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

ORDER PO-2405

Appeal PA-020092-1

Liquor Control Board of Ontario

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NATURE OF THE APPEAL:

The Liquor Control Board of Ontario (the LCBO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the complete record of the mediated settlement between a named Ontario winery (the affected party) and the LCBO, including copies of all agreements pertaining to the mediated settlement, all minutes of settlement between the parties, and all related documentation. By way of background, the affected party had previously commenced two applications for judicial review against the LCBO, and had also brought an action against the LCBO. The requested records relate to a voluntary mediation of all three of these proceedings which resulted in a settlement agreement. Some of the records also relate to the implementation of that agreement.

The LCBO responded to the request by issuing a decision letter granting partial access to the responsive records it identified. Access was denied to the remainder of the records pursuant to the following sections of the *Act*: section 13(1) (advice or recommendations); section 17(1) (third party information); section 18 (economic and other interests); and section 19 (solicitor-client privilege). The LCBO attached a "Schedule of Exempted Records" (the schedule) to the decision letter it sent to the appellant. The schedule listed 58 records to which access was denied and identified the particular exemptions claimed for each.

The requester (now the appellant) appealed the decision to deny access to Records 1, 6, 7, 8, 9, 16 and 54-58 inclusive, referring to the numbers and document titles in the schedule. The LCBO did not rely on the section 13(1) exemption in denying access to any of these records, and that exemption is therefore not at issue in this appeal.

The appeal was not settled in mediation and moved on to the adjudication stage, which this office initiated by issuing a Notice of Inquiry to the LCBO and the affected party, inviting their representations on the issues. Both the LCBO and the affected party provided representations.

Subsequent to the receipt of these initial representations, this office issued Order PO-2112, which addressed the question of settlement privilege and whether it is included in the scope of the solicitor-client privilege exemption found at section 19 of the *Act*. Since this appeal involves settlement-related records, this office invited the LCBO and the affected party to provide supplementary representations on the possible impact of Order PO-2112. Both the LCBO and the affected party provided supplementary representations.

This office then forwarded a Notice of Inquiry to the appellant, including portions of the initial representations of the LCBO and the affected party, as well as the supplementary representations of these two parties in their entirety (except the name of the affected party, which was redacted from all representations forwarded to the appellant). The appellant provided brief representations in response.

RECORDS AND EXEMPTIONS:

The following table lists the records at issue, as described in the schedule, and identifies the exemptions claimed for each.

Record Number	Description	Exemption(s) Claimed
1	Chronology of [affected party] and LCBO Events	17(1)(a), (b) & (c), 18(1)(c) & (d), 19
6	[Affected party] and LCBO and LLBO and [affected party] et al. LCBO – Mediation Brief of the Respondent/Defendant LCBO	17(1)(a), (b) & (c), 18(1)(c) & (d), 19
7	[Affected party] and LCBO – Mediation Brief of the LCBO (Defamation)	17(1)(a), (b) & (c), 18(1)(c) & (d), 19
8	[Affected party] and LCBO and LLBO – Affidavits for Mediation	17(1)(a), (b) & (c), 18(1)(c) & (d), 19
9	[Date] Mediation Agreement	19
16	Minutes of Settlement	17(1)(a), (b) & (c), 18(1)(c) & (d), 19
54-58	Documents relating to implementation of mediated settlement (comprising various documents totalling 241 pages).	17(1)(a), (b) & (c), 18(1)(c) & (d), 19

DISCUSSION:

THE APPELLANT'S REPRESENTATIONS/BURDEN OF PROOF

The appellant provided brief representations in response to the Notice of Inquiry forwarded to him. The appellant's representations, which apply to all claimed exemptions, are to the effect that the onus of proving the application of the exemptions has not been met in this case. Section 53 of the *Act* imposes this onus on the LCBO. Although the appellant did not so state, as regards the affected party, the law generally requires that in order to rely on an assertion, a party must provide proof.

To avoid repetition, I will not refer to the appellant's representations in my analysis of the exemptions, but I have considered them in reaching my conclusions.

The appellant's representations also refer to disclosure of the records at issue being a matter of public interest. I will refer to this submission in more detail under the heading, "Other Issues", later in this order.

SOLICITOR-CLIENT PRIVILEGE

Introduction/Background

Section 19 of the Act reads:

> 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.

Section 19 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 is based on the closing words of this section, which refer to "a record … that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". It contains two analogous statutory privileges that apply in the context of Crown counsel giving legal advice or conducting litigation.

The LCBO's submissions outline the history of the dispute between it and the affected party, which involved two applications for judicial review initiated by the affected party about actions taken by the LCBO, an action against the LCBO by the affected party, an unsuccessful mandatory mediation, a further informal attempt at mediation, and finally, the voluntary mediation that resulted in the settlement of the litigation between the affected party and the LCBO.

The LCBO claims section 19 for all records at issue. However, its representations with respect to the section 19 exemption focus only on Records 6, 7, Tab 5 of Record 8, and Records 54-58. The affected party maintains that this exemption applies to all the records at issue, in their entirety. Since the LCBO has not expressly limited its claim for this exemption, I will review its potential application to each of the records.

The interaction of the section 19 claims and arguments by the LCBO and the affected party in their primary and supplementary representations are complex. Before embarking on any detailed analysis, I will summarize these positions.

Representations of the LCBO

In its initial representations, the LCBO submits that the solicitor-client communication privilege aspect of branch 1 applies to parts of Records 54-58, which deal with the implementation of the settlement. It also makes this claim with respect to Record 6, Tab "B", which is an opinion by outside counsel retained by the LCBO. As noted in the table above, Record 6 is one of the LCBO's Mediation Briefs. It was provided to the mediator and the affected party in the context of the voluntary mediation.

The LCBO's initial representations also argue that Records 6 and 7 in their entirety (both of which are "Mediation Briefs" that were provided to the mediator and the affected party in connection with the voluntary mediation) and Record 8, Tab 5 (a "mediation affidavit" produced by the author of Record 6, Tab "B") are subject to statutory privilege under branch 2. The LCBO asserts that these records were prepared by Crown counsel during litigation for the purpose of settlement, or for use in the ongoing litigation if the settlement discussions failed. In

this regard, the LCBO submits that records produced for the purpose of settlement were "for use in litigation" within the meaning of the branch 2 language that appears at the end of section 19.

In addition, the LCBO submits that the legal opinion at Record 6, Tab "B" and the affidavit at Record 8, Tab 5 are subject to statutory privilege under branch 2 because they were prepared by Crown counsel for use in giving legal advice.

In its supplementary representations, the LCBO states that although its position, as set out in its initial representations, "… does not rest on common law settlement privilege, it is submitted that settlement privilege is included in litigation privilege and is encompassed by the s. 19 exemption".

Representations of the affected party

The affected party submits that all of the records are exempt under section 19.

The affected party makes a policy-based argument about the importance of settlement privilege, and relies on the modern principle of interpretation to argue against a reading of the *Act* that would permit the disclosure of settlement-related records.

In its initial representations, the affected party expressly relies on "the litigation privilege exemption found in section 19" because it says that all of the records at issue "were prepared or obtained by the LCBO for use in existing litigation". In its supplementary representations, the affected party submits that branch 2 "mirrors the common law privilege available to counsel in the traditional role of representing private clients engaged in an adversarial dispute". In essence, the affected party submits that branch 2 must be interpreted by reference to common law privilege.

In the alternative, the affected party adopts and relies on the "position of the LCBO in their supplementary submissions that it is not necessary … to resort to common law principles of privilege" because statutory privilege under branch 2 "is wide enough to permit permanent protection for documents such as mediation and settlement oriented materials prepared by or for [C]rown counsel".

Issues to be addressed under section 19

These submissions raise the following questions:

(1) Does the modern principle of statutory interpretation favour the inclusion of settlement privilege within the scope of section 19?

(2) Does common law litigation privilege under branch 1 encompass settlement privilege?

(3) If common law litigation privilege under branch 1 does not encompass settlement privilege, are the records nevertheless subject to common law litigation privilege under branch 1?

(4) Do the words, "prepared by or for Crown counsel in contemplation of or for use in litigation" in branch 2 encompass records prepared for use in the mediation or settlement of litigation? If so, were the records prepared by or for Crown counsel for that purpose?

(5) In the event that the settlement negotiations had failed, were the records prepared "by or for Crown counsel for use in litigation" within the meaning of branch 2?

(6) Are the records subject to branch 1 solicitor-client communication privilege?

(7) Were the records "prepared by or for Crown counsel for use in giving legal advice" within the meaning of branch 2?

I will address each of these questions.

(1) Does the modern principle of statutory interpretation favour the inclusion of settlement privilege within the scope of section 19?

In its initial representations, the affected party submits that "[t]he important public policy issue to be addressed in the present adjudication, is the impact on our system of justice, which promotes ADR [alternative dispute resolution], if a precedent were set allowing confidential mediation materials in the possession of the government to be disclosed [under the *Act*]". Later in its representations, the affected party amplifies this submission as follows:

> Mediation has become a central aspect of the modern litigation, and confidentiality the crux of its appeal and success. Any precedent for the disclosure of mediation materials pursuant to [the *Act*] would harm the adversary system of justice, notwithstanding the termination of litigation or loss of reasonably contemplated litigation.

The affected party returns to this theme at the conclusion of its supplementary representations, arguing that the following harms would result from disclosure:

> (a) undermin[ing] the public policy goal encouraging settlement;
>
> (b) interfer[ing] with the entrenched principle that provides procedural protection to the adversarial system of justice;
>
> (c) negatively impact[ing] the efficiency, quality and community-positive enhancements that mediation provides to the adversarial system of justice;
>
> (d) compel[ling] the breach of a private confidentiality agreement;

(e) expos[ing] to public scrutiny potentially embarrassing, compromising or damaging information of a private litigant.

The representations of both the LCBO and the affected party refer to the purpose of settlement privilege. The LCBO cites the following passage from *Hill v. Gordon-Daly Grenadier Securities* (2001), 56 O.R. (3d) 388 (Div. Ct.) at p. 395:

> This rule is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. Litigants are encouraged to freely and frankly put their cards on the table without fear that statements or offers made in the course of negotiations for settlement may be brought before the court of trial as admissions on the question of liability. (See *Rush and Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.).) Such evidence is therefore excluded in subsequent proceedings, even though this may have the effect of excluding evidence that might otherwise be both relevant and probative. Because of this rule, litigants in a civil dispute have a legitimate expectation that their discussions are private and privileged.

Settlement privilege is an important public policy principle in the broad context of the resolution of disputes. Nevertheless, the question of whether, or how, this interest is protected under the *Act* is a matter of statutory interpretation.

In its argument that section 19 should be interpreted as encompassing settlement privilege, the affected party relies on the "modern rule" of statutory interpretation. The rule was stated in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919 (S.C.C.) ("*Régie*") per L'Heureux-Dubé J. at pp. 1005-6, as follows:

> … the "modern" interpretation method was reformulated in Canada by Professor R. Sullivan: *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131:
>
> > There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

In *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) ("*Big Canoe*"), this formulation was adopted by the Ontario Court of Appeal (at pp. 172-3) in assessing the impact of common law privilege on the application of the litigation privilege aspect of section 19. The particular issue in that case was whether the common law rule that litigation privilege usually terminates at the end of litigation means that records formerly subject to litigation privilege lose their exempt status under section 19. From this use of the principle by the Court of Appeal, it is evident that the modern rule may provide guidance in assessing the extent to which common law privileges (e.g. litigation privilege, as in *Big Canoe*, or settlement privilege, as in this case), are encompassed within a statutory provision such as section 19. This assessment requires the determination of the meaning of the common law solicitor-client and litigation privileges (branch 1) in a *statutory* context, as well as the meaning of the statutory privilege in branch 2.

Section 1 provides important context for interpreting the *Act*. It states (in part):

> The purposes of this Act are:
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, …

The basic mechanism of the *Act* for allowing access to information subject to specific legislated exemptions is further addressed at section 4:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

In *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (the "*Williams Commission Report*"), which led to the enactment of the *Act*, various heads of government secrecy are canvassed, including Crown privilege or "public interest" privilege (at pp. 160-161):

> At common law … the Crown possessed the prerogative right to refuse to produce documentary or testimonial information to the court. … Although the Crown's common-law immunity from discovery has been modified by *The Proceedings against the Crown Act*, this statute expressly preserves the right of the Crown to refuse to disclose where it would be "injurious to the public interest".
>
> …
>
> Under the rubric of Crown privilege, then, a wide variety of government-held information may be withheld from the court, and therefore from the public domain.

The *Williams Commission Report* proceeds to consider the most appropriate mechanism for addressing this and other forms of government secrecy in the context of a freedom of information scheme, and concludes that legislation provides the best solution (at p. 231). Following this model, the *Act*'s legislated right of access, subject only to specifically identified exemptions, means that any kind of privilege or confidentiality that may exist at common law only applies to a request under the *Act* if it is embodied in an exemption.

In analyzing the types of exemptions to be included in the *Act*, the *Williams Commission Report* considers the problem of "Information Creating Unfair Advantage or Harm to Negotiations" (pp. 321-324), and proposes an exemption to protect "documents containing instructions for public officials who are to conduct the process of negotiation" (p. 323). This led to the enactment of section 18(1)(e), which protects "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)(e) is not at issue in this case. Section 17(1)(a) also addresses the question of negotiations, and protects certain types of records whose disclosure could reasonably be expected to "interfere significantly with the contractual or other negotiations of a person, group of persons, or organization".

In discussing the section 19 exemption, the *Williams Commission Report* (at v. 2, p. 340) mentions the need to incorporate protection for records that would otherwise be subject to litigation privilege:

> To grant access to this material would permit opposing parties to disrupt the preparation of the government's case and to obtain an advantage in preparing for adversarial proceedings. This premature disclosure of the government's case could unreasonably handicap the government in its conduct of the litigation.

The *Williams Commission Report* does not propose that this exemption should be extended to cover settlement documents, and there is no specific reference to settlement privilege or settlement negotiations in section 19.

As I noted at the outset, the affected party argues that settlement privilege plays an important role in the administration of justice. In applying the modern rule, however, it is also important to consider that the *Act* exists to provide a right of access to government-held information, subject to clearly enumerated exemptions, and in so doing, to promote democracy and an informed citizenry (see *Dagg v. Canada* (Minister of Finance), [1997] 2 S.C.R. 403), a purpose that is consistent with the description of the exemptions, in section 1(a)(ii) of the *Act*, as "limited and specific".

Accordingly, in my view, the modern rule of interpretation, and in particular the overall legislative context and history of the *Act*, cannot be said to favour a finding that section 19 encompasses settlement privilege.

As in *Big Canoe*, which concluded that the modern rule favoured the plain meaning test, the most appropriate source of meaning is therefore the words of section 19, considered in light of previous decisions. Both the LCBO and the affected party have provided me with extensive submissions to the effect that the proper interpretation of the legislative text, in light of a number of authorities, should lead to the result that both common law litigation privilege and branch 2 of the exemption encompass mediation and settlement-related records. I will consider these submissions in the context of the remaining questions posed above, to which I now turn.

(2) Does common law litigation privilege under branch 1 encompass settlement privilege?

This issue was extensively canvassed by Adjudicator Donald Hale in Order PO-2112, issued after the commencement of the present appeal. The LCBO and the affected party were invited to comment on this decision in the Supplementary Notice of Inquiry, and did so in considerable detail in their supplementary representations. Accordingly, what follows is Adjudicator Hale's discussion of this issue in Order PO-2112 in its entirety, beginning with his review of the previous discussion of the subject in Order PO-2006:

> In Order PO-2006 [upheld on judicial review in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 1426 (C.A.), Senior Adjudicator David Goodis discussed the purpose of litigation privilege as follows:
>
> > Justice Carthy, speaking for the majority in *General Accident Assurance Co. v. Chrusz* [45 O.R. (3d) 321 (C.A.)], explained the purpose of litigation privilege (as distinct from solicitor-client communication privilege):
> >
> > > The origins and character of litigation privilege are well described by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), at p. 653:
> > >
> > > > . . . [The origin of litigation privilege] had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control

> fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case . . .

R.J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence, L.S.U.C. Special Lectures* (Toronto: De Boo, 1984) at p. 163. He stated at pp. 164-65:

> . . . [T]he rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice …
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation . . . Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

It can be seen from these excerpts . . . that there is nothing sacrosanct about this form of privilege. It is not rooted, as is solicitor-client privilege, in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel what Sharpe calls a "zone of privacy" and what is termed in the United States, protection of the solicitor's work product: see *Hickman v. Taylor*, 329 U.S. 495 (1946).

In *Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co.* (1990), 74 O.R. (2d) 637, the Divisional Court articulated the purpose of this privilege as follows:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the

> trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel. See Kevin M. Claremont, "Surveying Work Product" (1983), 68 Cornell L.R. 760, pp. 784-88.

> These authorities support the proposition that litigation privilege is meant to protect the adversarial process by preventing counsel for a party from being compelled to prematurely produce documents to an opposing party or its counsel.

By contrast, settlement privilege exists for the purpose of encouraging parties to settle their disputes without recourse to litigation. As stated by Sopinka *et al.* in *The Law of Evidence in Canada* (above, at page 719):

> It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced, encouraged to effect a compromise without a resort to trial. In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming . . .

Sopinka *et al.* set out the conditions that must be present for the privilege to be recognized (at p. 722):

(a) a litigious dispute must be in existence or within contemplation;

(b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

(c) the purpose of the communication must be to attempt to effect a settlement.

Generally speaking, settlement privilege ceases to apply once an unconditional and complete settlement has been achieved (see, for example, *Begg v. East Hants (Municipality)* (1986), 33 D.L.R. (4th) 239 (N.S.C.A.).

There are several exceptions to settlement privilege. Prior to discussing these exceptions, Sopinka *et al.* explain the basis for them, and shed more light on the rationale for settlement privilege (at page 728):

> . . . The exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.

In *Mueller Canada Inc. v. State Contractors Inc.* (1989), 71 O.R. (2d) 397 (H.C.J.), Doherty J. (as he then was) adopts the passage from Sopinka *et al.* at page 728 and states:

> The reference to establishing "liability or a weak case" must refer to liability in relation to matters which are the subject of the settlement . . . Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production . . .

Similarly, in the leading decision in *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737, the House of Lords stated:

> The "without prejudice" rule is a rule governing admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than [litigate] them to a finish . . .
>
> . . . [T]he underlying purpose of the rule . . . is to protect a litigant from being embarrassed by an admission made purely in an attempt to achieve settlement.

I note also that Sopinka *et al.* discuss litigation privilege and settlement privilege in two separate and distinct sections of the text. The former is discussed under the heading "Confidential Communications within Special Relationships – Solicitor and Client – Materials Obtained and Prepared in Anticipation of Litigation", while the latter is explained under the separate heading "Communications in Furtherance of Settlement".

In summation, litigation privilege is meant to protect the adversarial process, by preventing counsel for a party from being compelled to prematurely disclose "the fruits of his work" (*i.e.*, research, investigations and thought processes) to an opposing party or its counsel. By definition, the documents in question are not known to the other side or to the world at large, and the rule establishes a "zone of privacy" around the party.

On the other hand, settlement privilege, a rule of admissibility of evidence, is meant to encourage settlement of disputes. It does so by precluding the admission into evidence of certain settlement communications, where the communication is being introduced to establish it as evidence of liability or a weak cause of action, or to "embarrass" the other party before the court. Although by definition both sides are aware of the contents of the settlement communication, the rule states that it cannot be put before the judge.

Put in the context of the *Act*, there is a strong policy rationale for interpreting the phrase "solicitor-client privilege" as including the two common law concepts of "solicitor-client communication privilege" and "litigation privilege". In both cases, disclosure to a party outside the solicitor-client relationship is deemed to cause some type of harm: in the former case, harm

to the public interest in allowing individuals to consult privately and openly with their solicitors; in the latter case, harm to the adversarial system of justice.

However, there can be no comparable harm from disclosure in the case of settlement privilege. That privilege is designed to prevent a party from putting certain communications into evidence in a proceeding before a court or tribunal. A determination of whether the *Act* requires disclosure of the material is in no way determinative of the issue of admissibility before a court or tribunal, an issue that would be determined by a decision-maker in that other forum.

I find support for the view that settlement privilege is separate and distinct from litigation privilege in the recent decision in *Statice Collections Ltd. v. Kam*, [2002] O.J. No. 4538 (Master). The plaintiff in that case argued that certain correspondence leading to the settlement of a dispute between it and a third party were subject to settlement privilege. Master Egan, applying the principles in [*Mueller*], held that in light of the particular pleadings, these records were not subject to litigation privilege. The Master then turns to the "additional argument" of the plaintiff that the documents are covered by litigation privilege, and states:

> . . . [I]t is difficult to understand how settlement documents with a third party were created for the dominant purpose of assisting the plaintiff in litigation with the defendants.

Accordingly, the Master rejects the additional argument and orders disclosure. In my view, this judgment underscores the differing nature of the two privileges.

The affected party relies on the decision in *Sun Life Trust Co.* as authority for the proposition that settlement privilege forms a part of litigation privilege. Justice Simmons does use the term "litigation privilege" to describe settlement privilege. However, the issue of the relationship between the two privileges was not before the court and therefore constitutes *obiter dicta*. Moreover, the implication that settlement privilege forms a part of litigation privilege is in direct conflict with other authorities as described above.

The affected party also relies on the recent decision of Justice Nordheimer in *Moyes*, in which he refers to *Sun Life Trust Co.* At no point in his discussion of settlement privilege does Justice Nordheimer use the term "litigation privilege". Therefore, the *Moyes* case does not advance the argument of the affected party or the Ministry.

I note that previous orders of this office have suggested that settlement privilege may form a part of litigation privilege (see Orders 49, M-477, M-712). I would first point out that the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier interpretations [*Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.)]. To the extent that these previous orders may conflict with my decision in this case, I decline to follow them.

For these reasons, I conclude that the records which the Ministry and the affected party claim are subject to settlement privilege are not, for that reason alone, subject to litigation privilege under section 19.

Both the LCBO and the affected party comment on this analysis in their supplementary representations.

The affected party submits that technical distinctions ought not to be made based on the use of different words:

> … the terms "litigation privilege", "without prejudice privilege" and "settlement privilege" are used interchangeably *throughout the legal literature*". We … argue that the reason for the interchangeable phraseology is that each term arises from the same principle and seeks to achieve the same public policy goal, that is, the protection of the adversarial system of justice. [my emphasis]

In support of this view, the affected party goes on to refer to the authorities cited in Order PO-2112, including Justice Carthy's reasons in *General Accident* (which the affected party repeats at some length, as quoted in Order PO-2112).

General Accident dealt with litigation privilege and the issue of whether various items were producible in that particular litigation. It did not concern settlement privilege. In fact, the article by R.J. Sharpe (now of the Ontario Court of Appeal) cited with approval in Justice Carthy's reasons in *General Accident*, and also referred to by the affected party in its representations, supports the view that the rationales underlying litigation privilege and settlement privilege are quite different.

As quoted by Justice Carthy, Justice Sharpe states that "… [l]itigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (at p. 331 of *General Accident*). By contrast, settlement privilege, as reflected and described in the authorities, encourages the parties to "freely and frankly put their cards on the table" (as stated in *Hill*, cited above) and is therefore not comparable to litigation privilege. In effect, settlement privilege entails the abandonment, or at least suspension, of the entire principle of litigation privilege, whose purpose is the avoidance of documentary production to the other party.

The only authority before me that appears to treat litigation privilege and settlement privilege as one and the same is the decision of Madam Justice Simmons in *Sun Life Trust Company v. Dewshi* (1993), 99 D.L.R. (4th) 232 (Ont. Gen. Div.), referred to above as "*Sun Life Trust Co.*". The affected party indicates that Justice Simmons does not differentiate between the two forms of privilege "because they are indeed one privilege". The affected party places particular reliance on the following passage from this decision (at p. 237 D.L.R.):

> Ontario courts have accepted the view that the concept of litigation privilege *is founded on public policy*. Having regard to the House of Lords decision in *Rush & Tompkins Ltd.*, I accept the view that the without prejudice rule should be considered as a rule which is founded on public policy and not partly on public policy and partly on implied agreement. I further accept the view that, as a general

> matter, the without prejudice rule should preclude the admission into evidence of admissions made for the purpose of or during the course of an attempt to reach a settlement whether or not a settlement is reached and whether or not such admissions are contained in the negotiations leading up to settlement or in any settlement agreement, itself.

Both the affected party and the LCBO argue that the issue of whether settlement privilege is part of (or one and the same as) litigation privilege is not *obiter dicta* in *Sun Life* as Adjudicator Hale states. The LCBO says that it is "the *ratio* of the case" and the affected party says it is an "integral part of her decision". With respect, I cannot agree. *Sun Life* uses the phrase "litigation privilege" when the subject matter is settlement privilege, without any discussion or consideration of the basis for doing so. The case is unique among the authorities in this respect, and I do not consider it persuasive authority for the conclusion that the two privileges are one and the same. In my view, it is simply not possible to equate a privilege intended to shield information in the possession of one litigant from the knowledge of the other with one designed to facilitate the sharing of information between the two sides. This is far more than a linguistic difference and I reject the affected party's submissions to that effect.

The affected party also submits that settlement privilege is a "logical extension" of litigation privilege, on the basis that both are intended to facilitate "the protection of the adversarial process and the judicial system.…" In that regard, the affected party relies on Justice Sharpe's comment in the article quoted in *General Accident*, referred to above, that litigation privilege is meant to "protect the adversarial system of justice". Seeking to demonstrate that settlement privilege has a similar public policy objective, also related to the litigation process, the affected party refers to the reasons of Ontario's Divisional Court in *I. Waxman & Sons Ltd. V. Texaco Canada Ltd.*, [1968] 1 O.R. 642 (H.C.J.) affirmed [1968] 2 O.R. 253 (C.A.). That case involved a finding that settlement privilege extended to prevent disclosure of a "without prejudice" letter in a third party action against one of the participants in the settlement negotiations. In the extract quoted by the affected party, the Divisional Court commented on the public policy purpose of settlement privilege:

> I am of opinion that in this jurisdiction a party to a correspondence within the "without prejudice" privilege is, generally speaking, protected from being required to disclose it on discovery or at trial in proceedings by or against a third party.
>
> In my opinion the privilege as so often stated, is intended to encourage amicable settlements and to protect parties to negotiations for that purpose. It is in the public interest that it not be given a restrictive application.

The LCBO makes a similar argument to the effect that settlement privilege is a fundamental rule of public policy designed to protect the adversarial process by promoting settlement. The LCBO cites the reference to public policy in *Hill v. Gordon-Daly Grenadier Securities* (2001), 56 O.R. (3d) 388 (Div. Ct.) which, as I have already noted, states that settlement privilege is "founded on

the public policy of encouraging litigants to settle their differences rather than litigate them to a finish", such that settlement discussions are "excluded in subsequent proceedings". It also refers to similar dicta in *Moyes v. Fortune Financial Corp.* (2002), 12 C.P.C. (5th) 154, and in addition, adopts the affected party's submissions I have just referred to, in relation to *Waxman*.

The affected party characterizes this line of argument as showing that settlement privilege is a "logical extension" of litigation privilege, while the LCBO refers to the "consistency of the policy rationale" of the two privileges. Both the LCBO and the affected party argue, in this part of their submissions, that Adjudicator Hale's statement of the purpose of settlement privilege is too narrow or restrictive. In making this argument, the affected party characterizes Adjudicator Hale's statement of the purpose of settlement privilege as "simply to protect litigants from embarrassment". The LCBO acknowledges that Adjudicator Hale also adverted to the purpose of facilitating settlement, but apparently views his statement that it is a "rule of admissibility of evidence" as too narrow.

Adjudicator Hale made these comments when summarizing his conclusion that the purposes of the privileges are fundamentally different. In my view, both the LCBO and the affected party mischaracterize Adjudicator Hale's discussion of the nature of settlement privilege, which he clearly acknowledges as an instrument of public policy in his quotations from the Sopinka text and the House of Lords decision in *Rush & Tomkins Ltd.*, both of which make this point. Even if settlement privilege is treated as a common law substantive rule (similar to solicitor-client privilege) as suggested by its description in *Waxman* (quoted above), this does not alter its fundamental purpose of protecting confidential discussions aimed at avoiding or ending litigation. Adjudicator Hale contrasts this purpose with the purpose of litigation privilege.

I agree with Adjudicator Hale that the privileges are fundamentally different. In my view, the fact that both privileges address a public interest relating to litigation does not make settlement privilege a "logical extension" of, or one and the same thing as, litigation privilege. The immediate interests they seek to protect, and the manner in which they accomplish their objectives, remain very different.

Related submissions by both the LCBO and the affected party advance an argument to the effect that both litigation privilege and settlement privilege create a "zone of privacy". While I agree that litigation privilege creates such a zone for the adversary preparing a case for trial, it would be more accurate to describe settlement privilege as creating a "zone of disclosure" for the limited purpose of attempting settlement. This again underscores the difference between these two types of privilege.

The affected party also argues that two cases cited in Adjudicator Hale's analysis (*Mueller* and *Statice Collections*) relate to exceptions to the general rule against disclosure rather than any distinction between the privileges. The two cases are discussed in separate parts of Adjudicator Hale's analysis.

Adjudicator Hale introduces his discussion of *Mueller* with a reference to Sopinka's analysis of the exceptions to settlement privilege, *i.e.* preventing introduction of an admission made during settlement discussions to prove "liability" or a "weak cause of action". This underlines its purpose of protecting disclosures made in the context of settlement discussions, which (after a related discussion of *Rush & Tompkins Ltd.*) Adjudicator Hale expressly contrasts with the "zone of privacy" rationale for litigation privilege. I agree with his analysis in this regard.

In his discussion of *Statice Collections*, Adjudicator Hale quotes the Court's comment that it is "difficult to understand how settlement documents [in litigation between the plaintiff and a third party] could be created for the dominant purpose of assisting the plaintiff in litigation with the defendants", which is in fact an application of the dominant purpose test in the context of litigation privilege. In my view, this should not be seen as a significant comment on the issue under consideration here, *i.e.* the relationship between settlement privilege and litigation privilege.

Both the affected party and the LCBO also critique Adjudicator Hale's reference to the *Begg v. East Hants* case, which he says supports the proposition that "[g]enerally speaking, settlement privilege ceases to apply once an unconditional and complete settlement has been achieved". The LCBO and the affected party argue that *Begg* is wrongly decided and not binding in Ontario. My reading of Adjudicator Hale's reasons indicates that this comment is simply part of his description of settlement privilege. He does not refer back to this, nor does he rely on it in distinguishing settlement privilege from litigation privilege. In my view, these submissions do not have any impact on Adjudicator Hale's conclusion that the two privileges are different, which is based on his analysis of their purposes.

Finally, both the affected party and the LCBO urge the rejection of the interpretation in Order PO-2112 in favour of the approach taken in previous decisions of this office such as Orders 49, M-477, M-712 and P-1278, which find that settlement privilege can form the basis of a section 19 claim. (The affected party also refers to Order MO-1233, which is based on classic solicitor-client communication privilege and not founded on settlement privilege.) I agree with Adjudicator Hale's disposition of similar arguments he dealt with in Order PO-2112, to the effect that *stare decisis* does not require me to follow them, and on the basis of my analysis here, I decline to do so.

In summary, I agree with Adjudicator Hale's determination in Order PO-2112 to the effect that settlement privilege and litigation privilege exist for very different purposes. Their operation is also totally different. In addition, I accept Adjudicator Hale's view that there is a sound policy rationale for including litigation privilege within "solicitor-client privilege" for the purposes of branch 1 of the exemption. Both common law solicitor-client privilege *and* common law litigation privilege seek to *prevent* disclosure to a party outside the solicitor-client relationship. This stands in marked contrast to the purpose of settlement privilege, which is entirely concerned with protecting a totally different relationship, namely that between the parties to a dispute, and seeks to *foster* disclosure outside the solicitor-client relationship. In my view, it is also a

significant distinction that settlement privilege does not even require the involvement of a lawyer.

I have reviewed the detailed submissions and related authorities provided by the appellant and the affected party. I am not persuaded that they provide a rationale for including settlement privilege in the scope of litigation privilege under branch 1 of section 19. This line of argument therefore provides no basis for finding the records exempt under section 19.

(3) If common law litigation privilege under branch 1 does not encompass settlement privilege, are the records nevertheless subject to common law litigation privilege under branch 1?

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).]

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
> >
> > It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
> >
> > . . . .
> >
> > [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, former Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.);

Hodgkinson v. Simms (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

The affected party relies on litigation privilege and submits that "all of the records were prepared by or for the LCBO for use in litigation".

Although the LCBO does not expressly rely on common law litigation privilege under branch 1, except insofar as it argues that this should encompass settlement privilege (as canvassed above), some of its arguments nevertheless suggest that litigation privilege could apply. In its initial representations, the LCBO submits that Tab B of Record 6, all of Record 7 and Tab 5 of Record 8 were prepared "for the purpose of attempting to settle the litigation and, failing settlement, for use in the ongoing litigation between the parties." Later in these representations, (as part of its submissions in relation to statutory privilege), the LCBO submits that these same records, as well as records 54-58:

> … were prepared for the dominant purpose of being used in the then existing litigation between the LCBO and [the affected party], in order to pursue the possible settlement of that litigation through mediation and, if the mediation was unsuccessful, to submit to the court or incorporate into the trial brief.

The LCBO goes on to cite Orders M-505, P-952, P-1278 and M-712 as authority for the proposition that "[p]revious IPC orders have recognized that records prepared for the purpose of pursuing or implementing a settlement of pending litigation may be regarded as having been created for the dominant purpose of litigation." Order M-505 deals only with branch 2, and I will address it in that context, below. The other orders cited by the LCBO do no more than apply the approach taken in Orders 49 and M-477, which I have already declined to apply. None of them, including Order M-505, applies the "dominant purpose" test to records prepared in the context of settlement negotiations. This is not surprising in view of the fact that all of them were issued prior to the judgment of the Ontario Court of Appeal in *General Accident*, cited above, which authoritatively affirmed dominant purpose as the primary test for common law litigation privilege in Ontario.

All of the records at issue were prepared for the primary purpose of the settlement negotiations, which would bring the litigation between the parties to an end. In my view, where a record was prepared for settlement negotiations, it cannot also be the case that exactly the same record was prepared for the dominant purpose "of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation", which is, in effect, what the LCBO argues here. This analysis bears common features with the difference between settlement privilege and litigation privilege, as canvassed above, since it is based, in part, on the fact that the processes of litigation

and settlement, like the respective privileges that go with both, are markedly different in both purpose and operation. With regard to later re-use of the records in litigation, the only evidence I have before me to substantiate that intention is the LCBO's bare assertion to this effect, quoted above. Even if there were a secondary purpose to re-cast some of the records at issue for use in the ensuing litigation had settlement not been achieved, I find that this is not sufficient to meet the dominant purpose test given the fact that the records before me were, in fact, clearly produced for and used in the mediation.

I am not in possession of any argument or evidence to the effect that the records at issue were actually included in counsel's litigation brief, and therefore the "selective copying" basis for litigation privilege has also not been established.

I find that common law litigation privilege does not apply to the records at issue and that type of privilege therefore provides no basis for finding them exempt under section 19.

The affected party's further submissions in connection with common law litigation privilege relate to whether it survives the termination of litigation. The affected party submits that:

- termination of litigation does not end the protection of litigation-privileged documents under section 19 (*Big Canoe* (cited above));

- in any event, the litigation between the parties is ongoing despite the settlement because of the possibility of future regulatory action by the LCBO or its successor agency, the Alcohol and Gaming Commission of Ontario, against the affected party.

I agree that, based on *Big Canoe*, the termination of litigation does not negate the availability of the section 19 exemption, though this argument is only relevant in the context of branch 2, which was the subject of the Court's decision. However, in the context of branch 1, I have already found that common law litigation privilege does not and never did apply, and the effect of the conclusion of the litigation between the parties is therefore not a relevant factor in assessing whether common law litigation privilege applies.

(4) Do the words, "prepared by or for Crown counsel in contemplation of or for use in litigation" in branch 2 encompass records prepared for use in the mediation or settlement of litigation? If so, were the records prepared by or for Crown counsel for that purpose?

In its initial representations, the LCBO submits that Records 6, 7, Tab "B" of Record 8 and Records 54-58 were prepared by or for Crown counsel for use in litigation, "… in order to pursue the possible settlement of that litigation through mediation…." As described in the LCBO's supplementary representations, these records consist of the LCBO's mediation briefs, affidavits and legal opinions used in the mediation and correspondence relating to the implementation of the minutes of settlement.

As previously noted, the affected party submits that "all of the records were prepared by or for the LCBO for use in litigation". The affected party also submits that the interpretation of branch 2 "mirrors the common law privilege available to counsel in the traditional role of representing private clients engaged in an adversarial dispute".

In the LCBO's supplementary representations, it submits that the Court of Appeal decision in *Big Canoe*, cited above, "… creates a distinct statutory exemption for records '… prepared by or for Crown counsel in contemplation of or for use in litigation'." The LCBO mentions the Court's reference to Driedger's modern principle (quoted in *Régie*, cited above) as supporting the application of the plain meaning rule, and submits that "the scope of that exemption is not restricted by the common law regarding solicitor-client privilege or litigation privilege and instead turns on the interpretation of the wording of s. 19." On this basis, the LCBO argues that the statutory exemption for records "created by or for Crown counsel for use in … litigation" encompasses records prepared for settlement purposes. The analysis of this argument is therefore a question of statutory interpretation.

In my view, as with the question of whether the common law temporal limit on litigation privilege applied to branch 2 (as analysed in *Big Canoe*), Driedger's modern rule also assists in deciding the different question of statutory interpretation under consideration here, namely whether records created for the immediate purpose of settlement could be seen as prepared "for use in litigation" within the meaning of section 19. As stated in *Régie* and adopted by the Court of Appeal in *Big Canoe*:

> An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

In support of its view that the records are exempt under branch 2 as having been "prepared by or for Crown counsel … for use in litigation", the LCBO submits:

- the records prepared for mediation were prepared while the litigation was pending, as were the records relating to negotiating the settlement, drafting the settlement documents and implementing the settlement;
- many of the materials were intended for later use in the litigation if the settlement failed;
- the voluntary mediation was "part of" and "inextricably linked with" the litigation;
- mediation is an integral part of the litigation process;
- the rules provide for "consensual" mediation.

In my view, the LCBO's proposed interpretation has a fatal flaw that brings it outside the norms of acceptable interpretation proposed by Driedger and accepted by the courts in *Régie* and *Big Canoe*, namely the fact that it would only protect materials prepared *by or for Crown counsel*. This would mean that only the government party's settlement-oriented records would be protected, not those of the private litigant engaged in settlement discussions with the Crown. In that regard, I do not agree with the affected party's submission in this appeal that *all* the records were prepared by or for the LCBO. For example, record 1, the affected party's "chronology", was prepared by the affected party to advance its case in the mediation, and would not be exempt, even under this interpretation. Although one could argue that a record of this nature was intended to be provided to Crown counsel during the mediation, and was thus prepared "for" Crown counsel, the nature of the solicitor-client relationship and the solicitor's role as advocate indicate that such records are prepared "by" or "for" the private litigant's counsel, rather than "for" counsel to a party adverse in interest. Therefore, in my view, this interpretation of branch 2 would only protect the government party's documents.

Given the transparency purpose of the *Act*, an interpretation protecting the government party's right to confidential settlement negotiations without affording the same protection to a private litigant is neither plausible, efficacious nor just. For this reason, and in keeping with my analysis of litigation privilege and the difference between the purposes of settlement and litigation, I conclude that records prepared for the purpose of settlement are *not* prepared "for use in litigation" and branch 2 does not apply to them on that basis.

The LCBO's initial representations also refer to Orders M-505, P-952, P-1278 and M-712. The LCBO argues that these orders support the interpretation of "for use in litigation" as including documents used in settlement negotiations. Orders P-952 and P-1278 do no more than apply the approach taken in Orders 49, M-477 and M-712, allowing the application of branch 1 to such documents, an approach I have already declined to apply. In Order M-505, the records were found to "relate to the implementation of a proposed settlement of litigation between the parties before the OHRC and the WCB and, accordingly, to fall within the exemption provided by Branch 2 of section 12". In my view, however, this interpretation fails to consider the markedly different purposes inherent in either proceeding with litigation, on the one hand, or on the other, engaging in discussions aimed at its avoidance. Nor does it consider the asymmetrical protection this approach affords, covering the Crown's mediation materials while potentially exposing those of others. For these reasons, I decline to follow Order M-505 in that regard.

(5) In the event that the settlement negotiations had failed, were the records prepared "by or for Crown counsel for use in litigation" within the meaning of branch 2?

As noted, the LCBO also submits that the mediation materials would have been used in litigation had the settlement negotiations failed. In fact, however, the materials were used in mediation, and not in litigation. Among the records are documents called "mediation briefs" and "affidavits for mediation". While not applying the dominant purpose test (which arguably applies only in the context of common law litigation privilege under branch 1), I have already reached the factual conclusion that the strong primary purpose of the records was mediation or settlement,

not eventual litigation. In the circumstances of this appeal, I find that the alternate purpose advanced by the LCBO in the event that mediation had been unsuccessful is too remote to support a finding that any of the records were prepared "for use in litigation". I find that branch 2 does not apply on this basis.

(6) Are the records subject to branch 1 solicitor-client communication privilege?

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Records 54-58

The LCBO's submissions regarding solicitor-client communication privilege focus on Records 54-58, which consist of 73 documents totalling 241 pages. The LCBO submits that these records may be categorized as follows:

(a) correspondence, memoranda and communications exchanged between the LCBO's outside counsel and its inside counsel concerning the negotiation, drafting and implementation of the settlement;

(b) memoranda prepared by outside counsel documenting settlement negotiations and ongoing discussions relating to finalizing and implementing the settlement; and

> (c) correspondence and memoranda exchanged between the LCBO's outside counsel and [the affected party]'s in-house or outside counsel concerning the negotiation, drafting and implementation of the settlement.

The LCBO submits that the documents falling within category (a) are subject to solicitor-client communication privilege. The LCBO states that some of these records consist of direct communications between the LCBO's outside counsel and its in-house counsel explicitly requesting or providing legal advice, and are therefore confidential communications made within the framework of the solicitor-client relationship for the purpose of obtaining legal advice. It states that others are communications back and forth between outside and in-house counsel, conveying information relevant to the implementation of the settlement, and therefore fall within the "continuum of communications" between solicitor and client described in the *Balabel* case, cited above. The LCBO also submits that the category (b) records qualify as solicitor's working papers as described in *Susan Hosiery*, cited above.

With respect to the category (a) and (b) records, I am satisfied that the LCBO sought and received legal advice regarding the settlement of its dispute with the affected party. Using the page numbers assigned by the LCBO on the copies provided to me, I find that the following parts of Records 54-58 constitute direct communications between solicitor and client in that regard, expressly seeking or giving legal advice, or forming part of the continuum of communications: pages 16-17, 18-19, 32-35, 36, 61-66, 73-74, 85-89, 93, 94-99, 100, 103-104, 114-116, 119-120, 124-125, 126, 135, 163-167, 192-193, 194, 208, 212-213, 214-227, 228-230, and 235-241. I also find that pages 3-4, 20-22, 53, 69-71, 72, 75, 83-84, 131, 147-162, 168-169, 170, 177 and 185-191 of Records 54-58 qualify as a solicitor's working papers. All of these records are therefore subject to solicitor-client communication privilege and are exempt under section 19 on that basis. I will not consider them further in this order.

Several documents within Records 54-58 consist of e-mail or facsimile transmissions enclosing copies of newspaper clippings, published press releases or broadcast transcripts. These records would not originally be subject to solicitor-client communication privilege, but could acquire that status if they qualify as part of the "continuum of communications". I am satisfied that the documents of this nature that are solicitor-client communications are sufficiently related to the implementation of certain terms of the settlement to justify including them in the continuum in the circumstances of this appeal, and I have included pages 73-74, 103-104, 119-120, 124-125 and 228-230 in the list of exempted records, above, for this reason. Pages 209-210 and page 211 of Records 54-58 appear similar, given that they consist of e-mail transmissions of a published newspaper article and a press release. But although they are addressed to the LCBO's outside counsel, it is not clear that they come from a client, nor has any other argument been advanced as to how they attract solicitor-client communication privilege. I therefore find that Records 209-210 and page 211 of Records 54-58, are not subject to solicitor-client communication privilege, and that type of privilege therefore provides no basis for finding them exempt under section 19.

As regards the category (c) records, both the LCBO and the affected party have cited a number of previous orders indicating that privilege may be established and maintained with respect to

communications between opposing counsel in the context of settlement. Specifically, reference is made to Order 49, which states that "it is possible for letters or communications passing between opposing lawyers to obtain the status of a privileged communication if they are made 'without prejudice' and in pursuance of settlement", and Order M-477, which stated that "[u]sually, disclosure of a document to a party adverse in interest would constitute waiver of privilege, but … this does not arise with respect to records pertaining to settlement discussions." (See also Orders P-1278 and M-712).

Neither the LCBO nor the affected party provides any authority beyond these previous orders to support the quoted statements. As noted earlier, Adjudicator Donald Hale dealt with a similar argument in Order PO-2112, and found that the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier interpretations. Like Adjudicator Hale, I have already declined to follow these previous interpretations as regards litigation privilege under branch 1 or the meaning of "for use in litigation" under branch 2.

I also decline to follow them as regards solicitor-client communication privilege under branch 1. The protection of settlement-related information that has been shared between parties adverse in interest derives from the doctrine of settlement privilege. I am not in possession of any binding authority that suggests in any way that this protection derives from solicitor-client communication privilege, which exists to protect confidential communications within a different relationship, namely that of a solicitor (or solicitors) and his or her own client. The fact that a record was either created by or sent to opposing counsel provides a clear indication that it was not intended to be confidential as between solicitor and client, and therefore such records cannot normally be subject to solicitor-client communication privilege. Accordingly, even where a copy of a letter to opposing counsel is sent by fax from solicitor to client, or where correspondence to opposing counsel is copied to the client by the solicitor, I find that in the absence of any added confidential communication, such records cannot be found to be privileged, even as part of the "continuum of communications". This finding also applies to transcribed voicemail messages from opposing counsel.

I therefore find that pages 1-2, 5-6, 7-9, 10-11, 12-15, 23-27, 28-31, 37-38, 39, 40-42, 43-44, 45-52, 54-60, 67-68, 76-77, 78, 79-82, 90-92, 101-102, 105, 106-109, 110-113, 117-118, 121-123, 127-130, 132, 133-134, 136-146, 171-176, 178-184, 195-207, 231-232 and 233-234 of Records 54-58 do not qualify for solicitor-client communication privilege, and that type of privilege therefore provides no basis for finding them exempt under section 19.

Records 6, 7, 8, 9 and 16

The LCBO submits that Record 6, Tab "B", comprising a legal opinion provided to the LCBO which was disclosed in the context of mediation, continues to be subject to solicitor-client communication privilege. As with communications between opposing counsel, this opinion lacks the necessary element of solicitor-client confidentiality to qualify for solicitor-client communication privilege, and that type of privilege therefore provides no basis for exempting it under section 19. I also note that disclosure of the opinion to opposing counsel constitutes a

clear waiver of any solicitor-client communication privilege it may have previously enjoyed (see *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)). Similarly, the remainder of Record 6, as well as Records 7, 8, 9 and 16 in their entirety, were all disclosed among opposing counsel, which again indicates that they were not confidential documents as between solicitor and client. Accordingly, these records do not qualify for solicitor-client communication privilege, and that type of privilege therefore provides no basis for finding them exempt under section 19.

(7) Were the records "prepared by or for Crown counsel for use in giving legal advice" within the meaning of branch 2?

The LCBO submits that Records 6, 7 and Record 8, Tab 5, and in particular, Record 6, Tab B and Record 8, Tab 5, were prepared by and for Crown counsel, for use in giving legal advice on certain issues raised in the litigation. The LCBO also submits that categories (b) and (c) among Records 54-58 were prepared by or for Crown counsel for use in giving legal advice.

Records 6 and 7 are Mediation Briefs. Record 6, Tab B is a legal opinion on one of the issues in the litigation. Record 8, Tab 5 is a "mediation affidavit" produced by the author of Record 6, Tab B.

I have already found that certain of the documents forming part of Records 54-58 are direct solicitor-client communications or working papers that qualify for solicitor-client communication privilege at common law and are therefore exempt under section 19 on that basis. Among records 54-58, those are the only documents I would find to have been prepared by or for Crown counsel for use in giving legal advice.

Record 8, Tab 5 was prepared as an affidavit for use in mediation, and intended to be given to the opposing party. Based on the information provided to me, I am not satisfied that it was prepared for use in giving legal advice. I find that it is not exempt under the "legal advice" aspect of branch 2.

Record 6, Tab B may have originally been prepared to convey legal advice and may therefore have been subject to solicitor-client communication privilege. In my view, however, as noted above, the act of disclosure during mediation constitutes waiver of solicitor-client communication privilege, which negates the application of the section 19 exemption (see *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)).

With the exception of the portions of records 54-58 that I have already exempted as direct solicitor-client communications that qualify for solicitor-client communication privilege, I find that the records do not qualify under the "legal advice" aspect of branch 2.

Conclusion

To summarize, I find that pages 3-4, 16-17, 18-19, 20-22, 32-35, 36, 53, 61-66, 69-71, 72, 73-74,

75, 83-84, 85-89, 93, 94-99, 100, 103-104, 114-116, 119-120, 124-125, 126, 131, 135, 147-162, 163-167, 168-169, 170, 177, 185-191, 192-193, 194, 208, 212-213, 214-227, 228-230, and 235-241 of Records 54-58 are subject to common law solicitor-client privilege, and therefore exempt under section 19. I find that the remaining parts of Records 54-58, and the remainder of the records at issue, are not exempt under section 19. Since no other exemption is claimed for Record 9, I will order it disclosed.

ECONOMIC AND OTHER INTERESTS

The LCBO claims that all records at issue except Record 9 are exempt under sections 18(1)(c) and (d). In its representations on these exemptions, the LCBO focuses on Records 6, 16 and 54-58, in their entirety, and Record 8, Tab 5. I have already found that a significant number of documents within Records 54-58 are exempt under section 19 and will not consider those further.

The affected party did not make specific submissions in respect of sections 18(1)(c) and (d), indicating instead that it adopts the LCBO's submissions in this regard.

Sections 18(1)(c) and (d) 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;

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.

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 [Order P-1190].

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].

For sections 18(c) or (d) 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 as to 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 LCBO submits that disclosure of the records for which it claims these exemptions "will prejudice the economic interests and/or competitive position of the LCBO and/or be materially injurious to Ontario and the Government's ability to manage the economy of the Province." The LCBO states that it "… has economic interests, in that it is a Crown Corporation responsible for, among other things, operating a commercial enterprise, namely: selling beverage alcohol in Ontario and earning revenue for the province of Ontario."

With respect to section 18(1)(c), the LCBO describes its economic interests as follows:

> (a) The LCBO has an economic interest in increasing the profitability of its retail stores (while continuing to fulfil the "social responsibility" aspect of its mandate) and has taken consistent steps to do so since the mid-1980's. The LCBO [has a] focus on improving and modernizing its retail operations to increase their profitability and the level of service to the public …
>
> (b) The LCBO also has an economic interest in preserving its position as an import monopoly and its "quasi-monopoly" over liquor sales in Ontario. It is that position which allows the LCBO to fulfill the "social responsibility" aspect of its mandate by, for example, controlling the minimum price at which alcohol may be sold in Ontario and ensuring that the price of a particular product is the same at all government stores;
>
> (c) The LCBO has an economic interest in the Ontario wine industry. Ontario wines are a major product line offered in all LCBO stores. The LCBO has an interest in ensuring a continued supply of high-quality Ontario wines for its retail operations. The LCBO has played an active role in promoting

> Ontario wines and in fostering a strong and internationally competitive Ontario wine industry.

As regards prejudice to its competitive position under section 18(1)(c), the LCBO submits as follows:

> [T]he LCBO competes in the liquor retailing industry in Ontario. Although the LCBO has, by statute, an import monopoly, it competes with a number of other retailers in the province with respect to the sale of alcohol. For example, the LCBO competes with Brewers Retail Inc. with respect to the sale of certain beer. It also competes with manufacturers' retail stores, which are now authorized by AGCO rather than the LCBO. This competition is recognized in the LCBO's 2001-2002 Annual Report, which states (at page 13) that the LCBO "operates in a shared marketplace along with other retailers of beverage alcohol". Currently, the LCBO has a market share of 45.1 % of the Ontario beverage alcohol market, while The Beer Store has a 31.5% market share and winery retail stores have a 2.3% share (LCBO 2001-2002 Annual Report, Schedule "I", p. 42).
>
> Previous IPC orders have recognized that Crown Corporations with statutory monopolies over certain activities may nevertheless have a "competitive position" for purposes of s. 18(1)(c) where they compete to some degree with private sector enterprises engaged in similar activities. For example, in Order P-941 … Inquiry Officer Fineberg held that certain market research studies prepared for the Ontario Lottery Corporation ("OLC") were exempt under s. 18(1)(c), on the basis that their disclosure would prejudice OLC's competitive position in relation to private sector competitors engaged in gaming activities, such as charities, operators of casino gambling and bingo games, etc. In that regard, Inquiry Officer Fineberg commented as follows:
>
> > While it is true that the OLC holds a monopoly on operating provincial lotteries, based on the information provided in the affidavit of the Acting Vice-President of Marketing of the OLC, I am satisfied that the activities described above compete with the OLC for the same consumer dollar. Accordingly, I find that disclosure of the information contained in the market research studies could reasonably be expected to prejudice the competitive position of the OLC and therefore qualifies for exemption under section 18(l)(c) of the Act.

In keeping with the analysis in Order P-941, I accept the LCBO's submissions that it has economic interests and a competitive position to protect in the context of section 18(1)(c).

With respect to the government's economic interests under section 18(1)(d), the LCBO states that:

> [a]ll of the above economic interests of the LCBO are shared by the government of Ontario. …[T]he LCBO is the government's single largest revenue source and remits most of the revenue it earns to the Treasurer of Ontario. The LCBO is also the agency through which the government regulates the importation, distribution and sale of beverage alcohol in Ontario and implements various social responsibility measures relating to the sale and consumption of alcohol. Consequently, the government of Ontario has an economic and financial interest in the profitability of LCBO retail stores and in the continuation of the LCBO's import/sales monopoly.
>
> Similarly, the Ontario government has an economic and financial interest in a strong Ontario wine industry because of the importance of that industry to the provincial economy. The economic importance of the grape and wine industry to Ontario was expressly recognized in Order P- 1062 … where Inquiry Officer Big Canoe commented as follows:
>
> > I am satisfied that the wine and grape industry in this province has a substantial impact on the economy of Ontario, and that disclosure of the record could reasonably be expected to be injurious to the financial interests of the government of Ontario.
>
> The record at issue in that case was the "Wine & Grape Sectoral Partnership Planning Framework", which outlined the strategy for advancing the Ontario wine industry. The record had been prepared by the Wine & Grape Sectoral Partnership, which was formed to (among other things) allow wine and grape growers to adapt to an increasingly competitive environment (ie: increased competition from foreign producers in the wake of the FTA). … The concern in that case was therefore similar to the one in the present case…. It was accepted that the disclosure of such information could reasonably be expected to be injurious to both the domestic industry and the financial interests of the Government of Ontario.

The LCBO further submits that:

- it is the single largest importer and purchaser of alcohol in the world;
- it contributed a $905 million dividend to Ontario's Consolidated Revenue Fund in 2001-2;
- its sales generate a substantial amount of provincial retail sales tax revenue;
- the Ontario government, through the LCBO and the Alcohol and Gaming Commission of Ontario, "control all aspects of the marketing of liquor, including pricing and points of

sale";

- alcohol is only sold through government operated or regulated stores, which include Ontario wineries' "on-site" stores;

- the regulation of the wine and beverage alcohol industry and the operation of government stores in Ontario are significantly restricted by Canada's international trade obligations under the Wine Trade Agreement (WTA), the General Agreement on Tariffs and Trade (GATT), the 1987 Free Trade Agreement (FTA) and the 1994 North American Free Trade Agreement (NAFTA);

- non-compliance with these agreements can lead to retaliatory measures;

- in the mid-1980's, the European Community launched a dispute against Canada regarding preferential treatment of domestic wine and other alcoholic beverages, which resulted in the adoption of the WTA in 1988;

- during the negotiation of NAFTA, the United States launched a further GATT dispute against Canada in relation to the sale of imported beer, which resulted in an adverse finding against Canada that required changes to provincial laws and regulations.

Based on these submissions, I am satisfied that matters affecting the LCBO may also have the potential to injure the financial interests of the government of Ontario or its ability to manage the economy.

In the particular circumstances of this case, I find that for some parts of the records, the LCBO's representations meet the evidentiary criteria to establish a reasonable expectation of the harms mentioned in these two exemptions, and in particular, prejudice to the economic interests of the LCBO and the financial interests of the government of Ontario, as well as the government's ability to manage the economy, in the context of the global market for beverage alcohol. The portions of the representations that provide the necessary "detailed and convincing" evidence and explain why this expectation is reasonable are confidential, as are the contents of the records, and I am therefore not at liberty to disclose them in these reasons.

Of the records specifically addressed in the LCBO's representations, I find that this reasonable expectation has been established for most of Record 6, Record 8, Tab 5 in its entirety, part of Record 16, and a considerable portion of Records 54-58. Similar information also appears in some passages in the rest of Record 8, and I find that this reasonable expectation has also been established for that information.

Some passages in Records 6 and 8 set out only matters of general knowledge that are already in the public domain, or disclose information that does not impact the section 18(1)(c) or (d) interests identified by the LCBO. Based on my review of the contents of these parts of the records, I am not satisfied that the harms at sections 18(1)(c) and (d) could reasonably be

expected to result from their disclosure. For the same reasons, I also find that this reasonable expectation is not established for Record 7. Some parts of Records 54-58 also do not reveal information that could reasonably be expected to result in these harms.

To summarize, I find that Record 8, Tab 5 in its entirety, pages 28-31, 39, 40-42, 43-44, 45-52, 76-77, 78, 79-82, 117-118, 121-123 and 231-232 of Records 54-58, in their entirety, parts of Record 6, parts of the rest of Record 8, parts of Record 16 and parts of pages 23-27, 67-68, 90-92, 101-102, 106-109, 136-146 and 178-184 of Records 54-58, are exempt under sections 18(1)(c) and (d) of the *Act*.

THIRD PARTY INFORMATION

The LCBO claims the mandatory exemptions at sections 17(1)(a), (b) and (c) for all the records at issue except Record 9.

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

> 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;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1)(a), (b) or (c) to apply, the LCBO 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) or (c) of section 17(1) will occur.

To meet part 3 of the test, the institution and/or the third party 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 failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

In its section 17 representations, the LCBO focuses on certain parts of the records, arguing that these sections apply to Record 1 and to paragraphs 52, 54-61, 65-67 and Appendix "A" of Record 7. Some of the paragraph numbers said to come from Record 7 do not actually appear in that record, which also lacks anything called Appendix "A". Based on my review of the records at issue, I have concluded that the LCBO is in fact referring to the identified paragraphs and Appendix "A" of Record **6** in this part of its submissions. The affected party's representations argue that sections 17(1)(a), (b) and (c) apply to records 1, 7 and 8, and again, its detailed references to Record 7 appear to refer to parts of Record 6, in identical fashion to the representations of the LCBO on this point.

The passages in Record 6 which the LCBO and the affected party apparently intended to refer to in their section 17 submissions are all included in the parts that I have already found exempt under sections 18(1)(c) and (d). However, I have reviewed the remaining part of Record 6 and all of Record 7 to determine whether they might be exempt under the mandatory section 17 exemption.

As noted in the foregoing summary, I have received submissions from the LCBO and the affected party concerning the application of section 17(1)(a), (b) and (c) to parts of Records 1, 6, 7 and 8. But the exemption, which is mandatory, is claimed for all records except Record 9. It therefore has potential application to all parts of Records 16 and 54-58 which I have not previously found exempt. I have reviewed these records and I find that some of them contain financial and/or commercial information, all of which originates with the settlement arrived at by the LCBO and the affected party, as set out in Record 16 (the settlement agreement), and was

therefore the product of negotiations. As indicated in Order MO-1706, except in unusual circumstances, agreed upon essential terms of a contract or agreement are considered to be the product of a negotiation process and therefore are not considered to be "supplied", and do not meet the requirements of part 2 of the test. In the absence of any argument on this point, I find that this information in Records 16 and 54-58 was not "supplied" and is therefore not exempt under section 17(1)(a), (b) or (c). Moreover, even if I were satisfied that the information had been supplied in confidence, the records could not meet the requirements of part 3 of the test. I have been provided with no explanation as to how the harms outlined in these sections could reasonably be expected to arise, which is not evident from the records themselves. I have therefore not been given the necessary "detailed and convincing" evidence to support the application of the exemptions to this material, and I will not consider it further.

I will now consider whether sections 17(1)(a), (b) and (c) apply to the parts of Records 1, 6, 7 and 8 not previously found exempt.

Part 1: type of information

The LCBO submits that Record 1 and paragraphs 52, 54-61, 65-67 and Appendix "A" of Record 7 [sic] contain commercial information. The affected party submits that Records 1, 7 and 8 contain "commercial information".

Based on my independent review, it also appears that some of the information in the records may be "financial information". The meaning of the terms "commercial information" and "financial information" has been discussed in previous 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 [Order 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 LCBO provides the following overview of why, in its view, the records contain commercial information:

> The information in the records noted above falls within [the] definition of commercial information, in that it relates to the buying and selling of merchandise produced by various … companies and, specifically, the buying and selling of … wine, beer and distilled spirits through winery retail stores operated by various …

> companies and through the LCBO's network of retail stores. Broadly speaking, the information relates to … commercial operations as a manufacturer and retailer of wine, beer and distilled spirits ("liquor"), within a regulated industry.

Turning to specific records under part 1 of the test, the LCBO submits:

> … Record 1 … consists primarily of commercial information. Although organized and styled as a chronology, Record 1 in fact contains detailed information and commentary by [the affected party] relating to its commercial operations and the regulation of those operations by the LCBO. … It is not a simple chronology, merely listing dates and events.
>
> …
>
> In summary, it is submitted that the Chronology addresses commercial issues relating to [the affected party's] manufacturing/retailing operations and contains commercial information regarding the "buying, selling or exchange of merchandise or services"(Order P-493), or information "pertaining or relating to or dealing with commerce" (Order 179, Re Ministry of Health; June 20, 1990).
>
> …
>
> Record 7 (the LCBO's Mediation Brief [Defamation]) contains certain commercial information supplied to the LCBO by [the affected party], primarily in the context of LCBO audits of [the affected party]'s operations and the provision by [the affected party] of mandatory reports to the LCBO concerning its purchases of grape juice, Ontario wine or other Ontario grape product; its transfer of that juice, wine or Ontario grape product and its sales of finished wine at the on-site stores of various … companies.…

In arguing that the information in Records 1, 7 and 8 qualifies as "commercial information", the affected party cites Order PO-1687, in which former Assistant Commissioner Tom Mitchinson dealt with a request for:

> … all information, LCBO deliberations, correspondence or memoranda, as well as the reasons for any decisions made by the LCBO in relation to approvals, authorizations and transfers granted to [a] named winery.

The responsive records in that case related to an application to relocate a winery retail store, and consisted of "… letters and other correspondence, applications, memoranda and other internal documents (including drafts), meeting minutes and handwritten notes." As regards part 1 of the test, the former Assistant Commissioner found that records setting out "… specific details regarding the business operation of the affected party or the business plan of the affected party to

relocate and conduct its business" consisted of commercial information for the purposes of section 17(1).

The affected party further submits:

> Given the strict regulatory framework that governs the commercial activities of those who manufacture liquor, it is perhaps inevitable that disputes which are entirely commercial in nature could arise in this public arena. Indeed, the dispute between [the affected party] and the LCBO, though occurring in a public law context, is in reality, a commercial one. All of the information disclosed by the parties during the Mediation relates to the commercial activities, both manufacture and sale, of [the affected party] and the LCBO, and the LCBO's regulation of those commercial activities. In this way, all of the said information relates to the buying, selling or exchange of products. In Order 179 (Re Ministry of Health), it was held that the concept of commercial information should [be] **construed broadly enough to encompass information "pertaining or relating to or dealing with commerce**" [affected party's emphasis].

The affected party also submits that Records 1, 7 and 8 are "substantially comprised of commercial information", or alternatively, that the commercial information is so intertwined with any non-commercial information that they cannot feasibly be separated.

I am satisfied that parts of Record 1 contain "commercial information". Some of it clearly relates to the buying and selling of goods and services. Other information is similar to that which former Assistant Commissioner Mitchinson found to be "commercial" in Order PO-1687, that is, specific details regarding the business operation of the affected party or the business plan of the affected party, and I am also satisfied that this comprises "financial information" for the purposes of section 17(1). This finding includes parts of Record 1 that relate to the acquisition of business interests, which in my view also qualifies as "financial information". In summary, I find that these categories of information, which comprise part of Record 1, meet part 1 of the test.

For these same reasons, parts of Record 7 also qualify as "commercial" information. Other parts of Record 7 concern a videotape whose contents are alleged to have damaged the affected party's business. I am not able to explain the connection between this video and "commercial information" without revealing the contents of these passages in Record 7, but I am satisfied, based on my independent review, that they also comprise "commercial information".

Although the LCBO did not submit that section 17(1) applies to Record 8, the affected party does make this submission. The affected party describes Record 8 as a "trade opinion" and argues that the following information in it qualifies as "commercial information":

(i) details with respect to [the affected party's] integrated corporate structure, and the distribution of manufacturing and retail responsibilities among its subsidiaries;

(ii) information pertaining to [the affected party's] production facilities and production process, including bottling, crushing, fermentation and ageing operations;

(iii) the operation of retail stores adjacent to [the affected party's] production facilities;

(iv) the productivity of [the affected party's] land and vineyards …

As noted previously, Record 8 is the "Affidavits for Mediation" produced by the LCBO and does not appear to contain a "trade opinion". I have, nevertheless, conducted an independent review of Record 8 to determine whether it contains "commercial information". Similar to my finding about Record 7, I am satisfied that the parts of Record 8 setting out specific details regarding the business operation of the affected party or the business plan of the affected party are "commercial information" and/or "financial information".

Record 6 also contains information about the buying and selling of goods and services, and specific details regarding the business operation of the affected party or the business plan of the affected party, and I also find this to be "commercial information" and/or "financial information".

As well, information relating to the commercial and/or manufacturing practices of other wineries and comparisons of the affected party's approach to commerce with that of the other wineries appears at various places in the records. I find that this also qualifies as "commercial information" and meets part 1 of the test.

The remaining parts of the records do not meet the definitions of "commercial" or "financial" information, nor do they constitute any of the other types of information described in section 17, and these parts therefore do not meet part 1 of the test and cannot be exempt under this section.

To summarize, I find that parts of records 1, 6, 7 and 8 contain "commercial" and/or "financial" information, and these parts therefore meet part 1 of the test.

Part 2: Supplied in confidence

The requirement to show that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third 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].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [Order PO-2043]

Regarding Record 1, the affected party submits:

> The Chronology, which is comprised of commercial information, was prepared by [the affected party] and supplied to the LCBO by [the affected party] in November, 2000, for the purposes of the Mediation. Prior to supplying the information, the parties entered into an explicit written Mediation Agreement to keep the information confidential, which specifically provides that documents produced in the mediation session and not otherwise discoverable would not be disclosed at a later stage in the Litigation, or through any other process. In addition, the Minutes of Settlement are evidence of the intention to maintain that confidentiality…. Thus, at the time it supplied the information, [the affected party] could reasonably expect that it would be kept confidential based on objective, express written provisions.

The LCBO submits:

> With respect to Record l ([the affected party's] Chronology), the information contained in that record was supplied by [the affected party's] legal counsel, … to the LCBO's legal counsel … on or about November 9th, 2000. The information was produced and supplied for use in a confidential mediation between the parties, which was scheduled for November 11 and 12, 2000. The confidentiality

> of the mediation and all materials prepared for use in the mediation was expressly provided for in a written Mediation Agreement….
>
> Record 1 has not been otherwise disclosed by [the affected party] or the LCBO and is not available from sources to which the public has access. Although some of the information referred to in the Chronology was included, in a different format, in materials filed by [the affected party] with the courts during the course of the litigation, the mediation Chronology was never filed or made publicly available. Moreover, the Chronology contained additional details and made a number of acknowledgments not present in [the affected party's] court materials, since the Chronology was prepared specifically for use in a mediation and with a view to settling rather than litigating the dispute between the parties.

I accept and agree with these submissions. Record 1 was prepared by the affected party and provided to the LCBO in the context of the mediation. Parts of it were previously known to the LCBO and possibly to others, but the chronology represents the affected party's understanding of the history of its dispute with the LCBO, and is a unique formulation of that history. I am therefore satisfied that the parts containing commercial and/or financial information were "supplied" to the LCBO. Because the mediation was expressly understood to be confidential, I find that this information was "supplied in confidence", and meets part 2 of the test.

Regarding Record 7, the affected party submits that it reveals or permits the drawing of accurate inferences with respect to information supplied in confidence by the affected party to the LCBO during audits. The affected party further submits that its expectations of confidentiality were implicit and reasonable in that:

> ... any corporate entity would reasonably expect that sensitive information such as audit reports, quality assurance tests, plans for products to be listed with the LCBO, and arrangements with respect to proposed manufacturing and retail facilities, which are contained in manufacturers' files kept by the LCBO, would be kept confidential by that organization. Indeed, any disclosure of such information could deter manufacturers from following the reporting requirements for fear that the information could be obtained by competitors, and thus prejudice the manufacturer in the marketplace.

The affected party also cites the LCBO's resistance to the disclosure of similar information about other wineries during its litigation with the affected party, to the extent of bringing a successful motion to avoid such disclosure. This is cited, in part, as evidence of the LCBO's practice of keeping information of this kind confidential.

As noted previously, Record 7 is a Mediation Brief prepared by the LCBO. Parts of it contain commercial information that was generated by the LCBO, based on its own sales. This information was calculated by the LCBO, and not "supplied" by the affected party, and in that respect, is similar to information at issue in the *Worker's Compensation Board* case, cited above,

in which the Court of Appeal upheld a determination by the IPC that such information was not "supplied". In the present appeal, therefore, I find that this information was not "supplied" to the LCBO and is therefore not exempt under section 17.

Other parts of Record 7 consist of confidential correspondence from the affected party to the LCBO, and replies to that correspondence, and I am satisfied that these parts of the record were either "supplied in confidence" to the LCBO, or would permit accurate inferences to be drawn about information that was supplied in confidence, and I find that these parts meet part 2 of the test.

The LCBO's submissions in relation to Record 7 appear to be in reference to Record 6, as outlined above in my discussion of section 18, and I have already exempted the passages in question in Record 6 under sections 18(1)(c) and (d). Record 6 is a Mediation Brief prepared by the LCBO. Regarding Record 8, which consists of the LCBO's "Affidavits for Mediation", the affected party again makes reference to a "trade opinion" which forms no part of this record. The LCBO makes no section 17 submissions regarding Record 8.

Some parts of Records 6 and 8 containing commercial information relate to licences and authorizations issued by the LCBO, and I find that this information was not "supplied". Given the nature of the information, I am satisfied that the other parts of these records that contain commercial and/or financial information would either reveal information supplied in confidence to the LCBO, or permit the drawing of accurate inferences regarding such information, and I find that these parts meet part 2 of the test.

To summarize, I find that parts of Records 1, 6, 7 and 8 meet part 2 of the test.

Part 3: Harms

Sections 17(1)(a) and (c)

To support its claim of harms under sections 17(1)(a) and (c), the affected party submits:

> The commercial information in the records in question contains many of the keys to [the affected party's] success story, in which competitors would, no doubt, take a keen interest. If this information were disclosed, it could reasonably be expected to suffer probable harm to its distinct position as a viable and profitable self-distributing liquor manufacturer with a competitive advantage in the marketplace.

The affected party makes further submissions about the negative effect of disclosure on its business plans, and refers to Order PO-1687 (which as noted previously, involves LCBO records of a similar nature to those at issue here), quoting the following passage from that order:

The affected party submits that disclosure of the records could interfere with its competitive position in the marketplace. The affected party states:

> If this information is revealed to a competitor, they are able to gain unfair advantage over the audience we target which could have an adverse affect on sales. Furthermore, if sales reduce, we must reduce our overall operation affecting what little employees we have.

The LCBO adds the following in support of this claim:

> The Records disclose business problems encountered by the [affected party], as well as information concerning the [affected party's] proposals for production and marketing plans. Given the nature of this information, it is reasonable to conclude that the disclosure of this information to the [appellant] could prejudice the competitive position of the [affected party] vis-a-vis the [appellant].
>
> Based on my independent review of the contents of the records and the submissions of both the LCBO and the affected party, I find that I have been provided with detailed and convincing evidence describing a set of facts and circumstances that could lead to a reasonable expectation that the harms described in section 17(1)(a) would occur if Records 10, 11, 18, 24, 32, and the third paragraph of Record 19 were disclosed to the appellant.

The affected party makes similar arguments in relation to section 17(1)(c) and in particular submits that disclosure would confer an undue benefit on its competitors, and compromise its expansion plans.

The LCBO adopts the affected party's representations with respect to harms under sections 17(1)(a) and (c).

Based on the affected party's representations and the nature of the commercial and financial information in the records, I am satisfied that disclosure of the information I have found to meet parts 1 and 2 of the test, found in parts of Records 1, 6, 7 and 8, could reasonably be expected to prejudice the affected party's competitive position and/or cause undue loss to it and undue gain to its competitors. I therefore find that this information is exempt under sections 17(1)(a) and (c).

Because I have found that all information that meets parts 1 and 2 of the test is exempt under sections 17(1)a) and (c), it is not necessary for me to consider the harms at section 17(1)(b).

OTHER ISSUES:

Public Interest in Disclosure

In his very brief representations, the appellant states:

> … in the case of sections 17 and 18, we … take the position that the information in the requested records is a matter of public interest since the LCBO is a government-owned monopoly. It is our submission that the public has the right to know about the commercial terms under which the LCBO does business, regardless of whether or not these terms were struck after the litigation, by way of mediation or in the normal course of business.

This appears to be a reference to section 23 of the *Act*, which states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

In this case, the requester is the anonymous client of a law firm. I am not in possession of any information concerning the nature of the appellant's interest in the records, and am unable to determine whether it is an interest of a public or private nature. I note, however, that the records at issue concern the relationship between a private litigant and the LCBO. The nature of the unproven allegations in the litigation, which relate to the business relationship between the LCBO and the affected party, suggests that the threshold of a "public" interest has not been met.

In Order P-241, former Commissioner Tom Wright observed that it would be inappropriate to place an onus on an appellant "who has not had the benefit of reviewing the requested records" to prove the application of section 23, since that onus "could seldom if ever be met by the appellant". In the circumstances, however, I must observe that the appellant's representations in this regard are entirely generic and appear to treat the public interest in the records as self-evident because the LCBO is a "government-owned monopoly". I do not agree with this assertion. I have conducted an independent review of the information I have exempted under sections 17 and 18 to determine whether it "rouses strong interest or attention". In my view, it does not, and therefore no "compelling public interest" has been established.

In any event, even if there were such an interest, it would be outweighed by an even stronger public interest in non-disclosure, particularly with regard to the information exempted under sections 18(1)(c) and (d).

I find that section 23 does not apply.

Personal Information

On my detailed review of the records, it appears that small portions of Records 6, 7, 8 and pages 136-146 of Records 54-58 that are not otherwise exempt may contain the personal information of several individuals. Neither the LCBO nor the affected party have identified this information, nor have they claimed that it is exempt under section 21(1), a mandatory exemption that forbids disclosure of personal information unless one of the exceptions at sections 21(1)(a) through (f) applies. I am not in possession of any information to indicate that any of the exceptions applies. In the circumstances, I will not order disclosure of this information and will highlight it with the exempt material described in the order provisions below. I and will highlight it with the exempt material described in the order provisions below. If the appellant decides to pursue access to this information, I will conduct a further inquiry to determine whether the information qualifies as personal information and if so, whether one of the exceptions in sections 21(1)(a) through (f) applies.

ORDER:

1. I order the LCBO to disclose, in their entirety, Record 9, and pages 1-2, 5-6, 7-9, 10-11, 12-15, 37-38, 54-60, 105, 110-113, 127-130, 132, 133-134, 171-176, 195-207, 209-210, 211 and 233-234 of Records 54-58, and parts of Records 1, 6, 7, 8, 16 and pages 23-27, 67-68, 90-92, 101-102, 106-109, 136-146 and 178-184 of Records 54-58 by sending them to the appellant not later than **August 8, 2005** and not earlier than **August 2, 2005**. For greater certainty, I have highlighted the exempt information Records 1, 6, 7, 8, 16 and pages 23-27, 67-68, 90-92, 101-102, 106-109, 136-146 and 178-184 of Records 54-58 on the copies provided to the LCBO with this order. The highlighted information is **not** to be disclosed.

2. I uphold the LCBO's decision to deny access, in their entirety, to Tab 5 of Record 8, and to Tab 5 of Record 8 and to pages 3-4, 16-17, 18-19, 20-22, 28-31, 32-35, 36, 39, 40-42, 43-44, 45-52, 53, 61-66, 69-71, 72, 73-74, 75, 76-77, 78, 79-82, 83-84, 85-89, 93, 94-99, 100, 103-104, 114-116, 117-118, 119-120, 121-123, 124-125, 126, 131, 135, 147-162, 163-167, 168-169, 170, 177, 185-191, 192-193, 194, 208, 212-213, 214-227, 228-230, 231-232 and 235-241 of Records 54-58, and to the portions of Records 1, 6, 7, 8 and 16, and of pages 23-27, 67-68, 90-92, 101-102, 106-109, 136-146 and 178-184 of Records 54-58, that are highlighted on the copies provided to the LCBO with this order.

3. If the appellant wishes to pursue access to the information that may be personal information in Records 6, 7, 8 and pages 136-146 of Records 54-58, the appellant must so advise me in writing by **August 30, 2005**. I remain seized of this matter to deal with those parts of the records, which are separately highlighted in the copies of these records provided to the LCBO with this order.

4. To verify compliance with this order, I reserve the right to require the LCBO to provide me with a copy of the records disclosed pursuant to order provision 1, above.

Original signed by: June 30, 2005
John Higgins
Senior Adjudicator