



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER P-1406

Appeal P_9600352

Ontario Native Affairs Secretariat



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NATURE OF THE APPEAL:

The Ontario Native Affairs Secretariat (ONAS) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The appellant, a representative of a local landowners association, sought access to records relating to the settlement of the Point Grondine land claim by the Governments of Canada (Canada) and Ontario and the Wikwemikong Unceded First Nation (the First Nation). The final details of the settlement have not yet been resolved, though a deadline for their finalization has been set for April 1998.

ONAS located a large number of responsive records and granted access to some of them, in whole or in part. ONAS denied access to the remaining records and parts of records, claiming the application of the following exemptions contained in the Act:

- Cabinet records - section 12(1)
- advice or recommendations - section 13(1)
- relations with other governments - sections 15(a) and (b)
- valuable government information - section 18(1)(a)
- economic and other interests - sections 18(1)(d) and (e)
- proposed policies, plans or projects of an institution - section 18(1)(g)
- solicitor-client privilege - section 19

The appellant appealed ONAS' decision to deny access. During the mediation of the appeal, the appellant advised that he no longer sought access to any personal information which may be contained in the records, as well as any information which may be subject to the third party information exemption in section 17(1). The parties agreed that this information would not form part of this appeal. Accordingly, there remains at issue 482 records (91 in part and 391 in full) containing 2,663 pages. The records consist of a wide variety of notes, correspondence, memoranda, briefing notes, e-mails and an assortment of other documents.

ONAS has divided the responsive records into 13 categories, entitled 506 to 515, 517, 521 and "Other Documents". Each individual page of each responsive record is also identified by a number. For example, Page 576 of Record Category 506 is described as Record 506-576. I will rely on the record numbering system used by ONAS in its representations and will attempt to be as clear as possible in describing each document in the text of this order.

Records 506-255 to 258, 506-435 to 438, 507-482 to 485, 508-460 to 461, 508-861 to 864, 509-31 to 36, 509-167 to 171, 509-172 to 178, 513-24 to 30, 513-100, 513-120 to 123 and 514-528 were identified by ONAS as being the subject of another request by the appellant. The appellant agreed that these records will not, therefore, be addressed in this order.

In addition, ONAS was unable to provide me with copies of Records 508-441 to 442, 593-595 and 871-876, which it identified as being responsive to the appellant's request. It has not yet found these documents and I have not been provided with any explanation as to their whereabouts, despite being requested to do so. I will, accordingly, require ONAS to provide me with a description of the nature and extent of the searches which it undertook for these documents in order to satisfy myself as to the reasonableness of its efforts to locate them. A Notice of Inquiry was provided to the appellant, Canada, ONAS and counsel to the First Nation. Submissions were received from the appellant, Canada and ONAS. In its

representations, ONAS withdrew its reliance on section 18(1)(g). As this is a discretionary exemption, it is not necessary that I address its possible application to the records at issue.

ONAS also provided me with a number of additional materials containing background information on the land claim resolution process, in general, as well as information respecting the Point Grondine land claim negotiations which gave rise to the creation of the records at issue. I found this information extremely helpful in understanding the records and how they relate to this land claim settlement.

In addition, during the inquiry stage of the appeal, ONAS identified a number of additional records as being responsive to the request and claimed the application of further discretionary exemptions to the records which it had earlier identified. The Confirmation of Appeal notice forwarded by this office to ONAS when this appeal was filed advised it that any additional discretionary exemptions beyond those claimed in its original decision letter must be put forward before October 31, 1996.

The claim for additional discretionary exemptions was received by this office on May 29, 1997. I find that this delay is unconscionable, particularly considering the latitude given to ONAS by this office in not requiring that it strictly comply with the time frames established by this office for the filing of its representations. While I recognize the difficulty institutions face in processing an appeal with such a large number of records, a more timely approach to the application of discretionary exemptions than that taken by ONAS is imperative.

Accordingly, I am not prepared to consider the possible application of any additional discretionary exemptions to any records beyond those which were identified by ONAS in the index which was supplied to this office and the appellant. I will, however, review the application of the exemptions claimed for the additional records identified by ONAS in its correspondence which was received by this office on May 29, 1997.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

ONAS has claimed the application of the exemptions in sections 15(a) and (b) to the vast majority of the records at issue, particularly those which relate to the actual face-to-face negotiation of the land claim settlement with the First Nation, Canada and Ontario. These sections state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) 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;

Section 15(a)

In order for a record to qualify for exemption under section 15(a), ONAS must establish that:

1. the relations must be intergovernmental, that is relations between ONAS and another government or its agencies; and
2. the disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

[Order P-908]

ONAS submits that the relations which exist in the course of the settlement of a land claims agreement with an Ontario First Nation, where Canada is also a party to the negotiations, are intergovernmental in nature. In Orders 210, P-630, P-908, P-949 and P-961, it was held that relations between Canada and Ontario which are reflected in records relating to a land claims settlement are “intergovernmental” in nature for the purposes of section 15(a). Accordingly, I find that the first part of the section 15(a) test has been satisfied with respect to those records containing information that passed between Canada and Ontario during the land claim negotiations, to which this exemption has been applied.

ONAS also submits that relations between Ontario and the First Nation are also “inter-governmental” for the purposes of section 15(a), because they exist in the context of the “tripartite” land claim settlement negotiations involving the First Nation, Ontario and Canada.

In a postscript to Order P-908, former Commissioner Tom Wright made the following comments with respect to the application of section 15(a) to the relations between Ontario and aboriginal First Nations:

Finally, in response to the Notice of Inquiry, ONAS made extensive submissions in support of the position that the First Nation was a "government" for purposes of

section 15 of the Act. Although it was not necessary for me to consider this issue in order to resolve this appeal, I believe that it will have to be directly addressed at some point.

Accordingly, I feel that it would be helpful if the provincial Legislature clarified its intention with respect to whether relations between First Nations and the government of Ontario are to be considered intergovernmental for the purposes of section 15 of the Act. For example, section 16 of British Columbia's Freedom of Information and Protection of Privacy Act (which corresponds to section 15 of the Act), specifically provides that "aboriginal governments" are included for purposes of the exemption.

No such legislative amendment has yet been passed by the provincial Legislature. In the context of this appeal, it is not necessary for me to determine whether relations between Ontario and a First Nation alone are “intergovernmental”. I find, however, that “tripartite” relations between

Ontario, Canada and “aboriginal governments” in the context of land claims settlements may properly be considered to be “intergovernmental” for the purposes of this exemption. Any records which reflect the relations between these parties to the land claims settlement negotiations are, therefore, exempt from disclosure under section 15(a).

ONAS also submits that the disclosure of the subject records will jeopardize the integrity of Ontario’s negotiations with Canada and other First Nations in the 16 other land claims currently being conducted, as well as the 46 land claims presently in the pre-negotiation stage of settlement. It argues that compromising the integrity of these negotiations with Canada and the First Nations gives rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations, within the meaning of section 15(a).

ONAS argues that it is important to Ontario that Canada be involved in land claims negotiations since Canada is primarily responsible for native Canadians pursuant to section 91(24) of the Constitution Act, 1867. As a result, Canada’s involvement in any settlement package is necessary. It further submits that the disclosure of these records will be considered by both the First Nation and Canada to be a breach of the confidentiality of the negotiations and will lead to a less frank discussion and cooperation in the implementation of the land claim. A lack of confidence in the confidentiality of the information exchanged in land claims negotiations would then result in a chilling effect whereby parties to the negotiations would be more reticent to share their views openly and frankly, particularly in further negotiations of other land claims.

Finally, ONAS submits that the disclosure of both Ontario’s and Canada’s negotiating strategies, as reflected in many of the records would have a “chilling effect” on future land claims negotiations. It is important to both Ontario and Canada that land claims be resolved through a negotiation process, rather than through litigation. ONAS suggests that the successful settlement of many of these claims may be jeopardized by the disclosure of information about strategies and negotiating tactics employed by Ontario and Canada in the Point Grondine negotiations. It argues that it is reasonable to expect that the disclosure of these records could give rise to prejudice to its relations with Canada in the field of native land claim settlements.

Canada submits that it has consistently opposed the disclosure of any records revealing the substance of confidential land claim negotiations and that disclosure would be considered a breach of the confidentiality of negotiations and would have a chilling effect upon the negotiations process. Canada further submits that this would result in prejudice to the conduct of intergovernmental affairs, and that it would be less willing to share material which is related to native land claims with Ontario if such information is made public. It submits that, in future, all such material would have to be carefully reviewed prior to being released to Ontario.

Application of Section 15(a) to Record Category 506

I have reviewed each of the Record Category 506 records to which ONAS has applied the section 15(a) exemption and make the following findings:

- (i) Records 506-20 and 21, 31-39, 41-54, 52-55, 56-58, 59, 146-148, 149, 183, 259-261, 262, 263-264, 265-310, 311-318, 319, 320-329, 330-334, 335-339, 340-341, 342-347, 348-353, 354-359, 360-364. 365, 366-368, 369, 373-376, 377-381, 382-396, 397-402,

411-413, 416-418, 420-424, 425-427, 428-429, 430-434, 439-441, 454-457, 460-465, 502-528, 529-562, 563-572, 573-586, 587-613, 614-623, 624-634, 635-666, 667-674, 675-686, 681-697, 698-700, 701-711, 712-719, 767-778, 779-792, 793-822, 823-843, 844-855, 856-880, 888-897, 890-895, 898-914, 915-920, 949-958, 964-967 (undisclosed portion), 969-987, 988-1016, 1017-1032, 1033-1049, 1050, 1051 (undisclosed portion), 1060-1062, 1063, 1064, 1067-1087, 1088-1089, 1094, 1095-1096, 1097, 1132-1133, 1138-40, 1183-1210, 1211-1213 and 1214-1234 are minutes or notes taken at meetings held between the parties to the land claim settlement negotiations, Ontario, Canada and the First Nation. The records often set out in detail the negotiating positions taken by each party through the course of the settlement discussions, including those taken by Canada and Ontario.

- (ii) In my view, however, I have not been provided with sufficient evidence to demonstrate that the disclosure of these records would give rise to a reasonable expectation of prejudice to the intergovernmental relations of Canada and Ontario in the field of land claims negotiations. First Nation representatives were present throughout the Point Grondine negotiations and would have had the opportunity to observe any negotiating techniques or other tactics used by both Canada and Ontario. Any information present in these records was also shared with the First Nation. I am not satisfied that there exists a reasonable expectation that harm to the intergovernmental relations of Ontario, the First

Nation and Canada in the conduct of land claims negotiations would arise as a result of the disclosure of this information. It is not, accordingly, exempt from disclosure under section 15(a).

- (iii) Records 506-240 to 254, 419, 444 (undisclosed portions), 445-446, 447-453, 454-457, 466-490, 491-496, 961-963 (undisclosed portions), 1052-1059, 1100-1101, 1102-1106, 1108-1109 (undisclosed portion), 1110-1114, 1115-1117, 1118-1124 (undisclosed portions), 1128-1129, 1134-1136, 1146-1149, 1155-1164 are notes of meetings held where the discussion of strategic positions taken by both Canada and Ontario in the absence of First Nation representatives were documented. In my view, the disclosure of this information gives rise to a reasonable expectation that harm to the intergovernmental relations between Ontario and Canada would occur. These records are, accordingly, exempt from disclosure under section 15(a).
- (iv) ONAS has also claimed the application of section 15(a) to Records 506-466 to 490, 499-501, 726-729, 740-743, 744-747, 748-750, 751-760, 1126, 1130-1131, 1150-1154 and 1165. These documents are notes taken at meetings involving Ontario officials and describe only matters involving Ontario's interests in the negotiations. They do not contain information regarding Canada's negotiating position, for example. As such, I find that their disclosure cannot reasonably be expected to give rise to harm to intergovernmental relations. Section 15(a) does not, accordingly, apply to these records.
- (v) Section 15(a) was the only exemption claimed for Records 506-149, 262, 373-376, 397-402, 445-446, 454-457, 460-465, 499-501, 1060-1062, 1097. As no other exemptions have been claimed for them, and no mandatory exemptions apply, they should be disclosed to the appellant.

Application of Section 15(a) to Record Category 507

I have reviewed each of the Record Category 507 records to which ONAS has applied the section 15(a) exemption and make the following findings:

- (i) The undisclosed portions of Records 507-185 and 196, as well as Records 507-189, 208-211, 238-254, 255-258, 431-437, 469-472, 473-479, 480-481, 486-491, 492-499, 519-529, 542-565, 566-568, 569-573, 576-580, 583-584, 585-586, 587-588, 589-590, 592-593, 594a-599 and 712-719 are correspondence, notes, draft letters and e-mail messages which were exchanged between Ontario and the First Nation, other Ontario officials, as well as the First Nation and Canada. As this information either described Ontario's interests in the negotiations or were shared with the First Nation, I find that their disclosure could not reasonably be expected to harm intergovernmental relations between Canada and Ontario. I have not been provided with sufficient evidence to substantiate the possible application of the exemption to these records. As such, section 15(a) has no application to them.
- (ii) The undisclosed portions of Records 507-196 and Records 507-263 to 268, 426-427, 508-509, 510-513 and 581-582 are letters which passed between Ontario and Canada during the land claim settlement negotiations. In my view, it is reasonable to expect that harm to the intergovernmental relations of Ontario and Canada will result from the disclosure of these documents. They are, accordingly, exempt from disclosure under section 15(a).
- (iii) As section 15(a) was the only exemption claimed for Records 507-185, 186-187, 208-211, 238-254, 255-258, 431-447, 469-472, 473-479, 480-481, 486-491, 519-529, 542-565, 576-580, 583-584, 585-586 and 587-588 and no mandatory exemptions apply to them, they should be disclosed to the appellant.

Application of Section 15(a) to Record Category 508

ONAS has withdrawn its reliance on section 15(a) with respect to paragraphs one and four of Records 508-51, 107-111 and 825-829. I have reviewed each of the Record Category 508 records to which ONAS has applied the section 15(a) exemption and make the following findings:

- (i) I have not been provided with sufficient evidence to satisfy me that the disclosure to the appellant of paragraphs two and three of Records 508-51 and Records 75, 82-84, 85-88, 89-90, 91-94, 97-100, 102-106, 107-111, 112-115, 116-120, 122-123, 124-127, 128-129, 130-138, 139-147, 148-149, 150-153, 154-161, 162-164, 171-172, 182-185, 441-442, 469-482, 487 (undisclosed portions), 494, 495-496, 503-504, 509-512 (undisclosed portions), 518-519, 523-525, 528-531, 536-537, 553-557, 563-564 (undisclosed portions), 565, 581-582 (undisclosed portions), 585-586 (undisclosed portions), 596-598 (undisclosed portions), 604-605 (undisclosed portions), 614-630 (undisclosed portions), 636-638, 639-642, 654, 655, 776-777, 789-795, 796-804, 820, 823 (undisclosed portions), 824 (undisclosed portions), 830, 832, 841-842, 858, 877-882, 898-899 and 900 could reasonably be expected to prejudice the conduct of intergovernmental relations by

the Government of Ontario or an institution. Therefore, section 15(a) does not apply to exempt these records from disclosure.

- (ii) However, the disclosure of Records 76-82, 169-170, 483, 484-486, 491-492, 497-499, 513-514, 532-534, 545-547, 548, 550-551, 581-582, 778-779, 780, 815-816, 835-836, 837, 838, 839 and 840 could reasonably be expected to prejudice the conduct of intergovernmental relations between the Governments of Ontario and Canada. These records are, accordingly, exempt from disclosure under section 15(a).
- (iii) No other exemptions were claimed for Records 441-442, 494, 495-496, 503-504, 528-531, 585-586, 820, 830, 832, 898-899 and 900 and no mandatory exemptions apply to these records. They should, therefore, be disclosed to the appellant.

Application of Section 15(a) to Record Categories 510-513

ONAS has withdrawn its reliance on section 15(a) with respect to Record 513-160 to 164. I have reviewed each of the Record Category 510-513 records to which ONAS has applied the section 15(a) exemption and make the following findings:

- (i) I have not been provided with sufficient evidence to satisfy me that the disclosure to the appellant of Records 510-116 to 117, 511-17, 512-1 to 13, 27-37 and 38-48, as well as 513-3, 5-6, 7, 13a, 12-15, 17-19, 35-36, 42-44, 53-54, 55-56, 58-59, 60-61, 62-64, 68-70, 71-72, 73-75, 86-92, 93-94, 109-110, 137-139, 149-151, 168, 201-204, 246-247, 255-256, 274-275, 281, 293-294, 297-301 and 303-306 could reasonably be expected to result in harm to the intergovernmental relations of the Government of Ontario. These records are not, therefore, exempt from disclosure under section 15(a).
- (ii) I am satisfied that the disclosure of Records 511-1 to 2, 3-5, 6-8, 9-11, 18-30, 31-41, 42-51, 52-54, as well as Records 513-8 to 11, 152-153, 193-198, 212-227 and 302 could reasonably be expected to result in prejudice to the intergovernmental relations of Ontario, with respect to the conduct of native land claims undertaken in conjunction with Government of Canada. These records are, accordingly, exempt from disclosure under section 15(a).
- (iii) Because section 15(a) was the only exemption claimed for Records 513-5 to 6, 12-15, 17-19, 42-44, 55-56, 109-110, 137-139, 255-256 and 281, and no mandatory exemptions apply, these records should be disclosed to the appellant.

Application of Section 15(a) to Record Category 514

I have reviewed each of the Record Category 514 documents to which ONAS has applied the section 15(a) exemption and make the following findings:

- (i) I have not been provided with sufficient evidence to demonstrate that the disclosure of Records 514-13 to 18, 60-63, 125-133, 134-138, 151-194, 195-201, 205-208, 209-220, 221-223, 224-226, 235-245, 250-255, 262-269, 270-277, 288-289, 290-291, 452-455,

472-479, 494-495, 500-503, 506-508, 537-539, 541-549, 557-571, 572-577, 580-589, 592, 593-595, 616-625, 628-629, 630-633, 676-678, 679-684, 685-691, 692 and 693 could reasonably be expected to give rise to prejudice to the intergovernmental relations of Ontario with Canada.

- (ii) Records 514-19 to 59, 141-142 (undisclosed portions), 202-204, 292-332, 333-404, 405-451, 480-482, 483-490, 491-493, 525-526, 529, 531-536 (undisclosed portions), 550-556 (undisclosed portions), 610-613 (undisclosed portions), 626-627 (undisclosed portions), 637-640, 669-675 (undisclosed portions), 796 and 797 are exempt from disclosure under section 15(a) as their release could reasonably be expected to result in prejudice to the intergovernmental relations of Ontario with Canada.
- (iii) The only exemption claimed for Records 514-13 to 18, 128-133, 134-138, 195-201, 224-226, 541-549 (undisclosed portion), 592, 616-625 and 693 was section 15(a). Because no other exemptions were claimed and no mandatory exemptions apply, they should be disclosed to the appellant.

Application of Section 15(a) to Record Category 517

I have reviewed each of the Record Category 517 documents to which ONAS has applied the section 15(a) exemption and make the following findings:

- (i) I have not been provided with sufficient evidence to demonstrate that the disclosure of Records 517-175 to 183, 184-186, 187-189, 194-195, 201-206, 207-214, 215-224, 233-239, 247-250, 343-364, 370-371, 372-375, 404-427, 428-454, 455-462, 483-487, 491-502, 503-507, 508-516, 517-521, 535-536, 537-569, 570-573, 598-623, 659-660, 662-665, 662-665, 666-667, 668-679, 680-682, 683-685, 686-689, 690-691, 698-700, 702-707, 725-748, 749-761, 762-787 and 1088-1089 could reasonably be expected to result in prejudice to the intergovernmental relations of Ontario with Canada. The majority of these records consist of legal opinions and correspondence between counsel and Ontario's negotiating team and will be addressed in greater detail in my discussion of section 19 of the Act. I find that section 15(a), however, has no application to these records.
- (ii) I agree with the position taken by ONAS that the disclosure of Records 517-463 to 465, 466-468 and 488-489 could reasonably be expected to result in prejudice to the intergovernmental relations of Ontario with Canada. These records are, accordingly, exempt from disclosure under section 15(a).
- (iii) Section 15(a) was the only exemption claimed for Records 517-481 to 502, 503-507 and 517-521, which are correspondence from Ontario to Canada and counsel to the First Nation involved in the land claims negotiation. As no other exemptions were claimed and no mandatory exemptions apply to these documents, they should be disclosed to the appellant.

Application of Section 15(a) to the “Other Record” Category

I have reviewed each of the “Other Record” Category documents to which ONAS has applied the section 15(a) exemption and make the following findings:

- (i) I have not been provided with sufficient evidence to demonstrate that the disclosure of Records 1, 7-8, 9-10, 12, the undisclosed portions of 13-20 and 44-45, 68-69, 70, 73, 74-75, 76-95, 121-131, 132-135, 144-145, 151-157, 158-159, 160-162, 163, 164-165, 170, 183, 185-186 and 187-193 could reasonably be expected to result in prejudice to Ontario’s intergovernmental relations with Canada. Section 15(a) does not, therefore, apply to these documents.
- (ii) The disclosure of those portions of Records 146-150, 181-182 and 212 which have not yet been released to the appellant could reasonably be expected to result in such prejudice. As a result, these records are exempt from disclosure under section 15(a).
- (iii) Because no other exemptions were claimed and no mandatory exemptions apply to Records 1, 7-8, 9-10, 12, 71, 73, 170 and 171-180, these records should be disclosed to the appellant.

Section 15(b)

In order for a record to qualify for exemption under section 15(b), ONAS must establish that:

1. the records reveal information received from another government or its agencies; and
2. the information was received by ONAS in confidence.

ONAS submits that the disclosure of a large number of the requested records would reveal various negotiating positions taken by Canada which were recorded by Ontario officials during the course of their discussions on the settlement. For this reason, ONAS argues that the first part of the section 15(b) test has been satisfied with respect to these records. I agree that much of the information contained in the records to which ONAS has applied section 15(b) was received from the Government of Canada or its agencies. This first part of the section 15(b) test has, accordingly, been met with respect to the majority of the records to which the exemption has been applied.

With respect to the second part of the section 15(b) test, ONAS submits that the parties to the land claims negotiations entered into a protocol which called for the confidentiality of the negotiations. It submits that each of the parties recognized the need for confidentiality in the conduct of its discussions with the other parties to the settlement discussions.

Because of the comparatively small number of records which I have ultimately found to be exempt under section 15(b), I will describe them as one group, rather than by record category as was the case with the discussion above. ONAS has made specific submissions on a few of these records only. I have also found that a number of other records to which ONAS applied the section 15(b) exemption are exempt under section 15(a).

I find that I have been provided with sufficient evidence to demonstrate that Record 506-263 to 264, the undisclosed portion of Record 506-466 to 490, Record 508-553 to 557 and all of Record 513-276 to 277 are properly exempt under section 15(b). Each contain information which was received from the Government of Canada by Ontario, in confidence. The remaining records do not qualify for exemption under section 15(b).

Because I have found that sections 15(a) and (b) do not apply, no other exemptions have been claimed for them, and no mandatory exemptions apply, the following records should be disclosed to the appellant:

Records 506-20 to 21, 31-39, 41-54, 52-55, 56-58, 146-148, 183, 259-261, 265-310, 311-318, 330-334, 335-339, 342-347, 348-353, 354-359, 360-364, 366-368, 377-381, 382-396, 416-418, 420-424, 425-427, 428-429, 430-434, 439-441, 502-528, 563-572, 573-586, 587-613, 614-623, 635-666, 779-792, 793-822, 823-843, 844-855, 856-880 (severing the personal information), 888-889, 890-895, 898-914, 915-920, 949-958, 964-967, 988-1016, 1017-1032, 1033-1049 (severing the personal information), 1064, 1067-1087, 1165 and 1211-1213 (severing the personal information), Records 507-594a to 599 and 74-75, 121-131 and 183 from the "Other Records" category.

SOLICITOR-CLIENT PRIVILEGE

ONAS submits that a large number of the records at issue in this appeal are subject to the exemption in section 19 of the Act, which states:

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

ONAS indicates that it is no longer relying on the application of section 19 with respect to several records. Therefore, as no other exemptions have been claimed and no mandatory exemptions apply to Record 508-780 and to the undisclosed portions of Record 508-789 to 795, they should be disclosed to the appellant.

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

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

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

1. (a) there is a written or oral communication, **and**
- (b) the communication must be of a confidential nature, **and**
- (c) the communication must be between a client (or his agent) and a legal advisor, **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

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

[Order 49]

A record can be exempt under Branch 2 of section 19, regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

ONAS indicates that, with one exception, it is relying on the first part of Branch 1, as well as on Branch 2 of the solicitor-client privilege exemption for many of the records. ONAS also submits that it is relying only on the second part of Branch 1 with respect to Record 513-297 to 301. I have reviewed this record and the submissions made by ONAS and find that it qualifies for exemption under the second part of Branch 1 as it was created especially for the lawyer's brief for the litigation which was expected to follow the filing of a Notice of Intended Action by the First Nation in 1988.

ONAS has made extensive submissions on the application of section 19 to each of several hundred records. Clearly, legal counsel were involved in the preliminary discussions and throughout the negotiation of the land claims settlement. A large number of the records were created by or for counsel and the majority of them qualify for exemption under section 19. For the sake of brevity and comprehensibility, I will simply list those records which qualify for exemption under each Branch of the exemption.

Records Which Are Exempt Under Branch One of the Section 19 Exemption

I have reviewed each of the records to which ONAS has applied Branch 1 of the section 19 exemption, as well as the submissions which it has made with respect to each record and make the following findings:

- (i) the undisclosed portions of Records 506-414 to 415, 720-725 and 1125, as well as all of Records 506-776 to 776b, 1130-1131, 1132-1133, 1138-1141 and 1144-1145;
- (ii) the undisclosed portion of Record 507-189, the marginal notes in Records 566-568 and 569-573 and all of Records 507-589 to 590 and 593a-595;
- (iii) the undisclosed portions of Records 508-45, 172-171, 596-598 and 666-671, the notes on Records 614 and 825-829 and Records 508-82 to 84, 85-88, 89-90, 91-94, 97-100, 102-106, 113-115, 117-120, 122-123, 125-127, 130-138, 139-147, 148-149, 150-153, 154-161, 182-185, 484-486, 518-519, 520-522, 545-547, 599-602, 604-605, 636-638, 639-642, 772-774, 784-785, 821-822, 847-848 and 855-856 in their entirety;
- (iv) paragraph one of Record 513-16a (and 513-247), the marginal notes in Records 513-290 to 291, 643-644 and 648-649, as well as Records 513-58 to 59, 68-70, 71-72, 201-204, 307-309, 462-463, 506-508 and 510-512 in their entirety;
- (v) the marginal notes in Records 517-508 to 516 and 634-639, and all of Records 175-183, 184-186, 187-189, 194-195, 201-206, 207-214, 215-224, 233-239, 343-364, 370-371, 372-375, 404-427, 428-454, 455-462, 469-470, 483-487, 490, 522-534, 535-536, 537-569, 570-573, 588-589, 598-628, 659-660, 668-679, 680-682, 683-685, 686-689, 690-691, 698-700, 701, 702-707, 708-710, 711-715 and 716-724;
- (vi) with respect to the "Other Documents" category, the marginal notes in Records 13-20 and 97-120 along with Records 96, 133-135, 160-162 and 167-168 in their entirety;

represent confidential, written communications between a solicitor and his or her client directly relating to seeking, formulating or giving legal advice. As such, all of these records and parts of records are exempt from disclosure under Branch 1 of the section 19 exemption.

Records Which Are Exempt Under Branch Two of the Section 19 Exemption

I have reviewed each of the records which ONAS claims to be exempt under Branch 2 of section 19, as well as the submissions which it has made with respect to each record and make the following findings:

- (i) the undisclosed portion of Record 506-1051, along with Records 506-529 to 562, 698-700, 712-719, 726-729, 730, 736-738, 740-743, 744-747, 748-750, 751-763, 767-778, 1183-1210 and 1214-1234 in their entirety;
- (ii) Records 507- 508-491 to 492, 654, 661-663 and 664;
- (iii) Records 514-270-277, 288-289, 452-455, 457-459, 464-471, 472-479, 494-495, 500-503, 557-571, 572-577, 578a-579a, 580-589 and 652;

- (iv) Records 517-662 to 665, 666-667, 725-748, 749-761, 762-787, 788-789, 790-793 and 1088-1089, as well as Records 76-95, 151-157 and 160-162 from the “Other Records” category;

are records prepared by or for Crown counsel for use in giving legal advice throughout the conduct of the land claims negotiations. They are, accordingly, exempt from disclosure under Branch 2 of the section 19 exemption.

Records Which are not Exempt under Section 19

I find that the following records are not exempt under either branch of section 19:

Records 506-712 to 719, 739, 764, 765, 1063, 1088-1089, 1095-1096 and 1098, Records 507-492 to 499, Records 508-112, 116, 124, 509-512, 631, 811-812, 865, Records 513-13a, 14a, 15a, 16 (except paragraph one), 20 to 23, 246-247 (except paragraph one of Record 247), 296, Records 514-460 to 461, 537 to 539, 653, 679-684 and Record 132 from the “Other Records” Category.

Because no other exemptions have been claimed and no mandatory exemptions apply to Records 506-765, 506-1098, 508-865, 514-460-461, 514-653 and 132 (Other Records), they should be disclosed to the appellant.

ADVICE OR RECOMMENDATIONS

This exemption is found in section 13(1) of the Act, which states:

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 is subject to the exceptions listed in section 13(2).

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 relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act. In addition, the information must relate to the **giving** of advice as opposed to seeking advice (Orders P-848 and P-872).

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”.

ONAS has made extensive representations on the nature of government decision making in the land claims process, as well as the environment within which advice is given. In addition, it has

made detailed submissions on the application of the section 13(1) exemption to each record in Record Categories 506, 507, 508 and 509 for which it is claimed. It has not, however, submitted anything other than generic submissions for the documents in Record Categories 510, 511, 512, 513, 514, 517 and the "Other Documents" category. Because I have found above that many of these records are exempt under sections 15(a), (b) or 19 of the Act, I will address the potential application of section 13(1) only to those records which are not exempt under those sections.

I have reviewed each of the documents to which ONAS has applied the advice and recommendations exemption in addition to the representations and make the following findings:

- (i) the portions of Records 506-319, 506-667 to 674, 506-1050, 506-1126, 508-877 to 882, 508-885, 513-149, 513-262, 514-153, 514-205 to 208, 514-223, 514-594, 514-628 to 629, 514-676, 517-247 to 250, 517-577 to 578, 517-581 and 29-35 from the "Other Records" category which I have highlighted on the copy provided to ONAS' Freedom of Information and Protection of Privacy Co-ordinator;
- (ii) Records 506-687 to 697, 506-1150 to 1154, 507-190 to 195, 508-67, 508-516 to 517, 508-526, 508-536 to 537, 508-564, 508-565, 508-658, 508-659, 508-775, 508-798 to 804, 508-810, 513-3, 513-60 to 61, 513-160 to 164, 513-168, 513-293 to 294, 513-296, 514-593 to 595 and Record 11 from the "Other Documents" category, in their entirety;

contain advice or recommendations within the meaning of section 13(1) of the Act and qualify, therefore, for exemption under this section. I further find that none of the exceptions provided in section 13(2) apply to this information. The remaining records to which ONAS applied section 13(1) do not qualify for exemption under this section.

Because no other exemptions have been claimed and no mandatory exemptions apply to Records 506-320 to 329, 506-340 to 341, 506-365, 506-411 to 413, 506-624 to 634, 506-701 to 711, 506-739, 506-969 to 987, 506-1063, 506-1088 to 1089, 506-1095 to 1096, 507-492 to 499, 508-74, 508-107 to 111, 508-128 to 129, 508-162 to 164, 508-487, 508-509 to 512, 508-515, 508-523 to 525, 508-535, 508-631, 508-811 to 812, 508-823, 508-841 to 842, 510-116 to 117, 512-1 to 13, 512-27 to 37, 512-38 to 48, 513-7, 513-13a, 513-20 to 23, 513-53 to 54, 513-86 to 92, 513-93 to 94, 513-171 to 172, 513-209 to 210, 513-234, 513-274 to 275, 513-303 to 306, 514-139 to 140, 514-209 to 220, 514-235 to 245, 514-250 to 255, 514-261, 514-262 to 269, 514-537 to 539, 514-630 to 633, 514-679 to 684, 517-591 and Records 44-45, 68-69, 70, 144-145, 158-159, 163, 164-165 and 185-186 of the "Other Records" category, they should be disclosed to the appellant.

CABINET RECORDS

ONAS has claimed that nine records are exempt from disclosure under the introductory wording of section 12(1) of the Act, or subsections (a), (b), (d) and (e) of section 12(1). These sections state:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees,
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

ONAS indicates that it erroneously claimed the application of section 12(1) of the Act to Record 507-591 to 592a. As no other exemptions have been claimed for this document, and no mandatory exemptions apply, it should be disclosed to the appellant. In my discussion under section 15(a) above, I found Record 514-610 to 613 to be exempt. I need not, therefore, address the possible application of section 12(1) to this document.

ONAS submits that Records 508-50, 508-51 and 514-540 refer to matters which were the subject of deliberations of the Executive Council and that these documents are, accordingly, exempt from disclosure under the introductory wording to the section which is contained in section 12(1). It submits that the disclosure of these records would reveal the substance of deliberations of Cabinet and they are, therefore, exempt. I find that the covering memoranda which comprise Records 508-50 and 51 refer to information which was the subject of Cabinet deliberations. These documents are, therefore, properly exempt under the introductory wording to section 12(1).

Record 514-540 is a one-page document entitled "Cabinet Submission Target Dates". In my view, this record does not qualify for exemption under either the introductory wording to section 12(1) or, as ONAS submits, section 12(1)(a). The disclosure of this record would not reveal the **substance** of the Cabinet submission with respect to the land claim which is the subject of these records. Similarly, it does not qualify as an "agenda, minute or other record of the deliberations or decisions of the Executive Council or one of its committees" within the meaning of section 12(1)(a). I find, therefore, that Record 514-540 does not qualify for exemption under these sections. As no other exemptions have been claimed and no mandatory exemptions apply to this document, it should be disclosed to the appellant.

Record 187-193 from the "Other Record" category is a draft Cabinet submission which addresses the Point Grondine Settlement Agreement. ONAS argues that because the draft is very similar to the submission actually made to Cabinet, its disclosure would reveal the substance of

the deliberations of Cabinet on this issue. I agree, and find that this record is exempt from disclosure under the introductory wording in section 12(1).

ONAS submits that Records 508-877 to 882, 508-883 to 887, 514-593 to 595 and 514-596 to 598 are exempt under both the introductory wording in section 12(1) and 12(1)(e). ONAS submits that each record pertains to the issuance of an Order in Council which was required to implement the land claims settlement agreement. Following the signing of the Order in Council, it was to be forwarded to Cabinet for its consideration. ONAS argues, therefore, that the disclosure of each of these records would reveal the substance of the deliberations of Cabinet with respect to this issue.

I find that Records 508-877 (other than those portions which I found to be exempt under section 13(1) above), 508-878, 508-879, 508-883, 508-884 and 514-596 to 598 are exempt under the introductory wording of section 12(1) as their disclosure would reveal the substance of the deliberations of Cabinet. I also find that Records 508-880 to 882, 508-885 to 887 and 514-593-595 are exempt under section 12(1)(e) as they are records prepared to brief a Minister of the Crown with respect to matters to be brought before Cabinet respecting the Point Grondine land claims settlement.

VALUABLE GOVERNMENT INFORMATION

ONAS claims that portions of Records 508-41 and 513-62 to 64 are exempt under section 18(1)(a) of the Act. It has also withdrawn its reliance on this exemption with respect to Record 136-143 of the "Other Records" category. As no other exemptions have been claimed and no mandatory exemptions apply to this document, it should be disclosed to the appellant.

In order to qualify for exemption under section 18(1)(a), ONAS must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**
2. belongs to the Government of Ontario or an institution; **and**
3. has monetary value or potential monetary value.

[Order 87]

The information in the two records which ONAS claims is exempt under section 18(1)(a) consists of the name of the budget department and the account number from which the payments from Ontario to the First Nation were to be made. In my view, this section cannot apply to information of this sort. If ONAS has security concerns about the disclosure of this information, it should have applied one or more of the law enforcement exemptions contained in section 14 of the Act to it. I find that none of the three parts of the test regarding section 18(1)(a) has been satisfied with respect to these records.

As no other exemptions have been claimed and no mandatory exemptions apply to the information contained in Records 508-41 and 513-62 to 64, it should be disclosed to the appellant.

ECONOMIC AND OTHER INTERESTS

ONAS has applied section 18(1)(d) of the Act to nine records and section 18(1)(e) of the Act to three records. These sections state:

A head may refuse to disclose a record that contains,

- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

Section 18(1)(d)

I have found above that six of the records to which ONAS has applied section 18(1)(d) are exempt under sections 13 or 15(a). I will, accordingly, only address the application of this exemption to Records 508-469 to 482, 514-151 to 194 and 514-685 to 691.

ONAS submits that it can reasonably be expected that the disclosure of the information contained in these records would be injurious to the financial interests of Ontario because they contain information about the valuation of land in the context of a land claim settlement negotiation. The records focus on the methodologies used by property appraisers in arriving at property values. In addition, it argues that the records contain precise information as to the actual value of certain parcels of land which were subject to the discussions in the land claims negotiations. It argues that financial harm to the current implementation process still underway in this settlement is reasonably likely to occur if this information is made public. Finally, it submits that harm to Ontario's financial interests in future land claim settlements could reasonably be expected to result in the disclosure of the methodologies of land valuation contained in these records.

I have reviewed each of the three documents to which ONAS has applied section 18(1)(d) and find that I am satisfied that the disclosure of these documents could reasonably be expected to be injurious to the financial interests of the Government of Ontario. They are, accordingly, exempt from disclosure under section 18(1)(d).

Because I have found that each of the records to which ONAS has applied section 18(1)(e) are exempt under either sections 15(a) or 18(1)(d), I need not address the possible application of section 18(1)(e) to them.

ORDER:

1. I uphold ONAS' decision to deny access to the following records:
 - (a) Records 506-240 to 254, 506-263 to 264, the highlighted portion of Record 506-319, 506-414 to 415, 506-419, 506-444, 506-447 to 453, 506-466 to 490, 506-491 to 496, 506-529 to 562, the highlighted portions of Records 506-667 to 674, 506-687 to 697, 506-698 to 700, 506-712 to 719, 506-720 to 725, 506-726 to 729, 506-730, 506-731 to 734, 506-736 to 738, 506-740 to 743, 506-744 to 747, 506-748 to 750, 506-751 to 760, 506-761 to 763, 506-766 to 766b, 506-767 to 778, 506-961 to 963, the highlighted portion of Record 506-1050, 506-1051, 506-1052 to 1059, 506-1100 to 1101, 506-1102 to 1106, 506-1108 to 1109, 506-1110 to 1114, 506-1115 to 1117, 506-1118 to 1124, 506-1125, 506-1126, 506-1128 to 1129, 506-1130 to 1131, 506-1132 to 1133, 506-1134 to 1136, 506-1138 to 1141, 506-1144 to 1145, 506-1146 to 1149, 506-1150 to 1154, 506-1155 to 1164, 506-1183 to 1210 and 506-1214 to 1234.
 - (b) Records 507-189, 507-190 to 195, 507-196, 507-263 to 268, 507-426 to 427, 507-508 to 509, 507-510 to 513, 507-514 to 517, the marginal notes in Records 507-566 to 568 and 507-569 to 573, 507-581 to 582, the notes on Record 507-589 to 590 and 507-594a to 599.
 - (c) Records 508-45, 508-50, 508-51, the covering memorandum to Record 508-67 to 72, 508-75, 508-76 to 81, 508-82 to 84, 508-85 to 88, 508-89 to 90, 508-91 to 94, 508-97 to 100, 508-102 to 106, 508-113 to 115, 508-117 to 120, 508-122 to 123, 508-125 to 127, 508-130 to 138, 508-139 to 147, 508-148 to 149, 508-150 to 153, 508-154 to 161, 508-169 to 170, the undisclosed portions of Records 508-171 to 172 and 508-182 to 185, 508-469 to 482, 508-483, 508-484 to 486, 508-491 to 492, 508-497 to 499, 508-513 to 514, 508-516 to 517, 508-518 to 519, 508-520 to 522, 508-526, 508-532 to 534, 508-536 to 537, 508-545 to 547, 508-548, 508-550 to 551, 508-553 to 557, 508-564, 508-565, 508-581 to 582, 508-596 to 598, 508-599 to 602, 508-604 to 605, 508-636 to 638, 508-639 to 642, 508-654, 508-658, 508-659, 508-661 to 663, 508-664, 508-666 to 771, 508-772 to 774, 508-775, 508-778 to 779, 508-784 to 785, 508-798 to 804, 508-810, 508-815 to 816, 508-821 to 822, the marginal notes in Records 508-825 to 829, 508-835 to 836, 508-837, 508-838, 508-839, 508-840, 508-847 to 848, 508-855 to 856, the highlighted portion of Record 508-877 to 882 and 508-883 to 887.
 - (d) Records 511-1 to 54 (with the exception of Record 511-17), 513-3, 513-8 to 11, 513-58 to 59, 513-60 to 61, 513-68 to 70, 513-71 to 72, 513-73 to 75, the highlighted portion of Record 513-149, 513-152 to 153, 513-160 to 164, 513-168, 513-193 to 198, 513-201 to 204, 513-212 to 227, paragraph one of Record 513-246, the highlighted portion of Record 513-262, 513-276 to 277, 513-293 to 294, 513-296, 513-302 and 513-307 to 30.

- (e) Records 514-19 to 59, 514-141 to 142, 514-151 to 194, 514-202 to 204, the handwritten notes on Record 514-205 to 208, the recommendation contained in Record 514-223, 514-270 to 277, 514-288 to 289, the notes on Record 514-290 to 291, 514-292 to 332, 514-333 to 404, 514-405 to 451, 514-452 to 455, 514-457 to 459, 514-462 to 463, 514-464 to 471, 514-472 to 479, 514-480 to 482, 514-483 to 490, 514-491 to 493, 514-494 to 495, 514-500 to 503, 514-506 to 508, 514-510 to 512, 514-523 to 524, 514-525 to 526, 514-529, 514-531 to 536, 514-550 to 556, 514-557 to 571, 514-572 to 577, 514-578a to 579a, 514-580 to 589, 514-593 to 595, 514-596 to 598, 514-610 to 613, 514-626 to 627, the recommendation contained in Record 514-628 to 629, 514-637 to 640, the handwritten notes on Record 514-643 to 644 and 514-648 to 649, 514-652, 514-669 to 675, the highlighted portion of Record 514-676, 514-685 to 691, 514-796 and 514-797;
 - (f) Records 517-175 to 183, 517-184 to 186, 517-187 to 189, 517-194 to 195, 517-201 to 206, 517-207 to 214, 517-233 to 239, the notes on Record 517-247 to 250, 517-343 to 364, 517-370 to 371, 517-372 to 375, 517-401, 517-404 to 427, 517-428 to 454, 517-455 to 462, 517-463 to 465, 517-466 to 468, 517-469 to 470, 517-483 to 487, 517-488 to 489, 517-490, the notes on Record 517-508 to 516, 517-522 to 534, 517-535 to 536, 517-537 to 569, 517-570 to 573, the highlighted portions of Record 517-577 to 578 and 517-581, 517-588 to 589, 517-595, 517-598 to 628, the notes on Record 517-634 to 639, 517-659 to 660, 517-662 to 665, 517-666 to 667, 517-668 to 679, 517-680 to 682, 517-683 to 685, 517-686 to 689, 517-690 to 691, 517-689 to 700, 517-701, 517-702 to 707, 517-708 to 710, 517-711 to 715, 517-716 to 724, 517-725 to 748, 517-749 to 761, 517-762 to 787, 517-788 to 789, 517-790 to 793, 517-1088 to 1089.
 - (g) Record 11, the notes on Records 13 to 20 and 29 to 35, 76-95, 96, 133 to 135, 146 to 150, 151 to 157, 160 to 162, 167 to 168, 181 to 182, 187 to 193 and 212 of the "Other Records" category.
2. I order ONAS to disclose **all** of the remaining records or parts of records to the appellant by forwarding him a copy by **July 14, 1997**.
 3. I order ONAS to provide me with an affidavit with respect to the nature and extent of the search which it has undertaken for Records 508-441 to 442, 508-593 to 595 and 508-871 to 876, in order for me to satisfy myself as to the reasonableness of its efforts to locate these documents. The affidavit is to be provided to me by **July 14, 1997**. A final order with respect to this issue will follow the receipt of this evidence.
 4. In order to verify compliance with the provisions of this interim order, I reserve the right to require ONAS to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____ June 12, 1997
Donald Hale
Inquiry Officer