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

Reconsideration Order PO-2538-R

Appeal PA-020092-1

Order PO-2405

Liquor Control Board of Ontario

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BACKGROUND:

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.

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. It moved on to the adjudication stage, which took the form of an inquiry under the *Act*. This office initiated the inquiry by sending a Notice of Inquiry to the LCBO and the affected party, outlining the issues and inviting their written representations. Both the LCBO and the affected party responded with representations. This office later invited the LCBO and the affected party to provide supplementary representations on the possible impact of Order PO-2112, which dealt with related issues. 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. The appellant provided brief representations in response.

I then concluded the initial inquiry by issuing Order PO-2405, in which I considered the possible application of a number of exemptions, including section 19. The main issue in relation to section 19 is whether it applies to records that are subject to settlement privilege. I found that it does not. Nevertheless, some records for which the LCBO claimed section 19 were protected by common law solicitor-client communication privilege, and exempt under section 19 on that basis. I also found that parts of certain records were exempt under sections 17(1)(a) and (c), and others under sections 18(1)(c) and (d). I found that the public interest override at section 23 does not apply. I also concluded that certain information in the records was personal information, although the LCBO had not made this claim, and I decided not to disclose it pending a decision by the appellant as to whether he wishes to have access to it. If the appellant wished access to the information I identified as personal, Order PO-2405 indicates that a further inquiry would be necessary to determine whether it falls under the personal privacy exemption found at section 21(1) of the *Act*. The appellant did not indicate, in response to the order, that he wishes access to any personal information in the records. As regards the records and portions that I found not to be exempt, I ordered them disclosed.

Both the LCBO and the affected party submitted reconsideration requests in relation to the order provision requiring disclosure, in relation to particular records, and provided detailed representations and authorities. Both the LCBO and the affected party requested that I stay the order, in relation to the records for which they requested reconsideration. I granted a stay of the order provision for all of the records ordered disclosed in full or in part except for the records that the LBCO indicated it would disclose.

RECORDS:

The following table lists the records that are subject to the reconsideration requests, as earlier described in the schedule provided by the LCBO. The LCBO has provided the other records ordered disclosed in Order PO-2405 to the appellant.

Record Number	Description	Notes
1	Chronology of [affected party] and LCBO Events	Reconsideration request relates to portions ordered disclosed
6	[Affected party] and LCBO and LLBO and [affected party] et al. and LCBO – Mediation Brief of the Respondent/Defendant LCBO	"
7	[Affected party] and LCBO – Mediation Brief of the LCBO (Defamation)	"
8	[Affected party] and LCBO and LLBO – Affidavits for Mediation	"
16	Minutes of Settlement	"
54-58	Documents relating to implementation of mediated settlement (comprising various documents totalling 241 pages).	Reconsideration request relates to all pages ordered disclosed in full or in part, except pages 1-2, 5-9, 12-15, 54-60, 127-130, 132-134, 171-176, 196-207, 209-210 and 211 of Records 54-58.

DISCUSSION:

THE RECONSIDERATION PROCESS

Section 18 of the IPC's *Code of Procedure* (the *Code*) sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code* state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:

(a) a fundamental defect in the adjudication process;

(b) some other jurisdictional defect in the decision; or

(c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

GROUNDS FOR THE RECONSIDERATION REQUESTS

Inconsistent Severances

One of the grounds advanced by the LCBO for its reconsideration request is that the severances mandated in Order PO-2405 are inconsistent with other information ordered disclosed. In my view, this is a valid basis for reconsideration under section 18.01(c) of the *Code*. The LCBO is correct that Order PO-2405, combined with the highlighted records I sent to them with it, requires disclosure of a small amount of information in Record 16 and in the records described as pages 37-38, 90-91, 101-102, 106-107 and 195 of Records 54-58 that would be inconsistent with other severances I upheld under sections 18(1)(c) and (d) of the *Act*. This was an inadvertent omission on my part. It constitutes an accidental error within the meaning of section 18.01(c), and should properly be corrected in this reconsideration. I therefore find this additional information to be exempt under sections 18(1)(c) and (d) and it should not be disclosed. I will provide a copy of these records to the LCBO showing the additional severances.

Other Grounds

The LCBO submits that Order PO-2405 should be reconsidered on the following further grounds:

(1) Recent decisions of the Ontario courts point to a different conclusion about settlement privilege and common law litigation privilege than the one reached in the order, and the Commissioner has previously reconsidered decisions in this situation (an apparent reference to the ground identified by section 18(1)(c) of the *Code*);

(2) My decision under section 19 rests on "factual misapprehensions about the nature of the mediation, the litigation process and the actions being mediated in this case", and this constitutes a fundamental defect in the adjudication process and an "omission" within the meaning of sections 18.01 (a) and (c) of the *Code*;

(3) My comments about "asymmetrical protection" under branch 2 of section 19 are in error and should be reconsidered under section 18.01(c) of the *Code;*

(4) Pages 136-146 of Records 54-58 contain more personal information than was identified in the order and this is an "omission" within the meaning of section 18.01(c) of the *Code*;

(5) Additional information should have been severed from Record 16, and from a number of pages within Records 54-58 under sections 18(1)(c) and (d), and again, this is an "omission" within the meaning of section 18.01(c) of the *Code*.

The LCBO provided an affidavit (the "affidavit") sworn by its Senior Vice President, General Counsel and Corporate Secretary which addresses item (2), above, as well as a number of its other arguments on the reconsideration.

The affected party makes the same submission as that set out at item (2), above, and adopts the LCBO's submissions concerning Record 16 in item (5), above. The affected party goes on to submit that the order should be reconsidered on the following further grounds:

(6) The decision to require disclosure of parts of Record 7 is in error because the passages should be exempt under section 19, and this error should be reconsidered under section 18.01(c) of the *Code*;

(7) To the extent that the decision relies on the settlement being complete, it rests on a factual error and should be reconsidered, again under section 18.01(c) of the *Code*;

(8) The order compels the LCBO to breach confidentiality provisions in the mediation agreement and the Commissioner has no jurisdiction to make an order having that result, and this constitutes an error under section 18.01(b) of the *Code*.

The LCBO also makes submissions, which the affected party adopts, in support of a broad interpretation of the power to reconsider.

I will address each of the grounds advanced by the LCBO and the affected party in turn. I will begin with the scope of the reconsideration power, as that impacts other arguments presented by the LCBO and the affected party in their reconsideration requests.

SCOPE OF THE POWER TO RECONSIDER

The LCBO cites *Chandler v. Alberta Assn. of Architects* (1989), 62 D.L.R. (4th) 577 (S.C.C.), one of the leading authorities on the law of *functus officio* and reconsiderations. The LCBO quotes the following passage from the judgment of Justice Sopinka:

> As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal changes its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the

> exceptions enunciated in Paper Machinery Ltd v Ross Engineering Corp., supra [[1934] S.C.R. 186].
>
> **To this extent, the principle of *functus officio* applies. It is based however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a Court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.** [LCBO's emphasis.]

I note that in *Chandler*, Justice Sopinka, for the majority, states that it is "necessary to consider (a) whether [the tribunal] had made a final decision, and (b), whether it was, therefore, *functus officio*." In this case, it is clear that Order PO-2405 was a final disposition of the issues before me. Justice Sopinka also comments, just before the passage quoted by the LCBO, that "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals."

The following passage from *Chandler*, which immediately follows the quotation provided by the LCBO in its representations, contains the following qualification on the principle of "flexibility" that is highly relevant in this case:

> Accordingly, *the principle* [of *functus officio*] *should not be strictly applied where there are indications in the enabling statute that a decision can be reopened* in order to enable the tribunal to discharge the function committed to it by enabling legislation. …
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. [Emphasis added.]

Chandler goes on to find that because the tribunal was mistaken as to which power it was exercising, and what its authority was, it had not fully exercised its statutory powers and therefore had not "used up" its jurisdiction. The LCBO does not argue that this is the case here; in Order PO-2405, it is clear that I fully exercised the authority granted to the Commissioner under section 54(1) of the *Act*, which states:

> After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

As well, the *Act* confers no express reconsideration power on the Commissioner. For this reason, in my view, the principle of "flexibility" ought to be exercised with caution in relation to decisions made under a delegated authority from the Commissioner.

In my view, with two exceptions, the approach taken in *Chandler* does not provide a basis for reconsidering Order PO-2405. One exception is the decision I have already made with respect to my failure to order severance of several passages. In my view, that qualifies as an error in carrying out the manifest intention of Order PO-2405, which is one of the exceptions to the *functus officio* doctrine recognized in *Chandler*. The other is item (8), above, which raises an issue that potentially goes to the Commissioner's jurisdiction. I will discuss this further below.

In support of its arguments that Order PO-2405 contains errors that should be corrected on reconsideration, the LCBO cites another well-known authority on this point, *Grier v. Metro Toronto Trucks Ltd.* (1996), 28 O.R. (3d) 67 (Div. Ct.). In that case, "the parties accidentally placed before [the adjudicator] an important fact which was incorrect." A business had ceased operations on September 19, 1992 and its successor began operations on September 21, 1992. The matter before the adjudicator was entitlement to vacation pay. In an agreed statement of facts, the date that the successor began operations was incorrectly cited as September 21, 1993, *i.e.*, one year later than the actual date. The adjudicator had considered whether the employees had resumed employment with the new operator of the business "within a reasonable time" after the prior owner ceased operations. The Court found that, as a result of a highly relevant error *by the parties*, the decision was a nullity and the adjudicator was therefore not *functus officio*. The Court states:

> In the present case, the parties made a mistake. The mistake influenced the decision of the referee. I can see no compelling reason for concluding that the mistake should not be corrected and the matter placed back before the referee for a new decision which would be untainted by reliance on the incorrect fact.
>
> In conclusion, the flexibility in the application of the principle of *functus officio* articulated by Sopinka J. in *Chandler* permits a just resolution of the issues raised on this application. The parties are entitled to a decision on the merits based on a full and accurate statement of the facts.

With respect to Order PO-2405, the parties requesting reconsideration do not allege that *they* made an error; rather, they argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect. This is, in essence, the argument put forward by the parties with respect to the following: the nature of the mediation; the fact that I did not make a broader finding that some of the information in one of the records was personal information (which was an independent finding of my own, on an issue that had never been raised before me at all); and the fact that I did not find certain information to be exempt under sections 18(1)(c) and (d). It is also the basis of the affected party's argument about whether the dispute is finally settled. In my view, these arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code of Procedure*, which are based on the common law set out in *Chandler* and other leading cases such as *Grier*.

On the contrary, I conclude that these grounds for reconsideration amount to no more than a disagreement with my decision, and an attempt to re-litigate these issues to obtain a decision

more agreeable to the LCBO and the affected party. This conclusion is reinforced by a review of the grounds summarized above as items (1) through (7). As Justice Sopinka comments in *Chandler*, "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.

With respect to the first ground (*i.e.*, item (1), above), the LCBO submits that "[r]econsideration has also been recognized by the IPC to be appropriate in cases where relevant and significant jurisprudence was released after the issuance of the IPC's decision, or after the completion of submissions by the parties." In support of this submission, the LCBO cites a reconsideration of Order PO-2006 mentioned in the Divisional Court judgment on the judicial review of that order (reported at *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 66 O.R. (3d) 692 (Div. Ct.), aff'd [2005] O.J. No. 1426 (C.A.)). In that case, a request to reconsider Order PO-2006 had been submitted by one of the parties shortly after Order PO-2006 was issued, on the basis of another decision by the Divisional Court concerning the very exemption in the *Act* that had been considered in the order.

For the reasons that follow, I do not find this to be a persuasive rationale for considering additional case law in the circumstances of the present reconsideration. The reconsideration decision on Order PO-2006 in fact rejected the argument based on the newly presented Divisional Court judgment, so it does not provide a precedent for granting a reconsideration request because of new or overlooked case law. I also note that other completely distinct issues were raised on the reconsideration of Order PO-2006, one of which was accepted as a basis for changing the order. The reconsideration of Order PO-2006 is further distinguishable on the facts because, unlike the Divisional Court judgment in that case, the further authorities cited by the LCBO in the present case do *not* deal with the interpretation of the *Act*. As well, some of the authorities cited by the LCBO in the present reconsideration were, in fact, issued before Order PO-2405, and even prior to the final representations provided to me by the LCBO and the affected party, and these should have been addressed in earlier submissions if they were to be relied upon. As with the other grounds reviewed above, this argument is part of an attempt to broadly re-argue the case. In my view, it is not supported by the law governing reconsiderations and must yield to the principle of the finality of litigation referred to by Justice Sopinka in the passage quoted above.

Accordingly, I find that as regards grounds (1) through (7), above, I am *functus officio* and not in a position to reconsider the order. For the sake of completeness, and because the LCBO and the affected party have gone to considerable effort to explain their basis for disagreeing with my decision, I will nevertheless review their arguments, below.

The only remaining issue that may fit within the grounds in section 18.01 of the *Code of Procedure* is the one mentioned in item (8) above, raised by the affected party, to the effect that an order requiring the LCBO to breach a confidentiality undertaking it gave in the mediation agreement is outside my jurisdiction. If this argument is valid, this ground might qualify under section 18.01(b) of the *Code*. In that regard, I note that the LCBO cites Order MO-1200-R as a basis for reconsidering an order to correct an error. This is part of the LCBO's general argument that all of the grounds it raises should result in reconsideration. What the LCBO fails to note is

the fact that, in Order MO-1200-R, other orders declining to reconsider on the basis of new evidence or other alleged errors are distinguished because the error that occurred in Order MO-1200-R went to the Commissioner's jurisdiction. For that reason, Order MO-1200-R said that "different considerations must apply". In this case, only item (8) raises the issue of the Commissioner's jurisdiction, and I will therefore consider it below. The rationale in Order MO-1200-R does not apply to items (1) through (7).

Before leaving this aspect of my analysis, it is necessary to assess the treatment to be given to the affidavit provided by the LCBO, mentioned above. It contains fresh evidence and arguments intended to support the LCBO's reconsideration request. Again, in my view, this is an attempt to re-litigate the issues that I have already decided. As with items (1) through (7), some of which it addresses, the affidavit therefore provides no basis for a reconsideration in this case. For the same reasons given with respect to those items, however, I have reviewed this additional information and taken it into account in the analysis below.

SETTLEMENT PRIVILEGE AND COMMON LAW LITIGATION PRIVILEGE – THE SCOPE OF BRANCH 1 OF THE SECTION 19 EXEMPTION

When this request was submitted, section 19 of the *Act* stated:

> 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.

Branch 1 of the exemption arises from the first part of the section, and in particular, applies to "a record that is subject to solicitor-client privilege". Branch 2, discussed later in this order, arises from the remainder of the section.

"Solicitor-Client Privilege" and Common Law Litigation Privilege under Branch 1

The LCBO and the affected party both submit that case law not considered in Order PO-2405 provides grounds for finding that common law litigation privilege encompasses settlement privilege and thus forms part of branch 1 of the exemption. This argument assumes that litigation privilege is itself part of "solicitor-client privilege". I addressed this issue in Orders PO-2483 and PO-2484, and observed in both orders that it was no longer tenable to take that approach. Order PO-2484 is subject to an application for judicial review on other grounds (Tor. Doc. 394/06, Div. Ct.). Order PO-2483 remains unchallenged.

Both Orders PO-2483 and PO-2484 dealt with the question of the application of common law solicitor-client communication privilege to information about the amount of legal fees paid in relation to particular matters. The potential application of common law litigation privilege to this information was not at issue in either case. The discussion of whether litigation privilege is part of common law "solicitor-client privilege" was part of an attempt to restate the general parameters of section 19 and to apply relevant decisions of the Divisional Court and the Court of Appeal to this question. In this regard, I stated as follows in Order PO-2483:

Branch 1 derives from the first part of section 19, which permits the Ministry to refuse to disclose "a record that is subject to solicitor-client privilege". Previous orders of this office have described this branch as encompassing both solicitor-client privilege and litigation privilege. This approach is no longer viable.

The first direct indication that it might not be correct for this agency to continue to include litigation privilege within the ambit of "solicitor-client privilege" came in *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 31 ([referred to in Order PO-2483 as] "*Attorney General # 2*"). Justice Carthy, writing for the Court, stated (at paras. 10-11):

> The distinctions between the two types of privilege were thoroughly canvassed in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, 180 D.L.R. (4th) 241 (C.A.)….
>
> …
>
> What is clear now, but perhaps [was] not so clear in 1987 [when the *Act* was under consideration by the Legislature], is that the two privileges are distinct and separate in purpose, function and duration. Solicitor and client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation.

Justice Carthy goes on to indicate that the words of branch 2 encompass "… the work product or litigation privilege which covers material going beyond solicitor-client confidences …" (para.12)

Referring to Justice Cathy's decision, in the *2005 Annotated Ontario Freedom of Information and Protection of Privacy Acts* by Colin H.H. McNairn and Christopher D. Woodbury (Toronto: Carswell, 2004) the authors comment as follows (at p. 166):

> … it would seem that the term "solicitor-client privilege" in the first part of section 19 should now be taken to embrace only solicitor-client communication privilege … but not litigation privilege …, a form of which is covered by the second part of section 19; see, particularly, [*Attorney General # 2*].

The views expressed by Justice Carthy in *Attorney General # 2* are further developed in *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) ("*Attorney General # 3*"). Justice Lane (writing for the Court) described section 19 as follows:

This section is generally regarded as having two branches: the first is the exemption for documents covered by the well-known solicitor-client privilege; the second is the exemption created by all words following "privilege" and is similar to the common law "litigation privilege" protecting "solicitor's work product" or the "solicitor's brief". [para. 4]

[T]he second branch of section 19 is not the source of litigation or "work product" privilege in the Crown brief. Litigation privilege grew out of solicitor-client privilege, but has a different policy justification. It is not related to the confidences between solicitor and client, but to the needs of the adversary system. Counsel must be free to make full and timely investigations, including obtaining information from third parties, statements from witnesses, and the like, without having to share the results with the opponent. Crown counsel's litigation brief enjoys the protection of this common law litigation privilege, subject to the over-riding constitutional obligation to make disclosure to the accused imposed by *Stinchcombe*. … [para. 26]

It is clear from [*Attorney General # 2*] that the second branch of section 19, unlike the first, does not simply import the common law into FIPPA. The second branch does not even refer to the common law litigation privilege. This point was made by Carnwath J., for the Divisional Court, in [*Attorney General # 2*, cited as *Ontario (Attorney General) v. Big Canoe*, (2001) 208 D.L.R. (4th) 327 (Div. Ct.)] at paragraphs 31 and 32, where he said that while the extent of solicitor-client privilege in the first branch would vary as the common law evolved, the second branch was fixed by the words of the section. The language was clear and unambiguous: the head may refuse to disclose a record prepared as described in the statute. … [para. 27]

In my view, this comment shows that Carthy J.A. agreed that the second branch was not an importation of common law litigation privilege, but an enactment in its own right. His subsequent finding that, unlike litigation privilege, the statutory exemption did not terminate when the litigation terminated, is consistent with this view. [para. 28]

The decision of the Court of Appeal in [*Attorney General # 2*] was informed by a particular piece of legislative history, which the court concluded demonstrated that the intent of the legislation was that the branch 2 exemption should be permanent, as solicitor-

> client privilege is, and not die with the litigation as is the case with common-law litigation privilege. … [para. 29]
>
> …[W]e must not commit the error of assuming that, because the documents described in the second branch would be privileged as work product at common law, all the law of litigation privilege applies … [para. 30]
>
> *If the statute does not import the common law of litigation privilege, what does it do? In my view, it creates, for FIPPA purposes only, an exemption: a statutory discretionary power* in the head to withhold a certain class of document. … While, as noted earlier, this exemption is similar to the common law litigation privilege, they are not identical in origin, content or purpose. The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the section 19 exemption exists to protect the Crown brief and its sensitive contents from disclosure to the general public by a simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. … [para. 37, emphasis added.]

In my view, following the comments of the Ontario Court of Appeal in *Attorney General # 2* and, in particular, the further explanation and commentary by the Divisional Court in *Attorney General # 3*, it is no longer tenable to treat branch 1 as including not only common law "solicitor-client privilege" (sometimes also called "solicitor-client communication privilege"), as it clearly does, but also common law litigation privilege.

Accordingly, I have concluded that branch 1 must be treated as encompassing only solicitor-client privilege at common law, and *not* litigation privilege.

If this interpretation were correct, then the question of whether settlement privilege is part of common law litigation privilege would be moot, since even a positive answer to this question would not bring it within branch 1 of section 19.

However, as the result of two decisions of the Supreme Court of Canada, I have concluded that my statement that litigation privilege is not included in branch 1 was an error and this agency's long-standing approach of including it in branch 1 should remain.

In *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39), the Court addressed this question in the context of section 23 of Canada's federal *Access to Information Act*. This section states:

> The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

Fish J., writing for the majority, stated (at paras. 1-4):

> This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the solicitor-client privilege and the litigation privilege. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.
>
> More particularly, we are concerned in this case with the litigation privilege, with how it is born and when it must be laid to rest. And we need to consider that issue in the narrow context of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), but with prudent regard for its broader implications on the conduct of legal proceedings generally.
>
> This case has proceeded throughout on the basis that "solicitor-client privilege" was intended, in s. 23 of the *Access Act*, to include the litigation privilege which is not elsewhere mentioned in the *Act*. Both parties and the judges below have all assumed that it does.
>
> As a matter of statutory interpretation, I would proceed on the same basis. The *Act* was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the *Act*. And it explains as well why, despite the *Act*'s silence in this regard, I agree with the parties and the courts below that the *Access Act* has not deprived the government of the protection previously afforded to it by the legal advice privilege and the litigation privilege: In interpreting and applying the *Act*, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

In separate concurring reasons, Bastarache J. made the same point even more emphatically (at paras. 70-71):

> … my view is that the two-branches approach to solicitor-client privilege should subsist, even accepting that solicitor-client privilege and litigation privilege have distinct rationales. The Advocates' Society, intervener, suggests at para. 2 of its factum that:
>
> > At an overarching level, litigation privilege and legal advice privilege share a common purpose: they both serve the goal of the effective administration of justice. Litigation privilege does so by

> ensuring privacy to litigants against their opponents in preparing their cases for trial, while legal advice privilege does so by ensuring that individuals have the professional assistance required to interact effectively with the legal system.
>
> Reading litigation privilege into s. 23 of the *Access Act* is the better approach because, in fact, litigation privilege has always been considered a branch of solicitor-client privilege. As the reasons of my colleague acknowledge, at para. 31, "[t]hough conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation."

Although section 23 of the *Access to Information Act* differs from section 19 of the *Act* because of the presence of branch 2 in the latter (applying to "records prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation"), and Justice Carthy essentially equates litigation privilege with branch 2 in the reasons quoted above from "*Attorney General # 2*", suggesting that it might not be necessary to follow *Blank* in order to protect litigation-privileged records, I have concluded that these factors do not provide a sufficient basis to depart from the clear guidance provided here by the Supreme Court of Canada in both the majority and concurring reasons. As well, the Supreme Court has essentially affirmed this approach in relation to section 19 of the *Act* in *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.J. No. 31:

> Section 19 recognizes these common law privileges: solicitor-client communication privilege and litigation privilege.

Accordingly, in my view, branch 1 encompasses both common law solicitor-client privilege and litigation privilege.

Settlement Privilege

Both the LCBO and the affected party urge an interpretation that would add a third type of privilege to the meaning of "solicitor-client privilege" in branch 1, namely, settlement privilege. In my view, it is to be noted that the Supreme Court of Canada does not mention settlement privilege in its description of the common law privileges encompassed within the phrase "solicitor-client privilege" in the context of the *Act* (*Goodis*) or the federal *Access to Information Act* (*Blank)*, nor is there any indication that it was considered to be part of solicitor-client privilege when the *Act* came into force in 1988.

The LCBO refers to two cases that were not addressed in Order PO-2405, namely *Kennedy v. Mackenzie*, [2005] O.J. No. 2060 (S.C.J.) and *Bard v. Longevity Acrylics Inc.*, [2002] O.J. No. 1373 (S.C.J.).

In *Kennedy v. Mackenzie*, the question was whether litigation privilege in a statement from one of the parties, obtained by an insurance adjuster, had been lost by the inadvertent disclosure of the statement to opposing counsel. In assessing the scope of litigation privilege, the Court expressed concern about "exposing investigatory steps taken by counsel, their research strategies or their opinions, thought processes and conclusions about their strengths and weaknesses in terms of settlement discussions, negotiation tactics and litigation strategies".

In my view, this concern is aimed at protecting the "zone of privacy" that is central to the purpose of litigation privilege. It does not support a conclusion that settlement privilege is part of litigation privilege at common law. Confidential strategies for conducting the litigation, and for its possible settlement, are distinct from information that a party actually discloses in the context of mediation or settlement negotiations. Only the latter type of information is at issue in the present appeal and in my view, once disclosed, it is no longer subject to litigation privilege. As noted in Order PO-2405, the rationale for the two types of privileges is very different:

> …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.
>
> …
>
> 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.

The second case cited by the LCBO, *Bard v. Longevity Acrylics*, deals with the very different question of whether matters discussed during settlement negotiations could be introduced in evidence at trial. The Court re-iterates the policy rationale for settlement privilege, namely that parties should be encouraged to settle their disputes without resort to litigation, and indicates that settlement privilege should be carefully protected whether the negotiations are in the context of a pre-trial, settlement conference or mediation. Again, this does not expressly address the question of whether settlement privilege should be part of litigation privilege at common law.

The affected party's arguments, both in the inquiry that preceded the issuance of Order PO-2405 and in support of its reconsideration request, are to a similar effect. In connection with the reconsideration request, the affected party submits:

> Parties would be discouraged from revealing the type of information that is fundamental to the success of a mediation without assurance that it will not

> disclosed or used against them in the future. Thus, protection of the confidentiality of such information provides procedural protection to our adversarial system of justice.

As extensively canvassed in Order PO-2405, I appreciate the public policy importance of encouraging negotiated settlements, but I am nevertheless of the view that the modern rule of statutory interpretation, which encompasses policy-based considerations, does not favour the inclusion of settlement privilege in branch 1 of section 19 of the *Act*.

In effect, absent any compelling case law to support the conclusion that settlement privilege is part of common law litigation privilege, the policy-based argument put forth by the LCBO and the affected party asks me to read settlement privilege into branch 1. In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507, the Court of Appeal reversed an interpretation of section 65(6)3 of the *Act* that purportedly "imported" the word "legal" into the phrase, "has an interest". The Court stated that "[t]o import the word 'legal' into the subclause when it does not appear, introduces a concept there is no indication the legislature intended." In my view, reading in "settlement privilege" to branch 1 would be similarly inappropriate. The legislature could have included this phrase in the exemption, but chose not to. As noted in Order PO-2405:

> 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.

In Order 01-06, British Columbia Information and Privacy Commissioner David Loukidelis addressed a similar policy-based argument to the effect that settlement privilege should be seen as included in section 14 of that province's *Freedom of Information and Protection of Privacy Act*, which creates an exemption for information that is subject to solicitor-client privilege. He stated:

> … My authority to authorize or require a public body to refuse access is statutory. It is not open to me to read an exception to the right of access into a section of the Act or to create an exception. As Assistant Commissioner Mitchinson put it, in Order PO-1732-F, […], at para. 61, the Act "contains an exhaustive list of the exemptions which are available to an institution should it wish to deny access to a particular record." It would, in my view, be an error for me to interpret s. 14 as incorporating 'settlement privilege'.

In my view, the issue of negotiations was canvassed by the Williams Commission and addressed in sections 17(1)(a) and 18(1)(e), and if the Legislature had intended to include settlement privilege in branch 1 of section 19, it would have said so.

Accordingly, even if this were a valid ground for reconsideration, I would not change the decision in Order PO-2405 on this basis.

ALLEGED FACTUAL MISAPPREHENSION OF THE NATURE OF THE MEDIATION

This aspect of the LCBO's and affected party's arguments relates to the claim that branch 2 of section 19 should apply because the records were prepared by or for Crown counsel in contemplation of, or for use in, litigation.

Branch 2 arises from the second part of section 19, which entitles a head to refuse to disclose a record "… that was prepared by or for Crown counsel for used in giving legal advice or in contemplation of or for use in litigation."

The LCBO submits as follows:

> In rejecting the argument that the mediation in the present case was an integral part of the litigation process and that the materials used in the mediation were prepared for use in litigation, Order PO-2405 summarizes the facts and arguments relied upon by the LCBO as follows (at page 21):
>
> 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.
>
> It is submitted that the above summary of the LCBO's position reflects a factual misapprehension about the nature of the litigation and mediation in the present case. In addition, it appears that the LCBO's submission that many of the mediation materials were prepared for later use in the litigation was rejected on the basis that there was insufficient evidence of that intention. The summary of the facts relied upon in Order PO-2405 fails to note or appreciate the significance

of the following facts, which were contained in the LCBO's original and supplementary submissions:

- Two of the proceedings being mediated (the main … defamation action and one of the LCBO's defamation actions) were subject to Case Management and, as such, were also subject to mandatory mediation under Rule 24.1 of the Rules of Civil Procedure. Those Rules treat mediation as an integral part of the litigation process. They require the parties in case managed actions to participate in a mediation with a mediator appointed by the Court or selected by the parties. The Rules also impose detailed requirements regarding the timing of the mediation, the procedure to be followed before the mediation session and attendance at the session.

- The Rules also provide for further, consensual mediation where an initial mediation has occurred and the parties agree to a further mediation session. As noted in the LCBO's initial submissions, that occurred in the present case, in relation to [the] defamation action. That action was case managed and had already been the subject of an unsuccessful mandatory mediation. The parties subsequently agreed to a further mediation of the defamation action, together with the other outstanding proceedings. It was not necessary to secure a court order in relation to it, since both parties agreed to the mediation and since doing so would likely have been cumbersome due to the fact that several proceedings (some case managed and others not) were being mediated at the same time.

- Although not ordered by the court, the second mediation clearly was treated as part of the litigation process by both the parties and the court. For example, the case management master in the defamation action … required regular written updates from the parties on the status of the mediation and the implementation of the settlement. The mediation was dealt with by [the case management master] as one of the aspects of the defamation action which required case management.

- The Rules expressly provide that "All communications at a mediation and the mediator's notes and records shall be deemed to be without prejudice settlement discussions". The parties in the present case entered into a mediation agreement which contained similar confidentiality provisions.

It is submitted that the above facts support a conclusion that the s. 19 exemption applies to the records in question because:

(a) at least in the context of this case, the mediation was a part of the litigation process, so that all records prepared for use in the mediation qualify as records prepared by Crown counsel for use in litigation; and

> (b) in any event, the records used in the mediation were prepared for use in other stages of the litigation and were therefore records prepared by or for Crown counsel for use in litigation.

The LCBO seeks to advance its argument that the mediation in this case was an "integral" part of the litigation process, and therefore materials prepared for it were "for use in" litigation, by citing *Rogacki v. Belz* (2003), 67 O.R. (3d) 330 (C.A.). As the LCBO points out, the issue in that case was whether breaching a confidentiality provision in a mediation agreement was grounds for finding a party in contempt of court, and the Court of Appeal decided that it was not.

In its submissions on *Rogacki*, the LCBO makes particular reference to the concurring reasons of Abella J.A. (as she then was), and in particular, her comment that "[m]andatory mediation is a compulsory part of the court's process for resolving disputes in civil litigation." I note, however, that she also acknowledges that "[i]t is true that the purpose of mandatory mediation is *to settle disputes outside of the court's process* and, as in discovery, it is not conducted by a judge." [Emphasis added.] As well, in my view, the conclusion in *Rogacki* that the Court's contempt powers could not be invoked to enforce a confidentiality clause in a mediation agreement supports the view that even a mandatory mediation is separate from the conduct of the litigation itself.

In similar representations on this point, the affected party submits that "… the Mediation, indeed all such mediations, are an integral part of the litigation process…," and constitutes a "step" in litigation proceedings.

I have considered these arguments and I am still not satisfied that the actual mediation that took place in this case was anything but voluntary. With respect to my alleged "factual misapprehension" in this regard, I note that the LCBO's initial submissions in this appeal state as follows:

> After an unsuccessful mandatory mediation of [the affected party's] defamation action and another unsuccessful attempt to informally resolve the outstanding proceedings, the LCBO and [the affected party] *agreed to participate* in a mediation…. [Emphasis added.]

The affected party's initial submissions refer to the Mediation Agreement governing the mediation that was undertaken. This document was a record at issue in this appeal. It sets out the terms of the mediation, and was disclosed pursuant to Order PO-2405. It confirms that "[t]he parties have *agreed to participate* in a mediation session…." [Emphasis added.] The affected party's supplementary submissions, provided to me prior to the issuance of Order PO-2405, state that "… the mediation at issue in the present case *was voluntarily initiated by the parties*." [Emphasis added.]

The LCBO's supplementary representations, also provided to me prior to the issuance of Order PO-2405, do refer to case management in the context of the cases being mediated, but also indicate that the mediation was *not* mandated by court order:

> Two of those proceedings … were subject to Case Management, and, as such, were also subject to mandatory mediation under Rule 24.1 of the Rules of Civil Procedure.
>
> …
>
> … *Although not ordered by the court*, the second mediation clearly was treated as part of the litigation process by both the parties and the court. [Emphasis added.]

I have also reviewed the representations and affidavit provided by the LCBO in relation to the reconsideration request, the affected party's representations in that same context, and the provisions of Rule 24.1 of the Rules of Civil Procedure. In its reconsideration request, as noted above, the LCBO concedes that in this case the mediation was not conducted pursuant to an order because "both parties agreed to the mediation," and it would have been cumbersome to obtain an order where some of the cases being mediated were subject to case management and others were not.

In view of all the evidence and argument provided to me both before and after the issuance of Order PO-2405, as outlined above, I see no reason to alter my conclusion that the mediation was voluntary. In my view, that is a justifiable interpretation of the facts.

In any event, and more importantly, the question of whether the mediation was voluntary is not determinative of the issue of whether the records were prepared by or for Crown counsel in contemplation of or for use in litigation. Given the different nature of settlement discussions and litigation, as extensively canvassed in Order PO-2405, and adverted to by Abella J.A. in her reasons in the *Rogacki* case referred to above, I am of the view that materials produced for mediation purposes, whether mandatory or otherwise, are not "prepared by or for Crown counsel … in contemplation of or for use in litigation" under branch 2 of the section 19 exemption. As well, I see no reason to alter my conclusion that these records were not produced for the "dominant purpose" of litigation, as required for the application of common law litigation privilege. There is no "zone of privacy" rationale for finding them subject to that type of privilege since, as noted in Order PO-2405 and quoted earlier in this reconsideration order, settlement discussions are more akin to a "zone of disclosure".

The LCBO also submits that the records could have been used at a later stage in the litigation if the settlement discussions had failed, and on this basis, asks me to reconsider my finding in Order PO-2405 that this did not provide a basis for concluding that the records were prepared "for use in" litigation, because the LCBO submits that this was an error that could be corrected on reconsideration. In its representations prior to Order PO-2405, the LCBO made this argument about Records 6, 7, part of Record 8, and Records 54-58. Again, I am not persuaded that my conclusion was in error. The immediate purpose of the records was the mediation. Possible use

in the litigation, which would have required at least some of the materials to be re-cast in a new form, was at best a secondary purpose. It is clear that the mediation briefs (Records 6 and 7) would not be used in any ensuing litigation in that form. The LCBO itself concedes (in the affidavit provided with its reconsideration request) that the part of record 8 for which it makes this claim would need to be altered before being used in any ensuing litigation. Records 54-58 consist of post-settlement documents and correspondence, and the manner in which they could be re-used in litigation is never explained. On these facts, I am simply not satisfied that the possibility of later re-use of some of the information in the records is a sufficient basis for a finding that they were prepared in contemplation of or for use in litigation.

In summary, the evidence and argument presented do not, in my view, support a finding that the conclusions reached in Order PO-2405 are based on an error or omission, accidental or otherwise.

I have therefore concluded that, even if this argument met the grounds for reconsideration, I would not uphold it.

ASYMMETRICAL PROTECTION

The LCBO takes particular issue with the branch 2 analysis in Order PO-2405 that the LCBO characterizes as the "asymmetrical protection" issue.

The LCBO submits:

> Order PO-2405 indicates (at page 22) that interpreting Branch 2 of s.19 to protect materials created by Crown counsel for use in the mediation of pending litigation and for other steps in the litigation process would create the following difficulty:
>
> > 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 *Regie* [*2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919 (S.C.C.)] and *Big Canoe* [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.)], 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.
>
> It is submitted that such an approach is inconsistent with the decision of the Ontario Court of Appeal in *Big Canoe*. In addition, it creates a much more troubling "asymmetry", namely: it places all Provincial government ministries, agencies and institutions in the position where their settlement discussions lack the confidentiality available to all other litigants.

In making this submission, the LCBO seeks to equate the legal question addressed by the Court of Appeal in *Big Canoe* with the one being addressed in Order PO-2405. In my view, they are not comparable. In *Big Canoe*, the Court had to decide whether branch 2 of the exemption provides permanent protection for information it applies to. The Court found that the words of branch 2 "describe the work product or litigation privilege" and that, unlike the corresponding privilege at common law, the statutory privilege under branch 2 is permanent. As the LCBO points out, this creates a more durable privilege for government lawyers than that enjoyed by members of the private bar. However, that otherwise uneven playing field is essentially leveled by the fact that members of the private bar are not subject to an access-to-information scheme, with the result that, under the *Act*, this "asymmetry" produces no significant result. Neither set of records would be required to be disclosed under the *Act.*

By contrast, protecting only the settlement materials produced "by or for Crown counsel", while providing no protection for settlement materials of private litigants that are in the possession of a government Ministry, produces an asymmetry that is much more significant. The settlement-oriented records of the government side would enjoy the protection of branch 2, while those of private parties would not. I am not persuaded by the idea that this problem could be addressed, as the LCBO suggests, by simply returning the other side's materials at the conclusion of mediation. In my view, this is not a practical solution.

More importantly, as discussed above under the heading, "Alleged Factual Misapprehension of the Nature of the Mediation", I am of the view that materials produced for mediation purposes, whether mandatory or otherwise, are not "prepared by or for Crown counsel … in contemplation of or for use in litigation" under branch 2 of the section 19 exemption. This is the essential basis for finding that branch 2 does not encompass such materials, regardless of the "asymmetrical protection" issue. The latter analysis is simply aimed at the question of whether the LCBO's proposed interpretation meets the criteria of being plausible, efficacious and just, as discussed in *Régie*, and concludes that it does not.

I also note that this submission by the LCBO is grounded upon the same concern raised by both the LCBO and the affected party throughout the history of this appeal, namely that settlement privilege ought to be included in the section 19 exemption on public policy grounds. This argument was extensively addressed in Order PO-2405 and I have discussed it further in this order, above, under the heading "Settlement Privilege and Common Law Litigation Privilege – The Scope of Branch 1 of the Section 19 Exemption". In the present discussion, the context is branch 2 of the exemption, but as under branch 1, it remains relevant to note that the issue of negotiations was canvassed by the Williams Commission and is addressed in sections 17(1)(a) and 18(1)(e) of the *Act*. As in branch 1, if the Legislature had intended to include settlement privilege in branch 1 of section 19, it would have said so, and in my view, interpreting branch 2 to include it would amount to "reading in" where there is no acceptable basis for doing so.

PERSONAL INFORMATION

Neither the LCBO nor the affected party raised the issue of the records containing personal information, either at the request stage or during the inquiry that culminated in the issuance of Order PO-2405. It was my own review of the records that revealed this possibility. I addressed this as follows in Order PO-2405:

> 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. 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 provision 3 of Order PO-2405 dealt further with this issue. It states:

> 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.

The appellant has not advised me that he wishes to pursue access to this information, so no inquiry in that regard is required.

Having failed to identify any personal information in the records at any previous stage of the proceeding, the LCBO now urges me to expand upon this finding in the context of pages 136-146 of Records 54-58. I am unable to reveal the specifics of the LCBO's submission on this point without revealing the contents of the records.

Section 2(1) defines "personal information" as "recorded information about an identifiable individual," followed by a non-exhaustive list of examples.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

In my view, the additional information the LCBO seeks to characterize as "personal" relates to an individual solely in his/her professional capacity, and does not reveal anything of a personal nature. The only information falling into the latter category in this record is the information I have already identified as personal information and withheld from disclosure. I am unable to elaborate further without revealing the information.

Accordingly, even if this objection met the grounds for reconsideration, I would decline to reconsider on this basis.

RECORD 16 AND PAGES 90-91, 101-102, 106-107, 136-146 AND 181-183 OF RECORDS 54-58 – SECTIONS 18(1)(c) and (d)

The LCBO submits that additional information raises issues that trigger the application of sections 18(1)(c) and (d) in a manner similar to the arguments that I accepted in Order PO-2405 in relation to those exemptions. The affected party adopts this argument with respect to Record 16.

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;

In Order PO-2405, I accepted that the LCBO has economic interests and a competitive position, and 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 finding some of the information in the records to be exempt under these provisions, I stated:

> 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.

The LCBO and, regarding Record 16, the affected party, now ask that I expand this finding to a category of information which, although claimed to be exempt under sections 18(1)(c) and (d), was not specifically identified in their earlier representations. The LCBO's submissions on this point in its reconsideration request consist of new evidence and argument, and for the reasons outlined earlier, do not fall within the proper scope of reconsideration on the basis of "mistake". These arguments should have been set out in the course of the earlier inquiry, not in a reconsideration request.

In any event, I am not satisfied, on the evidence provided, that the additional category of information the LCBO now identifies is comparable to the category for which I accepted its earlier arguments. In my view, there is a clear basis for concluding that disclosure of the first category of information could reasonably be expected to lead to the harms identified in sections 18(1)(c) and (d), for which the LCBO provided extensive factual background and detailed argument. In addition, the LCBO's representations in the inquiry described the potential harms in considerable detail. By contrast, the evidence and argument regarding the additional category are not convincing. In particular, although the LCBO provides a basis for speculating that the harms might come to pass in relation to the additional category of information, it provides no satisfactory basis for finding that there is a reasonable expectation of this outcome as a result of disclosure pursuant to Order PO-2405. I am not able to elaborate further without disclosing the contents of the records, or of the LCBO's confidential representations.

Even if this argument met the grounds for reconsideration, therefore, I would not reconsider Order PO-2405 on this basis.

RECORD 7

The affected party submits that Order PO-2405 is in error in relation to the disclosure of part of Record 7. This submission is based on court orders referred to by the affected party that allegedly restrict the use of an identified category of information. The affected party argues that disclosing certain paragraphs of Record 7 would violate this restriction. The relevant court orders have not been produced to me.

The affected party's allegation that the paragraphs in question actually reveal the type of information referred to in the court orders is incorrect, as far as I can tell from the description of the two orders that has been provided to me. These paragraphs of Record 7 refer to the issue in a roundabout way but do not reveal the information allegedly covered by the court orders.

In any event, even the existence of a publication ban or other restriction in a civil matter does not preclude access under the *Act* unless this triggers the application of an exemption. As I stated in Order PO-2490:

> In [*Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.)], Justice Lane issued an order prohibiting publication of information obtained in the civil discovery process, including publication by third parties. An application was made by a party to the civil litigation in that case under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to the contents of police files that were to be produced in the discovery process. Justice Lane stated that his order in the civil proceeding was not intended to interfere with the operation of *MFIPPA*, and would not bar the publication of records obtained under *MFIPPA*. … [T]he relevant comments of Justice Lane … bear repeating here:
>
> > In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

In my view, the same principle would apply here. I decline to reconsider Order PO-2405 on this basis.

THE SETTLEMENT IS NOT COMPLETE

The affected party submits that "[t]o the extent the Order relies upon the factual assumption that the dispute between the parties is at an end, [the affected party] respectfully submits that the Order should be reconsidered pursuant to Section 18.01(c) of the Code as an error in the decision." The affected party does not elaborate on what aspect of Order PO-2405 hinges on this factual conclusion. In my view, none of the conclusions in the order are made on this basis. It is well-established that the end of litigation does not preclude any claim for common law solicitor-client privilege under branch 1 of section 19, and in *Big Canoe*, the Court of Appeal makes it clear that this is also the case under branch 2. Order PO-2405 is entirely consistent with these principles. Nor was the termination of litigation any part of the basis for my decisions under sections 17(1) or 18(1)(c) or (d).

Accordingly, regardless of whether there is an ongoing dispute, I will not reconsider Order PO-2405 on this basis.

JURISDICTION

The affected party submits that the Commissioner does not have the authority to order disclosure in circumstances where that would breach a contractual obligation. The affected party argues that the *Act* does not confer this power on the Commissioner.

This submission is not in keeping with the structure and function of the *Act*. As outlined in section 10(1), the *Act* creates a right of access to records in the custody or under the control of an institution unless "the record or part falls within one of the exemptions under sections 12 to 22.…" Accordingly, the scheme of the *Act* provides that if the information subject to the appellant's request is not exempt, he is entitled to have it disclosed to him.

More specifically, the *Act* does not provide that the right of access is subject to contractual limits. If this were otherwise, commercial contracts between government bodies and private sector businesses, for example, or a potentially unlimited class of other records, could be entirely shielded from access by the simple addition of a confidentiality clause. As illustrated by the treatment of commercial contracts under the *Act*, such clauses are not determinative. Contracts of this nature are often claimed to be exempt under section 17(1) of the *Act* (third party information). While one of the requirements under that exemption is that the records were "supplied in confidence", information will not be exempt unless its disclosure could also reasonably be expected to cause one of the harms listed in sections 17(1)(a), (b), (c) or (d).

In Order PO-1993 (affirmed by the Court of Appeal in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563), Adjudicator Laurel Cropley explained that an institution's explicit agreement or assurance of confidentiality must remain subject to the provisions of the *Act*. Otherwise, the public's right of access to government-held information could always be defeated by the mere promise of confidentiality. She stated:

> ... [T]he legislature intended that issues relating to "confidentiality" with respect to records that fall within the scope of the Act are to be assessed and determined within that context.
>
> The intervenor's comments suggest that it has been led to believe that the Ministry has, in effect, provided a "guarantee" that records relating to the tendering process will be maintained in confidence. This is not a guarantee that the Ministry can give. At best, the Ministry may be able to assure potential bidders that it will recognize the confidential nature of this process, subject of course, to the requirements of the *Act*.

Similarly, in *Ontario First Nations Ltd. Partnership v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 1103, the Divisional Court upheld this office's decision in Order PO-2328, which required disclosure of third party records covered by an express confidentiality agreement between the affected party and the institution because the harms test in section 17 of the *Act* had not been met. Assistant Commissioner Tom Mitchinson explained in Order PO-2328 "that the specific information itself must be tested under section 17(1)(a) and (c).... [T]he

confidentiality provisions in the Agreement, although helpful, are by no means determinative of the harms issue."

Accordingly, in my view, although the existence of a confidentiality clause may be relevant to the issue of whether particular exemptions apply, information that is responsive to an access request and not exempt under the *Act* must be disclosed. I have determined the extent to which the information at issue in this appeal is exempt. Information that does not fall under an exemption must be disclosed.

Accordingly, in my view, the affected party's representations on this point do not demonstrate any jurisdictional error in Order PO-2405.

ORDER:

1. I accept the LCBO's submission that additional severances are required in Record 16 and in the records described as pages 37-38, 91-92, 101-102, 106-107 and 195 of Records 54-58 under section 18(1)(c) and (d) of the *Act*, to correct an oversight on my part when I issued Order PO-2405. I enclose amended copies of those records, showing the information to be severed with highlighting. The highlighted information is not to be disclosed.

2. In all other respects, the reconsideration requests of the LCBO and the affected party are dismissed. Subject to Order Provision 1, above, I order the LCBO to disclose all undisclosed records and portions of records whose disclosure was ordered in Provisions 1 and 2 of Order PO-2405, by sending copies to the appellant on or before **February 9, 2007** but not earlier than **February 5, 2007.**

Original signed by: December 29, 2006
John Higgins
Senior Adjudicator