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

ORDER PO-2816

Appeal PA08-64

Ministry of Natural Resources

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND OF APPEAL:

The Ministry of Natural Resources' (the Ministry or MNR) website states:

> In Ontario, there are more than 70 million hectares of forested land. The province of Ontario owns 90 percent of this area, referred to as "Crown forest". About 26 million hectares of Crown forest is managed for a broad range of uses and benefits, including timber production. Although the management of Crown forests in Ontario is the responsibility of the provincial government this responsibility is shared with forest product companies and communities.
>
> In Ontario, forest products companies pay a stumpage fee to the Crown for every cubic metre of timber harvested. A market-based pricing system is used by MNR to calculate the stumpage fees that companies and individuals pay. When market prices are strong for forest products, the stumpage system charges higher fees. In times of poor market prices, harvesters pay lower fees.
>
> The stumpage charges include a minimum charge, a forest renewal charge, a forest futures charge and a residual value charge.

The total revenue the Ministry collects from stumpage charges is public information and is found in the publications located and entitled "public accounts" on the Ministry of Finance's website. The following amounts represent the stumpage royalties collected by the Ministry since 2002:

Year	Stumpage Royalties
2002	$ 90,159,925
2003	$ 90,579,662
2004	$104,492.746
2005	$111,967,216
2006	$ 32,974,166
2007	$ 60,213,322

The requester in this appeal seeks access to information regarding a particular logging company's agreement with the Ministry to repay stumpage fee arrears.

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> [the] agreement(s) between the Ministry of Natural Resources and [named logging company] relating, in full or in part, to a payment schedule for stumpage fees in arrears.

The Ministry located three Repayment Agreements. The Ministry notified the logging company identified in the request, in addition to three banks, pursuant to section 28 of the *Act*.

The parties notified by the Ministry (affected parties), in turn, objected to the release of the agreements. The Ministry subsequently decided to deny the requester access to the agreements pursuant to sections 17 (third party information) and 18(1)(c), (d), (e) and (g) (economic and other interests).

The requester (now the appellant) appealed the Ministry's decision to this office. The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I commenced my inquiry by sending a Notice of Inquiry which set out the facts and issues of the appeal and sought representations from the Ministry, the logging company and the three banks. I then sent a Notice of Inquiry to the appellant seeking his representations. The non-confidential portions of the Ministry's and logging company's representations were provided to the appellant. The non-confidential portions of the bank's representations were summarized in the Notice of Inquiry sent to the appellant.

The appellant's representations were, in turn, shared with the Ministry and the affected parties, who were given an opportunity to provide reply representations. The Ministry, the logging company and two of the banks provided reply representations.

RECORDS:

The records at issue consist of three Repayment Agreements:

	Description of Record	**Withheld under sections:**
1	Repayment Agreement between the first bank, the Province of Ontario and the logging company, dated January 29, 2007	17(1)(a), (b) and (c) 18(1)(a), (c), (d), (e) and (g)
2	Repayment Agreement between the second bank, the Province of Ontario and the logging company, dated January 26, 2007	17(1)(a),(b) and (c) 18(1)(a), (c), (d), (e) and (g)
3	Repayment Agreement between the third bank, the Province of Ontario and the logging company, dated January 29, 2007	17(1)(a),(b) and (c) 18(1)(a), (c), (d), (e) and (g)

Attached to each agreement are two appendices. Appendix A identifies the amount of stumpage arrears incurred in a four month period and Appendix B is a payment schedule for the repayment of arrears.

DISCUSSION:

The Ministry, the logging company and the three banks claim that the repayment agreements contain confidential third party information and thus qualify for the mandatory exemptions at

sections 17(1)(a), (b) and (c). The appellant takes the position that the records are contracts and thus cannot qualify as third party information. The appellant also argues that if the records qualify for exemption under section 17(1), there is a compelling public interest in the disclosure of the information at issue. As a result, the issue of whether the public interest override at section 23 applies in the circumstances of this appeal was added as an issue.

The Ministry also argues that disclosure of the repayment agreements would prejudice its economic interests under sections 18(1)(c), (d), (e) and (g). As the section 18(1) exemptions are discretionary, the Ministry must also demonstrate that it properly exercised its discretion to deny the appellant access to the repayment agreements pursuant to section 18(1). The appellant submits that the discretionary exemptions at section 18(1) do not apply to the information and, in the alternative, argues that there is a compelling public interest in the disclosure of the records under section 23.

I will first consider whether the mandatory exemption at section 17(1) applies to the records. For any portions of the records that I find do not qualify for exemption under section 17(1), I will address the Ministry's claim that the discretionary exemption at section 18(1) applies to this information.

THIRD PARTY INFORMATION

Sections 17(1)(a), (b) and (c) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential

information of affected parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The Ministry's representations state that the records contain financial information about the logging company "in relation to the non-payment of stumpage charges and relates to a banking arrangement between [the logging company] and its banks." The Ministry's representations describe the agreements as "a commercial arrangement between the three parties [the Ministry, the logging company and its banks] for the repayment of stumpage".

The terms "commercial information" and "financial information" have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The affected parties submitted representations in support of the Ministry's position that the agreements contain financial and commercial information relating to the terms of the repayment of stumpage fees owing to the Province of Ontario (the Province). In particular, the affected parties submit that the agreements contain information which specifies the logging company's level of indebtedness to the Province.

The banks also submit that the repayment agreements contain information about their lending practices which constitutes their commercial and financial information. The lending practices the banks identified are their pricing and loan structure and credit risk designation/analysis. The banks did not specifically highlight which portions of the repayment agreements contain this information. However, I have carefully reviewed the records and find that the agreements do not contain the banks' commercial or financial information. In my view, the portions of the agreements which refer to non-compliance issues consist of standard clauses addressing the relationship between borrowers and creditors.

Further, information contained in the agreements which refers to the banks does not contain information about the logging company's level of indebtedness to its banks. Rather, this portion of the agreement appears to describe the banks role in facilitating the agreement between the Province and the logging company for the repayment of stumpage arrears. In my view, the banks participation does not in itself demonstrate that the agreement contains information about its lending practices, such as its pricing and loan structure and credit risk analysis.

However, I am satisfied that the records contain commercial and financial information relating to the logging company. In particular, I find that the records contain commercial information as the agreements refer to other arrangements between the parties regarding the logging company's obligation to pay stumpage fees.

I also find that the records contain financial information about the logging company's level of indebtedness to the Province. As stated previously, this information is contained in Appendix A and is attached to each agreement. However, it is important to note that the records do not contain any other financial information relating to the logging company, such as its financial statements, cash flow, assets or level of indebtedness to other entities.

As I have found that the agreements contain the logging company's commercial and financial information, I find that part 1 of the test for the application of section 17(1) has been met.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of affected parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general,

have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.)].

There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above)]. The parties resisting disclosure claim that the "inferred disclosure" exception applies in the circumstances of this appeal.

Representations of the parties

The Ministry's representations state:

> It is true that the [Divisional] Court has upheld the reasonableness of [the Information and Privacy Commissioner/Ontario]'s approach to the test for "supplied", indicating that a negotiating agreement between the parties does not qualify as "supplied". However, the terms of the Agreements would constitute "inferred disclosure" and reveal or permit the drawing of accurate inference with respect to underlying non-negotiated confidential information supplied by the [affected] party to the institution.

The Ministry, in the confidential portion of its representations, identifies specific information it claims would permit the drawing of accurate inferences about confidential information supplied by the logging company. The Ministry submits that this information "would lead to an accurate inference regarding [the logging company's] and the banks' underlying confidential information related to its financial obligations over the past two years". However, the information the Ministry identified as leading to this result relates to a pre-existing contractual arrangement between the Ministry and the logging company regarding the payment of stumpage fees.

The logging company's and bank's representations, in the first instance, did not specifically address the "supplied" component of part 2 of the section 17(1) test. Rather, they make the general claim that the logging company supplied the Ministry with confidential information and did so with an expectation of confidentiality. The logging company also states that each repayment agreement was negotiated separately. In particular, the logging company submits that

each repayment agreement is "distinct" and "reflects the result of the commercial balance reached with different partners."

In response, the appellant states:

> It is apparent from the representations of [the logging company] that the agreements that are the subject of this request were agreements negotiated between Ontario (whether specifically with the Ministry or not) and [the logging company]. Clearly, the information in the agreement – a negotiated documents – cannot be regarding as in any way meeting the strict test under section 17 of the [*Act*].
>
> …
>
> It is already clear that [the logging company] has not paid the stumpage fees. It would be reasonable to assume (indeed such is set [out] in the public representations) that there are financial reasons for such failure. To the extent any creditor or party seeking to conduct business with [the logging company] might be interested or concerned about [their] financial non-compliance, the query would arise based on the mere fact that [the logging company] has failed to meet its financial obligations.

The appellant's representations were provided to the Ministry, the logging company and the three banks. They were invited to respond to the appellant's position that the records are negotiated agreements and thus do not qualify as having been "supplied" for the purpose of section 17(1). The Ministry, the logging company and two banks provided reply representations. Their representations were not provided to the appellant, but are summarized below.

The Ministry's reply representations state:

> The terms of the Agreement and schedule for repayment of the deferred stumpage would lead to an accurate inference regarding [the logging company's] and the banks' underlying confidential information. This inferred disclosure would occur as a result of the particular clauses used in the Agreement, the clauses that are found in the Agreement are particular to the banking industry and used only in prescribed circumstances. Recognition of these clauses would provide an inference of the nature of the agreement and therefore the underlying non-negotiated confidential information supplied by the banks and [the logging company].

The logging company's reply representations state:

> [T]he appellant seeks to characterize the documents in question as negotiated with the government and therefore not "supplied". Such a characterization completely

> misses the point that these arrangements are first and foremost private banking arrangements. We are not talking about a situation in which the terms of the agreements were the culmination of back and forth negotiations between the company and the government. The terms of these agreements contain confidential information, including confidential information in the form of concessions received and/or given in negotiations between ourselves and our banks. THAT is the information then supplied to the government. These agreements are first, foremost and fundamentally financial agreement between a private company and its banks. These agreements contain the most sensitive information possible and … was in the full senses of the word "supplied" to the government under the full expectation that it would remain completely confidential.

The third bank argues that the agreement between itself and the logging company was supplied to the Province, following negotiations which did not include the Province. The third bank submits that it and the logging company are the original sources of the contents of the agreement pertaining to it. The second bank's reply representations did not address the "supplied" component of section 17(1).

Decision and Analysis

As described above, the agreements contain financial information about the logging company's level of indebtedness to the Province and commercial information relating to another contractual agreement between the Province and the logging company related to the payment of stumpage fees.

The parties resisting disclosure submit that the "inferred disclosure" exception applies to the portions of the agreements which, if disclosed, would lead to the drawing of accurate inference about non-negotiated confidential information the logging company supplied to the Province. As previously stated, the contents of a contract involving an institution and an affected party will not normally qualify as having been "supplied" for the purpose of section 17(1). However, an exception to this rule can apply where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution.

I have carefully reviewed the representations of the parties and find that the inferred disclosure exception does not apply to the information contained in the repayment agreements. The Ministry's evidence is that disclosure of particular clauses in the agreements would lead to the drawing of accurate inference regarding underlying confidential information exchanged between the logging company and its banks. The Ministry advises that particular clauses contained in the agreements are used only in prescribed circumstances in the banking industry and that disclosure of such clauses would disclose information the logging company supplied to it and its banks. However, the Ministry's representations do not specify the portions of the agreements which contain such clauses. The Ministry also does not identify the specific unknown financial

circumstance affecting the logging company which disclosure of the repayment agreement would reveal. If the Ministry is referring to the fact that the logging company has failed to pay stumpage fees as they came due, the very existence of the repayment agreement between the parties already reveals this information.

The logging company and the third bank take issue with the appellant's characterization of the records. They argue that the repayment agreement between themselves refer to negotiated private banking arrangements, which did not involve the Province. However, one of the provisions in each agreement clearly states that the Province and the banks met and established terms upon which the logging company will make stumpage fee arrears payments to the Province. The logging company also submits that the terms of the agreements refer to concessions received and/or given as a result of these negotiations. However, the evidence provided by the logging company did not specify which portions of the agreement contain this information. I also note that neither of the parties provided evidence explaining how disclosure of this information would reveal the substance of any negotiations that did not involve the Province. In any event, as stated above, the provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. In this case, the records themselves refer to negotiations, which preceded the agreements, involving the Province.

With respect to the portions of the agreements which identify the arrears owing and the payment schedule, I find that this information cannot be said to have been supplied by the logging company to the Ministry. Presumably, the amount of monies the logging company is to pay in stumpage fees is an amount prescribed and calculated by the Ministry. Similarly, the payment schedule created for the repayment of the arrears is a mutually generated contractual term between the parties.

Having regard to the above, I find that the repayment agreements at issue are comprised of mutually generated contractual terms agreed upon by the parties. In making my decision, I carefully reviewed the records and am satisfied the agreements represent a contract between the Province of Ontario, the logging company and its banks regarding the logging company's repayment of stumpage fees to the Ministry. Given that I have not been provided with sufficiently detailed evidence demonstrating that the "inferred disclosure" exception applies to the remaining information contained in the agreements, I find that this information has not met the "supplied" portion of the three-part test. Accordingly, this information cannot not qualify for exemption under section 17(1).

As a result of my finding, it is not necessary that I also consider whether the "in confidence" portion of part two of the three-part test has been met. It is also not necessary that I determine whether disclosure of the information could reasonably be expected to lead to the harms contemplated in sections 17(1)(a), (b) and/or (c).

ECONOMIC AND OTHER INTERESTS

As I have found that section 17(1) does not apply to the records, I will now consider the application of section 18(1)(c), (d), (e) and (g) to the agreements, which has been raised by the Ministry. These sections state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (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;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 18(1)(c), (d) or (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363].

Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

Section 18(1)(c): prejudice to economic interests

The Ministry submits that the repayment agreements qualify for exemption under section 18(1)(c) on the basis that disclosure of the repayment agreements could impact its ability to continue to collect stumpage fees. The Ministry argues that its forest regeneration activities and the future sustainability of Ontario's forests are placed at risk when its renewal and re-forestation efforts are under-funded because stumpage fees are in arrears.

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Orders P-1190 and MO-2233].

The section 18(1)(c) exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758]. However, the Ministry must provide detailed and convincing evidence to establish a reasonable expectation of harm.

I have carefully reviewed the Ministry's representations and find that the Ministry has failed to provide sufficiently detailed and convincing evidence to demonstrate the harms contemplated by section 18(1)(c). In particular, the Ministry did not provide sufficient evidence demonstrating that it competes for business in the forest industry or that disclosure of the repayment agreements could reasonably affect its ability to earn money in the marketplace. In my view, the Ministry's role in collecting and administering stumpage fees on behalf of the Province does not amount to a profit-making business activity which places it in a position to compete for business or earn money. Accordingly, I find that section 18(1)(c) does not apply in this appeal.

Section 18(1)(d): injury to financial interests

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233].

The Ministry's representations state:

> The Ministry works to balance its interest in assisting the forest industry as a whole with its duty to the people of Ontario. Releasing the records could unnecessarily impact its ability to continue to receive stumpage fees from companies who may erroneously view these Agreements as a carte blanche to stop or delay payment of their stumpage charges. Shortfalls in stumpage payments can have a serious impact on the ability of the Ministry and its licence holders to conduct renewal activities. Under-funded renewal trust would undermine the sustainability of Crown forests and thus any revenues generated by the Ministry from forest as well as industries that rely on the forest resources contained therein. Such a result would interfere with Ontario's ability to manage the economy of Ontario, particularly in those areas where the local economy is dependent on the forest industry.
>
> Second, if the Agreements were released they could jeopardize the Ministry's financial interests. If the records are released, as indicated earlier, the negotiations with [the logging company], the Ministry and the banks may become increasingly more difficult. Creditors may consider calling in any outstanding loans owed by [the logging company] which would ultimately jeopardize the Ministry's ability to recover deferred stumpage. Also, it is not unreasonable to assume that trade creditors may take action that would prejudice [the logging company's] relationship with its suppliers. Further, as a result of trade creditors actions [the logging company] may permanently close sawmills, leaving it open to the risk of sale to a competitor. All three outcomes either alone or in tandem would result in significant injury to [the logging company], the Ministry and the economy of Ontario. [The logging company] is a large company with a number of operations throughout … Ontario and is major employer in that region; closure(s) of mill(s) due to action of creditors relying on the disclosed records would been detrimental to those communities.
>
> Internationally, the release of the record could result in a further dispute under the Softwood Lumber Agreement (SLA). Based on past practice, the US has not be reticent in challenging Canada and the provinces for slight variation in practice. Currently, the Government of Ontario is involved in two arbitrations under the SLA. While confident that Ontario will succeed, these claims require continued investment of time and substantial financing to defend. In addition, a challenge under the SLA impacts the forest industry and is prejudicial to the economic position of Ontario throughout North America and injurious to the financial interests of the Government of Ontario.

The appellant made general submissions regarding the possible application of section 18(1). In particular, the appellant states:

> Ontario cannot enter into private arrangements with companies for the repayment of public funds owing. This would be consistent with government in private and permitting private companies to strike secret deals with a government while other companies – subject to the same regulatory regime – are not afforded similar "deals". The [*Act*] cannot be used to shield from public light and scrutiny, secret government transactions or arrangements. Similarly, the [*Act*] cannot be used to condone or authorize such private arrangements and competitively advantage one party over others.
>
> The Ministry's representations on the issue of its economic interests are antithetical to the very notion of public accountability and the rights of access to information in the hands of the government – which Ontarians have a right to expect. The "interest" that Ontario is protecting is not its own, but that of the preferential arrangement that has been entered into with [the logging company] and [its] maintenance of its preferential competitive advantage. There appears to have been no consideration of the issue of public accountability, of the fact that "secret" agreements or arrangements are contrary to the public interest or that what Ontario has granted [the logging company] is a financial advantage that has not been either disclosed or made generally available to industry as a means to avoid paying stumpage fees. The Softwood Lumber Agreement, moreover, cannot equally be used to hide governmental arrangements and action from public scrutiny.

The Ministry was given an opportunity to reply to the appellant's representations. The Ministry responded that although the details of what it describes as its "confidential commercial transactions" are not made available to the public, general information is available. In particular, the Ministry advises that "stumpage arrears" are made public through financial accountability mechanisms reported on the Ministry of Finance's website. In support of its position, the Ministry directed me to the Ministry of Finance's main web page and the Ministry of Finance web pages which index various ministries' annual financial statements (public account documents) and the Ministry's budget estimate for the 2008-2009 fiscal year. The Ministry's reply representations go on to state:

> Currently, the Ontario manufacturing sector, and particularly the forest industry, is in crisis. The government may have to make decisions about whether, when and how it wants to intervene to minimize the impact of the crisis in order to protect the economy and employment in Ontario. In this instance, the subject of the appeal concerns confidential information supplied by both the banks and the forest companies. The government may require confidential commercial or financial information to make informed decisions should it decide to intervene.
>
> …

> Without such confidential commercial information, the government only has blunt tools at its disposal in the face of economic complexities. The use of only blunt tools will limit the effectiveness of the relief and could result in an ineffective or inefficient use of tax dollars.

As I had difficulty locating information which described the amount of stumpage arrears owed to the Ministry in any given year, I wrote to the Ministry seeking its assistance in directing me to the specific financial statements which contain this information. My letter to the Ministry also advised that I was unable to locate information which would describe the Ministry's estimate of stumpage royalties to be collected or the amount, if any, is expected to fall in arrears for the 2008-2009 fiscal year. The Ministry was asked to provide a written response to my request for clarification. In particular, the Ministry was asked to provide photocopies of information available to the public which reports the amount of stumpage arrears accumulated in a given year or in the alternative, written clarification as to what information relating to the payment and default of stumpage fees is available to the public.

The Ministry responded that its reply representations contained a typographical error and the portion of their reply representations which refers to "stumpage arrears" should read "stumpage payments". The Ministry's response did not address what information relating to the payment and default of stumpage fees is available to the public.

Decision and Analysis

To establish a valid exemption claim under section 18(1)(d), the Ministry must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government to manage the economy. The harm addressed by section 18(1)(d) is similar, but broader, than section 18(1)(c). As stated above, the purpose of section 18(1)(d) is to protect the broader economic interests of Ontarians.

For sections 18(1)(d) to apply, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". In my view, the appellant's submissions highlight the need for public accountability regarding the Ministry's administration and collection of stumpage fees. The need for public accountability in the expenditure of public funds has been cited in previous orders as an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363]. In my view, this principle extends to the collection of government fees from private companies relating to the use of public lands. Given the Ministry's response to my clarification request, it appears that there is insufficient information in the public domain to allow for public scrutiny of the Ministry's stumpage arrears collection efforts. Accordingly, the circumstances of this appeal highlight the importance for "detailed and convincing" evidence.

Further, the main financial harm which the Ministry submits would result from disclosure is the underfunding of forest renewal and reforestation programs administered by the Ministry. The Ministry submits and I agree that the underfunding of these programs undermine the

sustainability of Ontario's forests and communities reliant on the forest industry. However, it appears that this is already an issue facing the Ministry. As indicated previously, the total revenue the Ministry collects from stumpages fees is public information and is found on the Ministry of Finance's website for any given year. Since 2006 the amount of stumpage royalties the Ministry has reported collected has declined. For example, in 2004 and 2005, $104,492.746 and $32,974.166 was collected. This was a marked difference from the $32,974,166 and $60,213,322 collected in 2006 and 2007. Accordingly, public sources of information indicates that in recent years the Ministry collected substantially less monies for stumpage fees than collected in the past.

Having reviewed the representations of the parties, I find that the Ministry has failed to provide sufficiently detailed and convincing evidence to establish a reasonable expectation of the harms contemplated in section 18(1)(d).

I do not agree with the Ministry's position that the Government's ability to effectively manage the economy will be affected by the disclosure of the repayment agreements in question. The repayment agreements contain information specifying the amount of stumpage arrears not paid for a relatively short period of time. The repayment agreements also contain information regarding the parties' agreement for the repayment of these arrears. In my view, the repayment agreements represent one of the many tools the Government has at its disposal to manage the economy. Accordingly, I do not accept the Ministry's argument that disclosure of the agreements, which the Ministry entered into over two years ago, would impact the Government's ability to continue to receive stumpage fees from other logging companies. In making my decision, I note that the Ministry's representations do not explain how disclosure of the terms of the agreements and the amount of stumpage arrears one logging company owed would place other logging companies in a position to *successfully* contract out of their obligations to pay stumpage fees to the Ministry. I also considered the Ministry's advice that the repayment agreements at issue seek to address specific economic realities facing the forest industry at the time the arrears were incurred. Having regard to the above, I find that the Ministry failed to adduce sufficiently detailed and convincing evidence in support of its position.

I also do not accept the Ministry's argument that disclosure of the records would hamper its ability to collect stumpage arrears from the logging company. The Ministry's argument in this regard is that disclosure of the records could reasonably be expected to result in the logging company's creditors demanding payment of any outstanding debt owed by the logging company which would result in "increasingly more difficult" negotiations with the logging company and its banks. The final result being that the logging company will not be in a position to pay its stumpage arrears to the Ministry, as its creditors will force it to shut down or sell its operations. In my view, the domino argument the Ministry presents in support of its position is highly speculative and not substantiated by the evidence it provided me.

Similarly, I find that the Ministry's argument that disclosure of the records could reasonably result in a further dispute under the Softwood Lumber Agreement is highly speculative and not substantiated by the evidence provided to me. In particular, I am not satisfied that the Ministry

provided detailed and convincing evidence demonstrating that disclosure of the terms of agreement relating to the repayment of stumpage arrears owed by one logging company to one province could result in negatively impacting an already long-standing protracted dispute between Canada and the United States.

For the reasons stated above, I find that section 18(1)(d) has no application.

Section 18(1)(e): positions, plans, procedures, criteria or instructions

The Ministry submits that section 18(1)(e) applies in the circumstances of this appeal as it is presently working with the logging company and its banks "to determine and implement a viable repayment plan based on the current repayment agreement which remains in force." The Ministry's representations state that:

> To date, a Memorandum of Understanding has been concluded between [the logging company] and the banks however a final repayment plan involving all of the parties remains in the negotiation stages. Disclosure would prejudice the economic interests of the government in that the information relates to positions, plans, procedures, criteria or instructions to be applied to negotiations carried on or to be carried on by the Government of Ontario. Repayment agreements are negotiated on a case by case basis. The Agreements contain plans for the repayment which will form the basis of any new repayment plan. The Agreements express the position of the Ministry regarding its approach to negotiations with [the logging company] as well as its relationship with the banks. Further, its terms and conditions will be referenced or considered by the Ministry in its negotiations of any new repayment agreement and may serve as a bottom line for the new agreement.
>
> Releasing the records will compromise the Ministry's negotiating position with respect to a continued repayment schedule and any new agreements with [the logging company] and/or the banks. The difficulty created by the disclosure of the Agreement would jeopardize all efforts at obtaining a repayment agreement with [the logging company] and the banks.

In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution [Order PO-2064].

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Orders PO-2064 and PO-2536]. The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow [Order PO-2034].

Part 1: plan, position, procedure, criteria or instructions

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Orders P-348 and PO-2536]. The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Orders PO-2034 and PO-2598].

In my view, the information contained in the records does not constitute a "plan, position, procedure, criteria or instructions". As already stated, the records are agreements between the Ministry and the logging company for the repayment of stumpage arrears. I have carefully reviewed the agreements and am not satisfied that the non-compliance provisions contained in the agreements constitute a "plan, position, procedure, criteria or instructions" to be applied to the Ministry's negotiations with the logging company and its banks to secure repayment of stumpage arrears. I also considered the Ministry's representations and, based on my review of the records, do not agree that the repayment agreements detail the Ministry's negotiating position with the logging company and its banks. Accordingly, I am not satisfied that disclosure of the records would preview any negotiating strategy the Ministry may pursue in future negotiations with the logging company and its banks. I am also not persuaded that any of the terms of the repayment agreements which may be incorporated in a future agreement between the parties constitutes a "plan, position, procedure, criteria or instructions" for the purposes of section 18(1)(e).

As part 1 of the four-part test under section 18(1)(e) has not been met, I find that this section has no application.

Section 18(1)(g): proposed plans, policies or projects

The Ministry submits that section 18(1)(g) applies to the repayment agreements. In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and
2. disclosure of the record 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.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

The Ministry submit that the first-part of the two-part test has been met and takes the position that the records contain its proposed plan, policies or projects. However, I do not agree with the Ministry's characterization of the repayment agreements. The Ministry argues that the records contain its proposed plans, policies or projects for the repayment of stumpage arrears owed by the logging company. In support of its position, the Ministry's representations state:

> It is the position of the Ministry that the agreements constitute a proposed project or plan of the Ministry.
>
> …
>
> The records are both the proposed plan for repayment and basis for (and is vital to) ongoing negotiations regarding specific terms of any new repayment agreement. However, the Ministry's position in its negotiations with [the logging company] would be jeopardized by the disclosure of the records and impact its ability to continue to secure repayment of the stumpage fees. Moreover, the Agreements prevent the Ministry from taking any enforcement action where debts are still owed to the bank. The Government of Ontario is therefore limited in the action it can take to obtain the debt making negotiations of the utmost importance. These Agreements will form part of a Ministry plan to resolve [the logging company's] stumpage in arrear.

However, the Ministry's evidence does not identify a policy decision. The only decision identified in the Ministry's representations is its intention to "resolve" the outstanding stumpage arrears issue involving the logging company. In my view, the Ministry's decision to collect outstanding stumpage arrears does not constitute a proposed plan, policy or project. In fact, there is no evidence before me suggesting that the Ministry has the discretion to not pursue the non-payment of stumpage fees for timber cut in Ontario's forests.

Accordingly, I find that part 1 of the test under section 18(1)(g) has not been met. As all parts of the section 18(1)(g) must be meet for this section to apply, I find that it has no application.

In summary, as I have found that section 17(1) and 18(1) do not apply to the records, I will order the Ministry to disclose the records to the appellant.

ORDER:

1. I order the Ministry to disclose the records at issue to the appellant, and to do so by **September 24, 2009** but not before **September 19, 2009**.

2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.

Original Signed by: August 19, 2009
Jennifer James
Adjudicator