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

ORDER P-772

Appeal P-9400081

Ministry of Natural Resources

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of Natural Resources (the Ministry) for access to copies of all agreements, draft agreements, discussion papers and summaries of negotiations undertaken between the Ministry and a number of First Nations and on the subjects of hunting and fishing. The requester represents an organization with an interest in these issues.

The Ministry denied access to these documents in their entirety based on the following exemptions contained in the Act:

- Cabinet records - section 12(1)
- third party information - section 17(1)
- proposed plans, policies or projects of an institution - section 18(1)(g)

The Ministry subsequently indicated that it wished to claim section 18(1)(e) of the Act (positions to be applied to negotiations) for a series of handwritten notes found on one of the agreements.

A Notice of Inquiry was provided to the Ministry, the appellant, the four First Nations which were parties to these individual agreements and to the federal government. Representations were received from the appellant, the Ministry and three of the First Nations.

The records which remain at issue in this appeal consist of three draft agreements involving the Ministry and four First Nations. These documents are more particularly described as follows:

(1) An Interim Commercial Fishing Harvest Conservation Agreement between a First Nation and Her Majesty the Queen in Right of the Province of Ontario.

(2) A draft 1993\94 Commercial Fishing Agreement between a First Nation, Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of Ontario (this record also contains the handwritten notes).

(3) A 1992-1993 Interim Fishing Agreement between two First Nations and Her Majesty the Queen in Right of the Province of Ontario.

PRELIMINARY MATTERS:

INTERLOCUTORY AND SUBSTANTIVE MATTERS RAISED BY THE FIRST NATIONS

In their representations, one or more of the First Nations have requested the opportunity to (1) present oral representations in addition to written submissions, (2) reply to any representations made by other parties to the appeal and (3) adopt any representations with which they agree. The First Nations have also submitted that some or all of the discretionary exemptions found in sections 13(1), 15, 18(1)(a) and (b), and 19 of the

Act - which the Ministry had not originally claimed - also apply to exempt the three records from disclosure. Because of the manner in which I have decided this appeal, it is not necessary for me to address any of these issues.

THE APPLICATION OF THE CHARTER OF RIGHTS AND FREEDOMS

In its representations, the appellant questions the negotiation process employed by the Ministry in dealing with the First Nations over fishing rights. More specifically, the appellant argues that the Ministry has not undertaken sufficient consultation with either the public or other groups which have expressed an interest in this subject. The appellant alleges that these omissions contravene section 7 of the Charter of Rights and Freedoms (the Charter). This provision states that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It has been established in a number of previous orders that the Commissioner, or his delegate, has the authority to determine a Charter issue raised in an appeal. These orders have also stated that the party which raises a Charter challenge must provide a "clear and compelling" argument to support its position.

The appellant's position appears to be that, since the Ministry has not consulted extensively on the subject of aboriginal fishing rights, it ought not to be allowed to rely on the provisions of the Act to deny access to any document which relates to this subject. While I understand the appellant's concern, the argument presented does not persuade me that section 7 of the Charter somehow precludes the Ministry from relying on the exemptions contained in the Act.

DISCUSSION:

PROPOSED PLANS, POLICIES OR PROJECTS OF AN INSTITUTION

The Ministry submits that section 18(1)(g) of the Act applies to withhold the three draft agreements from disclosure. In order for these records to qualify for exemption under this provision, the Ministry must establish that each of them:

1. contains information including proposed plans, policies or projects; and

2. that disclosure of the information could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.

Part One of the Test

The Ministry indicates that its current negotiations with the four First Nations were initiated following the issuance of several court decisions (see for example R. v. Jones (1993), 14 O.R. (3d) 421 (Prov. Div.)). In these rulings, the courts specifically recognized the commercial fishing rights of the four First Nations involved in this appeal. One of these decisions also encouraged the provincial government to negotiate with the First Nations involved on the allocation of fish harvest quotas. Among the issues now being addressed in these negotiations are the conservation of fish stocks, fish quotas and resource co-management.

One of the issues before me is whether the negotiation strategy which the Ministry has pursued with the First Nations constitutes a **proposed project** for the purposes of section 18(1)(g) of the Act. To explore this question, I will need to examine the dictionary definitions of the term "project".

The Concise Oxford Dictionary (Eighth Edition) defines a project to mean: "a plan; a scheme ... a planned undertaking". Webster's Third New International Dictionary, on the other hand, describes a project, in part, as: "a devised or proposed plan: a scheme for which there seems hope of success" and as "a planned undertaking". In short, a project either means a plan, a scheme or a planned undertaking.

It will be recalled that section 18(1)(g) permits an institution to exempt from disclosure information about proposed plans, policies or projects under certain circumstances. Having in mind the wording of this provision, I believe that the dictionary definitions of a project as a "plan" or "scheme" are captured and fall under the term "proposed plan" for the purpose of section 18(1)(g). On this basis, the part of the definition which is left to define a project for the purposes of this exemption is "a planned undertaking".

The question, therefore, is whether the Government's negotiation strategy with the four First Nations may be likened to a "planned undertaking" and hence a project for the purposes of this exemption.

I have carefully reflected on this issue. I have concluded that the approach taken by the Ministry to systematically negotiate agreements with different First Nations on the subjects of fishing rights, harvest quotas, conservation and resource co-management constitutes a planned undertaking and, therefore, a project under section 18(1)(g) of the Act.

In order for the first part of the section 18(1)(g) test to be satisfied, the undertaking in question must be a **proposed project** and not one that has already been completed. On the basis that the relevant negotiations are ongoing and have not yet been completed, I find that they collectively fall within the definition of a proposed project for the purposes of the Act. The result is that the first part of the section 18(1)(g) test has been met.

Part Two of the Test

Part two of the section 18(1)(g) test is made up of two branches. In order to satisfy the second branch, the Ministry and/or the First Nations must establish that the disclosure of the draft agreements could reasonably be expected to result in undue financial benefit or loss to a person. The evidence necessary to substantiate

the connection between the disclosure and these results must be detailed and convincing.

In its representations, the Ministry emphasizes that its negotiations with the First Nations are extremely sensitive in nature and that the level of trust which has developed between the parties has only been achieved at great effort over time. The Ministry then argues that the disclosure of the draft agreements would undermine this relationship and would likely result in the breakdown of these negotiations.

The representations provided by the First Nations support this assertion. The First Nations state that, by virtue of the Supreme Court of Canada's decision in R. v. Sparrow [1990] 111 N.R. 241, governments must consult with First Nations whenever aboriginal fishing rights may be impacted by regulatory initiatives. They submit that, without assurances that the information which they provide to government will be held in confidence, such negotiations will not take place. The likely result is that the entire consultation process will be undermined.

The First Nations also concur with the Ministry's position that the negotiations in question were undertaken on the assumption that all information would be kept confidential. One of the First Nations adds that negotiations conducted between the Government of Ontario and another First Nation on commercial fishing rights were cancelled after the contents of a draft agreement were improperly disclosed to the public.

The Ministry next submits that the failure of these negotiations would likely result in undue loss to members of the various First Nations. It points out that, without the enactment of binding agreements, (1) there would continue to exist uncertainty about the rights of aboriginal peoples to fish in the designated areas, (2) individuals would continue to run the risk of being charged under the Ontario Fishery Regulations and (3) it would be difficult for commercial fishing ventures operated by native persons to obtain sources of financing.

The First Nations, for their part, submit that fishing, both for the purposes of food and trade, has been a foundation upon which their communities have been built. They argue that commercial fishing is essential not only for economic reasons but that it represents an important vehicle towards establishing self-reliance for their communities.

They also state that the failure to reach an agreement with the federal and provincial governments could jeopardize aboriginal fishing operations resulting not only in individual job losses but also economic upheaval in their communities.

From yet a different perspective, the Ministry submits that, without a mutual agreement on the quota of catches for aboriginal and non-aboriginal fishing enterprises, the over-harvesting of existing fish stocks could occur. This would invariably lead to the depletion of fish resources for all commercial fishing operations - not only those belonging to native communities - in the geographic areas in question.

The appellant, on the other hand, questions the authority of the provincial government to enter into fishing agreements with First Nations. This organization also believes that the negotiation process which the parties have adopted will not take fundamental conservation objectives into account.

I have carefully considered the representations advanced by the parties. Based on the evidence before me, I have formed the conclusion that the negotiations in which the Ministry and the First Nations are currently involved are highly sensitive in nature. I am also satisfied that, if the contents of the draft agreements are released prematurely, there is a reasonable likelihood that one or more of the First Nations will abandon the negotiation process. Should this result occur, I believe that undue financial loss would accrue to those native persons involved in commercial fishing and to the native communities as a whole. In addition, the inability to reach a determination on fishing quotas could eventually jeopardize all commercial and sport fishing activity in these regions.

For these reasons, I find that the second part of the section 18(1)(g) test has been satisfied with the result that the Ministry is entitled to rely on this exemption to withhold disclosure of the three draft agreements.

POSITIONS TO BE APPLIED TO NEGOTIATIONS

One of the draft agreements contains the handwritten notes of a Ministry official. These notes indicate which of the proposals contained in the document are acceptable to the Ministry and which will require further negotiation. The Ministry submits that these comments are exempt from disclosure under section 18(1)(e) of the Act. In order for this provision to apply to the notes, the Ministry must establish that (1) the draft agreement contains a position and (2) this position will be applied to negotiations which are either currently underway or which are contemplated in the future.

I have reviewed the draft agreement and find that the notes in question set out the position of the Ministry respecting the various terms in the agreement. I further conclude that this position will be applied to negotiations that are already underway or which are contemplated in the future. On this basis, I find that the section 18(1)(e) exemption applies to these notes.

Since I have found that the records in question are exempt from disclosure in their entirety under either section 18(1)(e) or (g) of the Act, it is not necessary for me to consider the other exemptions which the Ministry has raised.

ORDER:

I uphold the Ministry's decision to deny access to the three draft agreements.

Original signed by: October 4, 1994
Irwin Glasberg
Assistant Commissioner