



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-961

Appeal P-9400670 and P-9400786

Ministry of Natural Resources



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **BACKGROUND:**

For a number of years, Ontario and the federal government have been engaged in discussions over Aboriginal fishing regulations. In the summer of 1992, Ontario and the seven Williams Treaty First Nations began negotiating agreements which would allow members of these First Nations to carry out traditional activities off the reserve. The implementation of these agreements depended on Ontario having the legal authority to enter into these negotiations. Ontario looked to the Aboriginal Communal Fishing Licence Regulations (the ACFLRs), regulations enacted under the federal Fisheries Act, as the only option available to provide a legal basis for those portions of the agreements related to fishing.

On May 12, 1994, the Supreme Court of Canada, in the case of R. v. Howard, 18 O.R. (3d) 384, held that the seven Williams Treaty First Nations had surrendered their traditional right to fish for food when they signed the Williams Treaty in 1923. This decision meant that the province of Ontario had to resume normal enforcement activities consistent with Ontario and federal law regarding hunting and fishing carried out off the reserve by members of these seven First Nations communities.

In an attempt to provide a legal framework which would permit the seven Williams Treaty communities to exercise the same Aboriginal right to fish for food enjoyed by the other First Nations in Ontario, and to provide a conservation framework for the community harvest, Ontario proposed to enter into regulations with the federal Department of Fisheries and Oceans (the DFO) respecting fishing carried on in accordance with the ACFLRs. The ACFLRs allow the federal Minister of Fisheries and Oceans, or any provincial minister designated in the regulations, to issue licences to Aboriginal communities with appropriate terms and conditions which provide for the control of fishing. As part of the ACFLRs, Community Harvest and Conservation Agreements (Harvesting Agreements) would be entered into between the province of Ontario, as represented by the Ministry of Natural Resources (the Ministry), and the First Nations for facilitating hunting and fishing by the Williams Treaty First Nations in a manner consistent with the law and conservation objectives.

Prior to the promulgation of the ACFLRs and the signing of the Harvesting Agreements, the DFO required that the province of Ontario consult with stakeholders about the impact of the regulations and the agreements. These consultations were carried out between September 1994 and January 1995. A report of the public consultation was forwarded to the federal government in relation to the ACFLRs. The regulations were promulgated on February 21, 1995 and the Harvesting Agreements signed. The Ministry states, however, that many of the terms of the agreements have yet to be implemented.

## **NATURE OF THE APPEALS:**

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry received two requests from a representative of one of the groups whose views were sought by Ontario as part of the consultation process described above. The first request was for all records of public consultation regarding the licences since 1992. The second was for copies of all correspondence between the Ministry

and the DFO relating to the ACFLRs. The time period covered by the second request was from May 1992 to May 30, 1994.

The records at issue in these appeals consist of the Ministry's communications strategy in conducting the consultations, as well as correspondence between the Ministry and the federal government departments involved with the ACFLRs, primarily the DFO and, to a lesser degree, the Departments of Indian and Northern Affairs, and Justice. Some of the correspondence deals directly with the proposed consultations and the regulations, while others address the more general issues of the impact of the Howard decision and Ontario enforcement of the general hunting and fishing regulations. The records are more particularly described in Appendix "A" to this order.

Upon receiving the requests, the Ministry notified the DFO and the Department of Justice. The DFO and the Department of Justice consented to the disclosure of the records which the Ministry had identified as potentially affecting the interests of these federal government departments.

The Ministry granted partial access to a document entitled "Aboriginal Communal Fishing Licences Regulations and Community Harvest Communications Strategy" (Record 6). The Ministry denied access to the remaining records, including those for which it had received the consents of the DFO and the Department of Justice, on the basis of the following exemptions:

- advice or recommendations - section 13(1)
- relations with other governments - section 15(a)
- proposed plans, projects or policies of an institution - section 18(1)(g)

The requester appealed the denial of access and maintained that there is a public interest in disclosure of the requested records.

Because of the similarity of the records at issue, it was agreed that both appeals would be dealt with together. A Notice of Inquiry was sent to the Ministry, the appellant, the DFO, the Department of Justice, the Department of Indian and Northern Affairs, the seven Williams Treaty First Nations, the United Indian Councils and the Chiefs of Ontario. Representations were received from the Ministry, the appellant, the three federal government departments, three of the Williams Treaty First Nations and the Chiefs of Ontario. In their submissions, the Chiefs of Ontario raised the application of the invasion of privacy exemption, section 21 of the Act, to the All Ontario Chiefs Conference Resolution (the Resolution) which is Attachment (ii) to both Records 13 and 14.

## **DISCUSSION:**

### **RELATIONS WITH OTHER GOVERNMENTS**

The Ministry submits that all the records at issue are exempt pursuant to section 15(a) of the Act which states:

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

prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution.

The appellant maintains that section 15(a) cannot apply to exempt Records 1-6 (the Communications Roll-Out and Strategy) as these are internal Ministry documents which did not flow between governments.

As I have previously indicated, the communications strategy was devised in order that Ontario might satisfy the federal government's requirement for consultation prior to the ACFLRs and the Harvesting Agreements coming into effect. Thus, Records 1-6 reflect matters in which the federal government had an interest and which, in the circumstances of this appeal, consequently relate to the relationship between Ontario and the federal government. Therefore, I find the fact that these records were not provided to the federal government does not negate the potential application of section 15(a) of the Act.

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

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

[Order P-908]

### **Part One**

The Ministry states that it is the relations between the governments of Ontario and Canada which could be affected by the disclosure of the records. The Ministry submits that Canada is involved in the issue of Aboriginal fishing rights because of the federal government's primary responsibility for fisheries. The Ministry states that any changes to the manner in which Aboriginal fishing rights are addressed in Ontario must be effected through regulations under the federal Fisheries Act by the federal government. Ontario and the federal government are having continuing discussions on these matters. Accordingly, I am satisfied that the relations between Ontario and Canada regarding the subject matter described in the records are intergovernmental. Therefore, part one of the test has been satisfied.

### **Part Two**

I will now consider the second part of the section 15(a) test, that is, whether disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

In their submissions, the DFO and the Department of Justice reiterate their positions previously communicated to the Ministry. That is, the DFO consents to the disclosure of Records 12, 14 and 16, correspondence written by the then Minister of Fisheries and Oceans to the then Minister of Natural Resources (the DFO notes that it cannot consent to the disclosure of the Resolution attached to Record 14 without consulting with the Council of Chiefs). The Department of Justice consents to the disclosure of the letter which constitutes Attachment (i) to Record 14. Given that these federal government departments have consented to the disclosure of the records in which they have an interest, I must first determine whether, in these circumstances, disclosure of these documents could nonetheless be said to give rise to a reasonable expectation of prejudice to the conduct of the relations between Ontario and the federal government.

First of all, I note that the consents reflect only the position of these federal government departments on the issue of disclosure. They do not represent the perspective of the provincial government with whom they are dealing on the issue of Aboriginal fishing rights (Ontario still objects to the disclosure despite the consents), nor do they represent the position of the federal government as a whole since, as discussed below, the Department of Indian and Northern Affairs objects to the disclosure of certain records related to these issues.

Second, it is important to recall the broader context of these records. That is, the continuing discussions between Ontario and Canada on Aboriginal fishing rights.

In many instances, each party to such negotiations will have different interests in the relationship which it seeks to protect. One party may wish the negotiations to proceed in a certain manner, with specific issues as priorities. The other party may well have its own negotiating agenda and strategy. Thus, while disclosure of certain information may be beneficial or not affect the position of one of the parties, it could negatively affect that of the other which, in turn, could prejudice the relationship between the two parties.

Moreover, it is not only the interests in the negotiating relationship which may differ between the parties, but also the policy considerations which each brings to the negotiating table. Again, because the policy agendas of the negotiating parties may not coincide, disclosure of certain information could negatively impact on one party and not on the other. This, in turn, could result in prejudice to the relationship between the parties.

In my view, the fact that the DFO and the Department of Justice have consented to the disclosure of certain of the records is not determinative of the issue of whether disclosure of these documents could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations between Ontario and Canada.

The Department of Indian and Northern Affairs objects to the disclosure of Record 10, Attachments (ii) and (iii) to Record 1 (Appeal P-9400786), and Record 4 (Appeal P-9400786). The Chiefs of Ontario object to the disclosure of the Resolution. The three Williams Treaty First Nations "... believe that [they] will be affected by the disclosure of the records...", but acknowledge that none of the records were created by or provided to them; nor do they have copies of most of them.

With respect to the records exchanged between Ontario and Canada, the appellant states that:

... they are routine requests by the provincial government to the federal government asking that Ontario be allowed to participate in the Aboriginal Communal Fishing Licence Regulations. This in no way would prejudice the conduct of intergovernmental relations by the Government of Ontario.

It is the position of the Ministry that disclosure of the records could prejudice intergovernmental relations between the province and the federal government with respect to their continuing discussions on how to address the issue of Aboriginal fishing rights in Ontario. The Ministry states that over the years, the two governments have taken different approaches to the resolution of this matter. The Ministry has provided extensive submissions on this issue. However, because of the nature of this information, I am precluded from discussing it in further detail in this order.

The Ministry notes that disclosure of the records could result in pressures being placed on the negotiations from outside interest groups, which could lead to the breakdown and cessation of the negotiations. The Ministry cites examples of confrontations between Aboriginal and non-Aboriginal fishermen and the opposition to the ACFLRs as incidents which could be exacerbated should the records be released. In essence, the Ministry submits that parties who oppose the Ministry's position could use the information revealed in the records to increase opposition to the ACFLRs in particular, and to Ontario's position on Aboriginal fishing rights in general. The Ministry claims that this, in turn, would prejudice the conduct of discussions between the DFO and the Ministry over further modifications to regulations under the Fisheries Act with respect to First Nations.

Given the sensitive and complex nature of Aboriginal fishing rights generally, and the particular circumstances of this appeal, I am persuaded that disclosure of all the records at issue could reasonably be expected to prejudice the conduct of intergovernmental relations between Ontario and Canada. Therefore, the records are exempt from disclosure pursuant to section 15(a) of the Act.

In light of this finding, it is not necessary for me to consider the application of sections 13(1), 18(1)(g) or 21 of the Act. Nor is it necessary for me to consider the submissions of the First Nations that they are "governments" for the purposes of section 15 of the Act, a matter referred to by Commissioner Tom Wright in his postscript to Order P-908.

## **PUBLIC INTEREST IN DISCLOSURE**

In this order, I have found that all the records are exempt pursuant to section 15(a) of the Act. The appellant submits that there exists a compelling public interest in the release of these records under section 23 of the Act (the so-called public interest override).

In order for section 23 to apply to a record, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the relations with other governments exemption.

The appellant submits that there was overwhelming public opposition to the government's plan to issue the ACFLRs. In addition, he claims that the province misled the federal government, municipalities, and the public in its public consultation exercise. He then goes on to cite numerous examples of this and other concerns he has about the manner in which the consultations were conducted.

It is the Ministry's position that it is in the public interest that the issue of Aboriginal fishing rights continues to be resolved and implemented through negotiations. The Ministry states that if the records are disclosed, and the negotiations break down, there is a risk that these matters would proceed to litigation, in which case the parties would be forced to take adversarial positions in relation to one another. The Ministry claims that a negotiated, as opposed to a litigated, resolution is in the public interest for two reasons. First, the Ministry states that a negotiated settlement is likely to be more balanced and satisfying for the parties. Second, it will be less costly for the province and the taxpayers of Ontario.

None of the other parties have provided any submissions on the application of section 23.

I have carefully considered the position of the appellant and the Ministry. I agree with the appellant that public consultation must in fact be "public" in the sense that those consulted be given the opportunity to provide timely and meaningful input into such government decisions. However, in my view, in the circumstances of these appeals, the appellant is asserting a private, as opposed to a public interest. The appellant's group objects to the ACFLRs; the documentation provided by both the appellant and the Ministry indicates that there are other members of the public who support them. Therefore, I find that the appellant has not satisfied me that there is a public interest in the disclosure of the records which clearly overrides the need to protect the conduct of intergovernmental relations by the Government of Ontario. In addition, I accept the Ministry's position that there is a public interest in continuing negotiations, an interest which could reasonably be at risk, should the prejudice to the intergovernmental relations described by the Ministry result from disclosure of the records.

**ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ July 24, 1995



## APPENDIX A

### INDEX OF RECORDS AT ISSUE Appeal Numbers P-9400670 and P-9400786

<b>APPEAL P-9400670</b>			
<b>RECORD NUMBER(S)</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTIONS OR OTHER SECTION(S) CLAIMED</b>	<b>DECISION ON RECORD</b>
1	Communications Roll-Out	13(1), 15(a), 18(1)(g)	Decision Upheld
2	Aboriginal Communal Fishing Licences Regulations, Communications Strategy, First Draft, dated March 18, 1994	13(1), 15(a), 18(1)(g)	Decision Upheld
3	Aboriginal Communal Fishing Licences Regulations, Communications Strategy, Second Draft, dated April 22, 1994	13(1), 15(a), 18(1)(g)	Decision Upheld
4A	Aboriginal Communal Fishing Licences Regulations, Communications Strategy, Executive Summary, dated June 28, 1994	13(1), 15(a), 18(1)(g)	Decision Upheld
4B	Ministry of Natural Resources response to Howard Decision, Communications Strategy, Third Draft, dated June 15, 1994	13(1), 15(a), 18(1)(g)	Decision Upheld
5	Aboriginal Communal Fishing Licences Regulations, Communications Strategy, Fourth Draft, dated June 27, 1994	13(1), 15(a), 18(1)(g)	Decision Upheld
6	Aboriginal Communal Fishing Licences Regulations and Community Harvest, Communications Strategy, Fourth Draft, dated August 25, 1994	13(1), 15(a), 18(1)(g)	Decision Upheld
7	Letter dated June 29, 1993 from the Minister of Natural Resources to the Minister of Fisheries and Oceans Attachments: (i) Proposed Consultation Plan for Ontario Re: Aboriginal Communal Fishing Licences Regulations (June 23, 1993 version)	15(a), 18(1)(g)	Decision Upheld

<b>APPEAL P-9400670</b>			
<b>RECORD NUMBER(S)</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTIONS OR OTHER SECTION(S) CLAIMED</b>	<b>DECISION ON RECORD</b>
8	Documents sent from the Minister of Fisheries and Oceans to the Governor in Council Attachment: (i) Regulatory Impact Analysis Statement	15(a), 18(1)(g)	Decision Upheld
9	Letter dated May 24, 1994 from the Minister of Natural Resources to the Minister of Fisheries and Oceans	15(a), 18(1)(g)	Decision Upheld
10	Letter dated June 8, 1994 from the Minister of Natural Resources to the Ministers of Indian Affairs and Northern Development, and Fisheries and Oceans	15(a), 18(1)(g)	Decision Upheld
11	Letter dated June 9, 1994 from the Ministry to the Native Affairs Directorate, Department of Fisheries and Oceans Attachments: (i) Draft correspondence from the Minister of Natural Resources to the Minister of Fisheries and Oceans (ii) Consultation Summary	15(a), 18(1)(g)	Decision Upheld
12	Letter dated June 14, 1994 from the Minister of Fisheries and Oceans to the Minister of Natural Resources	15(a), 18(1)(g)	Decision Upheld
13	Letter dated June 15, 1994 from the Minister of Natural Resources to the Minister of Fisheries and Oceans Attachments: (i) "Public Consultation Regarding the Aboriginal Communal Fishing Licence Regulations" (June 14, 1994) (ii) All Ontario Chiefs Conference, June 7-10, 1994, Resolution #94/31 (iii) Letter dated June 14, 1994 from Ministry Legal Services Branch to Legal Services, Department of Fisheries and Oceans	15(a), 18(1)(g)	Decision Upheld
14	Letter dated June 17, 1994 from the Minister of Fisheries and Oceans to the Minister of Natural Resources	15(a), 18(1)(g)	Decision Upheld

<b>APPEAL P-9400670</b>			
<b>RECORD NUMBER(S)</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTIONS OR OTHER SECTION(S) CLAIMED</b>	<b>DECISION ON RECORD</b>
	<p>Attachments:</p> <p>(i) Letter dated September 17, 1992 from Counsel at the Department of the Environment and Department of Fisheries and Oceans to the Ministry of the Attorney General</p> <p>(ii) All Ontario Chiefs Conference, June 7-10, 1994, Resolution #94/31</p>		
15	<p>Letter dated June 17, 1994 from the Minister of Natural Resources to the Minister of Fisheries and Oceans</p> <p>Attachments:</p> <p>(i) Letters to Chiefs of Williams Treaty First Nations</p> <p>(ii) Two enforcement appendices</p>	15(a), 18(1)(g)	Decision Upheld
16	<p>Letter dated July 4, 1994 from the Minister of Fisheries and Oceans to the Minister of Natural Resources</p>	15(a), 18(1)(g)	Decision Upheld
17	<p>Draft letter dated July 14, 1994 from the Minister of Natural Resources to the Minister of Fisheries and Oceans</p>	15(a), 18(1)(g)	Decision Upheld
18	<p>Letter dated July 22, 1994 from the Minister of Natural Resources to the Minister of Fisheries and Oceans</p>	15(a), 18(1)(g)	Decision Upheld

<b>APPEAL P-9400786</b>			
<b>RECORD NUMBER(S)</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTIONS OR OTHER SECTION(S) CLAIMED</b>	<b>DECISION ON RECORD</b>
1	Letter dated January 7, 1993 from the Minister of Natural Resources to the Minister of Fisheries and Oceans Attachments: (i) Regulations (Fifth Draft) (ii) Letter dated July 8, 1992 from the Deputy Minister of Natural Resources to the Deputy Minister of Indian and Northern Affairs (iii) Letter dated August 25, 1992 from the Deputy Minister of Natural Resources to the Deputy Minister of Indian and Northern Affairs	15(a), 18(1)(g)	Decision Upheld
2	Letter dated April 7, 1993 from the Minister of Fisheries and Oceans to the Minister of Natural Resources	15(a), 18(1)(g)	Decision Upheld
3	Duplicate of Record 7 in Appeal P-9400670		Decision Upheld
4	Letter dated May 12, 1994 from the Minister of Natural Resources to the Ministers of Indian and Northern Affairs, and Fisheries and Oceans	15(a), 18(1)(g)	Decision Upheld
5	Duplicate of Record 9 in Appeal P-9400670		Decision Upheld