44 is an email from an Associate General Counsel in the General Counsel’s Office to an individual in the OSC’s Executive Office. The e-mail was copied to Capital Markets staff and other OSC counsel, including the assigned Crown. The Index of Records prepared by the OSC indicates that the e-mail provides an update regarding a meeting with RS counsel and staff. I

have reviewed this record and am satisfied that it was prepared by Crown counsel "... for use in giving legal advice". Not only does the e-mail provide an update of the meeting with RS, it includes the Associate General Counsel's identification of issues relating to the litigation matter.

The OSC also claims that this record is exempt under the statutory solicitor-client communication privilege under Branch 1. However, given my finding that this record already falls within the ambit of Branch 2 it is not necessary that I also determine whether it is also exempt under Branch 1.

c) Group E – Records 16, 17, 28, and 43

I find that the records comprising of Group E meet the definition of records "prepared by or for Crown counsel for use in giving legal advice" under Branch 2.

Records 16, 17, 28, and 43 are handwritten notes to file, and in one instance a typewritten note, prepared by Senior Legal Counsel in the General Counsel's Office. The Index of Records prepared by the OSC indicate that the records relate to meetings and discussions between OSC counsel and RS counsel and staff. I have reviewed the records and am satisfied that they were prepared by Crown counsel "for use in giving legal advice". In making my decision, I took into account that the records refer to the Senior Legal Counsel's identification of issues, questions and comments relating to matters arising from the litigation. Accordingly, I find that these records fall within the ambit of Branch 2.

d) Group F – Records 42 and 52

I am satisfied that the two records comprising of Group F meet the definition of a record that was "prepared by or for Crown counsel for use in giving legal advice" under Branch 2.

Records 42 and 52 are handwritten notes to file prepared by OSC counsel in the General Counsel's Office. The Index of Records prepared by the OSC indicates that the notes relate to a telephone conference call and meeting with other OSC counsel and RS counsel and staff. I have reviewed these records and am satisfied that the notes were prepared by Crown counsel "for use in giving legal advice". In particular, I am satisfied that the notes identify issues raised during the meetings and discussions that took place in preparation of OSC's response to litigation commenced by the appellants. In my view, these records fall within the ambit of the statutory solicitor-client communication privilege under Branch 2.

Loss of Privilege

In their representations, the appellants' submit that if any of the records are found to contain solicitor-client privileged information, any privilege that exists has been waived by the OSC. As noted above, I found that all of the records at issue, but for Records 48, 57, 59 and 64, fall within the ambit of Branch 2.

The application of Branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and
- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

I already identified the records I determined fall outside of any reasonable “zone of privacy” and will order the OSC to disclose these records (48, 57, 59 and 64).

Accordingly, the only limitation to the application of Branch 2 that could apply to the remaining records is the waiver of privilege by the *head of an institution*.

In support of their position that the application of Branch 2 is limited in the circumstances of this appeal, the appellants’ make two arguments. First, they argue that “... OSC counsel has presumably made the legal arguments for which its advice was formulated and information obtained, in the hearing before the OSC Hearing Panel”. Second, they submit that if any of the records are found exempt under the statutory privileges that any such privilege has been waived.

With respect to the first argument, the appellants’ submission that the termination of the litigation matter may limit the application of the statutory litigation privilege under Branch 2 is incorrect. The courts have established that the termination of litigation does not affect the application of statutory litigation privilege under Branch 2. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) and *Ontario (Attorney General) v. Big Canoe* (2006) O.J. No. 1812 (Div. Ct.)]. In other words, there is no “temporal limit” to the records I found meet the definition of records prepared by Crown counsel “in contemplation of or for use in litigation”.

Turning now to the appellants’ argument that a waiver of privilege by the *head* has occurred. Other than stating that the OSC has waived privilege, the only other argument the appellants make which appears to relate to an action or decision of the *head*, is their submission that the “head” failed to make an informed decision in the exercise of his discretion.

The OSC disputes that any waiver of privilege took place. The OSC also submits that the privilege is not theirs alone to waive given that the records relate to communication between themselves and other parties sharing a common or joint interest. In my view, the appellants have failed to adduce sufficient evidence to demonstrate that the application of Branch 2 has been limited in circumstances of this appeal as a result of a waiver of privilege by the *head of an institution*. I will address the appellants’ argument regarding the OSC’s exercise of discretion below.

Having regard to the representations of the parties, I am not satisfied that any waiver took place. Accordingly, I find that the application of Branch 2 has not been limited in the circumstances of this appeal. Accordingly, I find that all of the records at issue, but for Records 48, 57, 59 and 64, are exempt under section 19(b) of the *Act*.

As section 19(b) is a discretionary exemption, I must go on to consider whether the OSC properly exercised its discretion in denying the appellants' access to the records I found exempt under section 19(b).

EXERCISE OF DISCRETION

General principles

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

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

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The OSC submits that it exercised its discretion in good faith. The OSC advises that in making its decision, it determined that there exists a legitimate zone of privacy with respect to the records prepared for the conduct of litigation or were created for the purpose of giving legal advice to senior executives of the OSC.

As noted above, the appellants' question whether the OSC made an informed decision in the exercise of its discretion. In their representations, the appellants' state:

Counsel for the Appellants spoke to and had correspondence with the head, on the basis of which counsel for the Appellants believes, with all respect, that the head was either not familiar with the Records at Issue or did not have sufficient information concerning the Records in Issue to make an informed decision as to the exercise of his discretion.

If the “head” did make an informed decision as to the exercise of his discretion, the Appellants take the position, with all respect, that the head was in error of not requiring the Records in Issue, or a majority of the Records in Issue, to be disclosed in the public interest, where it is clear that the OSC Staff and RS mutually agreed to pursue a course of action, without notice to or knowledge of the Requesting Parties, that was prejudicial to the Requesting Parties, in circumstances where some members of OSC Staff had serious reservations about the validity or propriety of the TSX filing that gave rise to the Request for Hearing and Review.

In reply, the OSC states:

At the time the access decision was made, the head was in possession of all of the records and received detailed advice from OSC Staff with respect to the factors that ought to bear on his exercise of discretion with respect to section 19. While a large number of records were disclosed to the appellant, the records in issue in this appeal were withheld because they were considered to be inherently privileged records that related to matters that were the subject of ongoing litigation. It is submitted that this constitutes an entirely appropriate exercise of the head’s discretion to section 19.

Having regard to the parties representations, I am satisfied that the OSC has properly taken into account only relevant factors, and not irrelevant ones, in exercising its discretion to withhold the records I found exempt under section 19 of the *Act*. In particular, it appears that the OSC considered the confidential nature of the information and the extent to which it is significant and sensitive. I found that the exempt records constituted the “work product” of Crown counsel involved in the OSC’s response to litigation commenced by the appellants or were prepared for the purpose of giving legal advice. The purpose of statutory privileges in section 19 is protect such communications. The appellants do not argue that the OSC exercised its discretion in bad faith or took into account irrelevant considerations. Rather, they argue that the OSC should release the records in order to promote transparency regarding its role in the litigation. As previously stated, the appellant takes issue with the OSC’s role in the litigation and apparent collaboration between the RS and TSX. I already stated that this issue is not relevant to the determination as to whether or not the records are exempt under section 19 of the *Act*. Similarly, these concerns are also not relevant to a determination as to whether the OSC properly exercised its discretion. In my view, the appellants’ underlying concerns about the OSC’s role in the proceedings is not a relevant factor and thus need not be considered by the OSC in the exercise of their discretion.

Having regard to the above, I find that the OSC properly exercised its discretion in deciding to withhold the information I have not ordered to be disclosed.

ORDER:

1. I order the OSC to disclose Records 48, 57, 59 and 64 which I found are not exempt under section 19 of the *Act* by **February 3, 2009**.
2. I uphold the OSC's decision to withhold the remaining records at issue.
3. In order to verify compliance with this Order, I reserve the right to require a copy of the records disclosed by the OSC pursuant to order provision 1 to be provided to me.

Original Signed by: _____
Jennifer James
Adjudicator

_____ December 30, 2008