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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

CARNWATH, BELLAMY & PIERCE JJ.

B E T W E E N:	)	
	)	
LIQUOR CONTROL BOARD OF ONTARIO	)	*Jill Dougherty & April Brousseau*, for the
Applicant	)	Applicant
	)	
- and -	)	
	)	
	)	
MAGNOTTA WINERY CORPORATION	)	
AND MAGNOTTA WINERY LTD. AND	)	*Ian Roher*, for the Respondents, Magnotta
MAGNOTTA WINES LTD. AND	)	Group of Companies
MAGNOTTA CELLARS CORPORATION	)	*William Challis & Allison Knight*, for the
AND MAGNOTTA VINEYARDS LTD. AND	)	Respondent, Information and Privacy
MAGNOTTA BREWERY LTD. AND	)	Commissioner
MAGNOTTA DISTILLERY LTD.,	)	*Leslie McIntosh & Erin Rozak*, for the
MAGNOTTA VINTNERS LTD. and	)	Intervenor, Attorney General of Ontario
INFORMATION AND PRIVACY	)	
COMMISSIONER	)	
Respondents	)	
	)	
ATTORNEY GENERAL OF ONTARIO	)	
	)	**HEARD AT TORONTO**: March 12 &
Intervenor	)	13, 2009

CARNWATH J.:

OVERVIEW

[1] The Liquor Control Board of Ontario ("the LCBO") applies for judicial review of two decisions of the Information and Privacy Commissioner of Ontario ("the IPC/Commissioner"). The decisions relate to some of the mediation materials ("the disputed records") which were the subject of a confidentiality agreement prepared for the mediation of seven court proceedings between the LCBO and the respondent, Magnotta companies ("Magnotta"). The IPC held that the disputed records were not exempt from release under s. 19 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 [*FIPPA*].

[2] Section 19 of FIPPA provides an exemption which allows an institution to refuse to disclose certain records, as follows:

> **19.** A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation ...

[3] The first branch of s. 19 ("Branch 1") exempts from disclosure communications that fall within the solicitor-client privilege. The second branch ("Branch 2") exempts from disclosure records that were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[4] Many of the disputed records in question were prepared by the LCBO's counsel, whose qualification as "Crown counsel" is conceded for purposes of s. 19 exemption. The disputed records were prepared for a mediation and settlement, if possible, of a number of court proceedings which were then ongoing between the LCBO and Magnotta. The LCBO used the disputed records (which included its mediation briefs, legal opinions and unified affidavit materials) in mediating the court proceedings. Also in the possession of the LCBO were mediation materials prepared by Magnotta for use in the mediation. The LCBO alleges it intended to use its materials in future steps in the litigation if the mediation was unsuccessful. The LCBO also takes the position that those records, including the Magnotta material, were prepared by or for Crown counsel, for use in litigation, both at the mediation stage and at later stages in the litigation, if necessary.

[5] Magnotta has supported the LCBO throughout' the dealings with the IPC and adopts its submissions.

[6] In two long and detailed orders, Order P0-2405 and Reconsideration Order PO-2538-R, the IPC ruled that common law settlement privilege did not attach to the disputed records nor did the second branch of s. 19 of *FIPPA* (prepared by or for Crown counsel ...) exempt the records from disclosure.

[7] The LCBO, Magnotta and the Attorney General for Ontario ("the Intervenor") all seek an order in the nature of *certiorari*, quashing or setting aside the IPC's Orders as they relate to the disputed records.

[8] These applications raise two questions:

(a) Does common law settlement privilege exempt the disputed records from disclosure?

(b) Are records prepared by or for Crown counsel, in respect of the mediation and settlement of ongoing litigation, exempt from disclosure under s. 19 of *FIPPA*?

My answer to each of these questions is "Yes".

BACKGROUND FACTS

[9] Between 1996 and 2000, Magnotta commenced two judicial review applications and a defamation action against the LCBO, and the LCBO commenced four related defamation actions against Magnotta. Two of those defamation actions were subject to case management and mandatory mediation under the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, as amended, s. 24.1 [*Rules*].

[10] Between 1997 and 2000, the LCBO and Magnotta made several efforts to resolve all the litigation between them by means of mediation and a number of informal settlement attempts. Ultimately, the parties arranged for a further mediation before the Honourable Mr. George Adams with respect to all the applications and actions between the parties.

[11] In order to participate in the mediation, all parties were required to execute a mediation agreement which included the following confidentiality provisions:

> Statements made and documents produced in the mediation session and not otherwise discoverable shall not be subject to disclosure though discovery or any other process; shall be confidential; and shall not be admissible into evidence for any purpose, including impeaching credibility;

[12] Prior to the mediation sessions, both parties filed mediation materials. The LCBO filed two mediation briefs (one with respect to the judicial reviews and the other with respect to the defamation actions) and a number of affidavits and legal opinions, all of which were prepared by external counsel for use in the litigation with Magnotta. Magnotta, in turn, filed mediation materials which ultimately found their way into the LCBO's possession. The IPC found those Magnotta documents in the custody and control of the LCBO not to be exempt from disclosure to the Requester.

[13] The LCBO and Magnotta succeeded in reaching a mediated settlement. External counsel for the parties corresponded after the mediation throughout the remainder of 2000 and most of 2001 for the purpose of drafting the Minutes of Settlement and finalizing and implementing the terms of the settlement. The parties then executed: Minutes of Settlement, which contained extensive confidentiality provisions. During that period, the litigation between the parties remained outstanding. None of the actions or judicial review applications was dismissed until January of 2002.

[14] The LCBO subsequently received a request under *FIPPA* from an unidentified Requester, seeking access to "a copy of the complete record of the mediated settlement between Magnotta and the LCBO, including copies of all agreements pertaining to the mediated settlement, all Minutes of Settlement between the parties and all related documentation pertaining to the mediated settlement".

[15] The LCBO granted partial access to the records sought but denied access to the remainder of the records pursuant to a number of exemptions under *FIPPA*, including s. 19. The LCBO notified Magnotta of the request, as an affected party, and Magnotta also opposed the release of the disputed records. The records to which the LCBO denied access and which are in issue in this application consist of:

(a) the mediation briefs and other mediation materials (including affidavits and legal opinions) prepared by the LCBO's external counsel and used in the mediation of the litigation between the LCBO and Magnotta;

(b) a chronology prepared by Magnotta's counsel, which was also used in the mediation;

(c) the Minutes of Settlement reached in that mediation; and

(d) the correspondence relating to finalizing and implementing the Minutes of Settlement.

[16] The Requester appealed the LCBO's decision to the IPC. The IPC wrote to the LCBO and Magnotta (as an affected party), inviting them to make representations and enclosing materials explaining the IPC's procedures. Those materials indicated (among other things) that representations could include unsworn or sworn statements of fact and that "affidavits are optional, unless the adjudicator explicitly requires them". Both the LCBO and Magnotta made extensive submissions to the IPC, and provided supporting documents and jurisprudence. Neither Magnotta nor the LCBO filed affidavit materials.

[17] The LCBO took the position that the disputed records in issue were exempt under the second branch of s. 19 of *FIPPA*, since they had been prepared by or for Crown counsel, for use in the litigation between the LCBO and Magnotta, both in order to pursue the possible settlement of the litigation through mediation and, if the mediation was unsuccessful, to use in later stages of the litigation. The IPC allowed the Requester's appeal and directed the LCBO to release the disputed records in issue to the Requester (subject to a number of deletions based on other sections of *FIPPA*, which are not the subject of these judicial review applications).

[18] The IPC ruled that a mediation of ongoing litigation is not part of the litigation process and that materials prepared by or for Crown counsel for use in mediation are not prepared for the dominant purpose of litigation and are not subject to the s. 19 exemption. The IPC also ruled that s. 19 does not encompass settlement privilege. With respect to the argument that the disputed records in issue were also prepared for use in later stages of the litigation, if necessary, the IPC ruled that "the only evidence I have before me to substantiate that intention is the LCBO's bare assertion to that effect".

[19] The LCBO requested the IPC to reconsider its decision. In light of the IPC's comments about the lack of evidence concerning the intended use of the disputed records in issue, the LCBO supplied an affidavit from its Senior Vice-President and General Counsel, confirming that the disputed records were prepared both for use in the mediation and in later stages of the litigation. The Adjudicator reviewed the affidavit, rejected it on the basis that it was fresh evidence and ruled that he was *functus officio* and not in a position to reconsider his order in respect of most of the grounds raised. Nevertheless, he then proceeded to comment extensively on the affidavit and the LCBO's submissions in a lengthy reconsideration order. The IPC refused the LCBO's reconsideration request in relation to the disputed records in issue, by Reconsideration Order PO-2538-R.

[20] By Notice of Application for Judicial Review dated February 5, 2007, the LCBO applied for judicial review of the IPC's Orders on the basis that the IPC had erred in law in interpreting s. 19 and common law settlement privilege, in ruling that a mediation of outstanding litigation is not part of the litigation process, in holding that materials prepared for use in such a mediation are not prepared for use in litigation, and in rejecting the LCBO's affidavit materials.

ORDER PO-2405

[21] Order PO-2405 was issued on June 30, 2005, over the signature of Senior Adjudicator John Higgins ("the Adjudicator"). In analyzing s. 19 of the *Act*, as it then was, the Adjudicator began as follows:

> 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.

[22] After reviewing the submissions of the LCBO and Magnotta, the Adjudicator found the submissions raised the following questions:

> 1. Does the modern principle of statutory interpretation favour the inclusion of settlement privilege within the scope of s. 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?

[23] The Adjudicator answered all of the seven questions with "No".

RECONSIDERATION ORDER PO-2538-R

[24] The list of records still in dispute between the LCBO and Magnotta, on the one hand, and IPC, on the other, are:

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 totaling 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

[25] After reviewing s. 18 of the IPC's *Code of Procedure* (the "*Code*"), the Adjudicator acknowledged an accidental error within the meaning of s. 18 and corrected it. Apart from that, he found he was *functus officio* and not in a position to reconsider the order. Nevertheless, he went on to review the arguments of the LCBO and Magnotta explaining his action by noting that they had gone to considerable effort to explain their basis for disagreeing with his decision. This discussion went on for nineteen pages of analysis involving solicitor-client privilege, litigation privilege and settlement privilege, all in their relation to s. 19 of *FIPPA*. He concluded that order P0-2405 should stand, subject to the minor correction.

STANDARD OF REVIEW

[26] All parties submit that the standard of review of an adjudicator's decision under s. 19 of *FIPPA* is correctness. We agree.

ANALYSIS

(a) Does common law settlement privilege exempt the disputed records from disclosure?

[27] A discussion of settlement privilege requires a comparison of three privileges - solicitor-client privilege, litigation privilege and settlement privilege.

SOLICITOR-CLIENT PRIVILEGE

[28] Solicitor-client privilege protects the direct communications – both oral and documentary – prepared by the lawyer or client and flowing between them, in connection with the provision of legal advice. The communication must be intended to be made in confidence, in the course of seeking or providing legal advice, and must be advice based upon the professional's expertise in law.

[29] Solicitor-client privilege is no longer considered to be a rule of evidence, but a substantive rule that has evolved into a fundamental civil and constitutional right. Solicitor-client privilege is not absolute, but it is a privilege that is as close to absolute as possible to ensure public confidence and retain relevance. It will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis.

[30] Solicitor-client privilege applies to government and in-house lawyers. The determination of whether there is a solicitor-client relationship in any given circumstance, and thus whether the communications are subject to solicitor-client privilege, depends on the nature of the relationship, the subject-matter of the advice and the circumstances in which the advice was sought and rendered (excerpted from Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, looseleaf (Aurora: Canada Law Book, 2006) at 11-3 [Hubbard]).

LITIGATION PRIVILEGE

[31] Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated.

[32] Litigation privilege is not a class or absolute privilege and, unlike solicitor-client privilege, has not evolved into a substantive rule of law.

[33] Information sought to be protected by litigation privilege must have been created for the dominant purpose of use in actual, anticipated or contemplated litigation.

[34] Litigation privilege can protect documents that set out the lawyer's mental impressions, strategies, legal theories or draft questions. These documents do not have to be from or sent to the client. This is the first broad category of documents that are most often protected by litigation privilege as part of the lawyer's brief. The second broad class of documents includes communications by the lawyer, client or third party, created for the purpose of litigation, e.g., witness statements, expert opinions and other documents from third parties.

[35] Litigation privilege allows a lawyer a "zone of privacy" to prepare draft questions and arguments, strategy or legal theories.

[36] The elements required in order to claim work product or litigation privilege over documents or communications are as follows:

> (a) the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
>
> (b) the preparation must be done in a realistic anticipation of litigation;
>
> (c) if there is more than one purpose or use for the document, facts must reveal that the dominant purpose was for the anticipated litigation;
>
> (d) there must be no requirement under legal rules governing the proceeding to disclose the documents or facts; and,
>
> (e) there has been no prior waiver of documents or facts by disclosure to the opposing party.
>
> (excerpted from Hubbard, above at 12-2 - 2.1-3.)

SETTLEMENT PRIVILEGE

The Public Policy Rationale

[37] When parties share information in furtherance of settling disputes, that information is generally subject to privilege from disclosure. The documents containing the information are often, but not always, marked as being "without prejudice".

[38] In Ontario, as early as 1968, Fraser J. analyzed the public policy considerations which supported non-disclosure of information shared during the course of settlement discussions and negotiations. He concluded:

> 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.
>
> (*I. Waxman & Sons Ltd. v. Texaco Canada Ltd. et al.*, [1968] 1 O.R. 642 at 656 (H.C.J.).)

[39] The Ontario Court of Appeal confirmed Fraser. J.'s judgment:

> We find ourselves in agreement with the conclusions reached by Fraser J., and also with his analysis, in the main, of the very numerous decisions referred to in his reasons for judgment. ...
>
> (*I. Waxman & Sons Ltd v. Texaco Canada Ltd. et al.*, [1968] 2 O.R. 452 at 453 (C.A.).)

[40] In 1988, the House of Lords concluded:

> In my view, this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation. In my view the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties.
>
> (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 at 744 (H.L.) [*Rush*].)

[41] In British Columbia, the Court of Appeal endorsed the public policy basis for non-disclosure of settlement discussions. McEachern C.J.B.C. said:

> ... I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket", prima facie common law, or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> (*Middelkamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 at 232-33 (B.C.C.A.) [*Middelkamp*].)

[42] Chief Justice McEachern went on to say:

> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.
>
> (*Middelkamp* at 233.)

[43] Also in *Middelkamp* Locke J.A. agreed, although he concluded the issue had to be determined on a "case-by-case" analysis rather than the class privilege proposed by Chief Justice McEachern. At 250-51, he stated:

> With all respect I cannot in law see one reason why this province, alone in the Commonwealth, should not recognize the overriding importance of this protection from the eyes of a third party. To refuse is to inhibit and penalize one who wishes to settle. It is easy to envisage a building owner loath to compromise the minor claim of a small sub-contractor because of concern an admission of fact would be held against him in another major subcontractors proceeding.
>
> All the cases emphasize that no bars should be placed in the way of one who wishes to compromise, and to allow the production is by definition to inhibit. Such barriers to settlement should only be permitted if the other competing interest absolutely demands it.

[44] In 1992, the Supreme Court of Canada also stressed the public policy aspect of settlement negotiations in *Kelvin Energy Ltd. v. Lee* (1992), 97 D.L.R. (4th) 616 at 634 (S.C.C.) [*Kelvin*]. The Court quoted with approval the following statement from *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (H.C.J.) [*Sparling*]:

> ... The Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interest of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.

[45] There is strong support for a public-policy based class privilege for settlement privilege. However, that support comes from cases where the court analyzes each claim in the context of its particular facts.

[46] The case-by-case analysis is preferable. It is particularly important in the following instances:

(a) where discussions have led to a settlement, the litigation has resolved, but an argument arises over the terms of the settlement;

(b) where the interests of third parties in other litigation might be affected; and,

(c) where there is a dispute over whether litigation was "in contemplation".

I conclude that any analysis undertaken to establish common law settlement privilege must be done on a case-by-case analysis.

[47] I point out in the matter before us, there is no argument over the terms of the settlement. There is no evidence of interests of third parties in other litigation which might be affected by the settlement. There is no dispute over whether litigation was "in contemplation." Litigation had begun with a vengeance.

[48] Nevertheless, a case-by-case analysis must be undertaken, given that the development of settlement privilege continues as is so often the case with the common law. At its current stage, it is not yet a class or absolute privilege nor has it evolved into a substantive rule of law.

THE DIFFERENCE BETWEEN SOLICITOR-CLIENT PRIVILEGE AND LITIGATION PRIVILEGE

[49] Solicitor-client privilege is a class privilege which never ends, unless waived or unless the communication is in furtherance of a crime. Litigation privilege ends with the litigation. As stated by Fish J. in *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at para. 37 [*Blank*]:

> Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

[50] Solicitor-client privilege requires a communication between a solicitor and a client. Litigation privilege is available to parties whether represented by a solicitor or not:

> Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.
>
> (*Blank* at para. 32.)

THE DIFFERENCE BETWEEN SOLICITOR-CLIENT PRIVILEGE AND SETTLEMENT PRIVILEGE

[51] Solicitor-client privilege is a class privilege which never ends unless waived or unless the communication is in furtherance of a crime. Settlement privilege is not a class privilege. Its existence must be established on a case-by-case analysis first applying the "Wigmore" test, as described in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 at 260:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
>
> (3) The relationship must be one which, in the opinion of the community, ought to be 'sedulously fostered'.
>
> (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

[52] The Supreme Court of Canada re-affirmed the approach in *Slavutych*, making it clear that privilege is to be determined on a case-by-case basis (see: *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 20; see also *Rudd v. Trossacs Investments Inc.* (2006), 79 O.R. (3d) 687 at para. 26 (Div. Ct.) [*Rudd*]).

THE DIFFERENCE BETWEEN LITIGATION PRIVILEGE AND SETTLEMENT PRIVILEGE

[53] Litigation privilege ends with the litigation. Settlement privilege continues past termination of the litigation, absent those circumstances noted in para. [45], above. Litigation privilege meets the need for a protected zone of privacy to help in the investigation and preparation of a case for trial - the adversary process. Settlement privilege is also a process in the adversary system - one which permits the parties to focus on avoiding a trial, without jeopardizing the ability to return to a true adversarial position. Obviously, certain communications will be common to both should the attempts at settlement fail. While it is understandable that some authorities refer to settlement privilege as being part of litigation privilege, such is not the case. While both privileges started as rules of evidence, settlement privilege, in particular, has advanced to the point where it is now regarded as key in the promotion of settlements.

APPLICATION OF THE "WIGMORE" TEST TO THE FACTS OF THIS CASE

[54] The communications between the LCBO and Magnotta originated in confidence. They were the subject of a strong confidentiality agreement. The first *Wigmore* condition has been satisfied.

[55] In order for the parties to arrive at a settlement, they must be assured of confidentiality so that discussions can be free and frank. Confidentiality is essential to meaningful settlement discussions. The second *Wigmore* condition has been satisfied.

[56] Starting with the House of Lords in *Rush*, above, and running through to the Supreme Court of Canada in *Kelvin*, above, courts in Canada have consistently favoured the settlement of lawsuits. In *Kelvin* at 634, the Supreme Court cited with approval the statement of Callaghan A.C.J.H.C. in *Sparling*, above at 230:

> In approaching this matter, I believe it should be observed at the outset that the Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. *This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.*
>
> (*Sparling v. Southam Inc.*, *supra*, at p. 28 (Emphasis added).)

(See also *Bard v. Longevity Acrylics Inc.* (2002), 18 C.C.E.L. (3d) 256 at para. 29 (Ont. S.C.J.) [*Bard*]; *Rudd*, above.)

[57] In *Rudd*, the Divisional Court found at para. 33:

> The third Wigmore condition requires a determination whether the relationship in which the communication is given is one which should be "sedulously fostered". The Rules of Civil Procedure require mandatory mediation of many civil disputes in order

> to assist the parties in arriving at a settlement and thus reduce the costs of litigation. There is clearly a significant public interest in protecting the confidentiality of discussions at mediation in order to make the process as effective as possible.

[58] I conclude the law is well-settled that there is a significant public interest in protecting the confidentiality of settlement discussions in order to make the process as effective as possible. Confidentiality of settlement discussions should be "sedulously fostered". The third *Wigmore* condition is satisfied.

[59] The fourth stage of the *Wigmore* test requires a balancing of the public interest in disclosure of government records called for by *FIPPA* against the public interest in preserving the confidentiality of communications during settlement negotiations. It is to this balancing I now turn.

TRANSPARENCY IN GOVERNMENT ACTION vs. SETTLEMENT PRIVILEGE

[60] The Requester in this matter is anonymous. We have no knowledge of why the Requester seeks the information in the disputed records. If there is a public policy reason that would support and explain why the Requester is entitled to obtain the otherwise privileged information vis-à-vis the Requester, we do not know what it is. Absent such an explanation, the competing public policy interests in this matter are simply those created by *FIPPA* versus the interest in promoting settlements of disputes through confidential settlement negotiations.

[61] The IPC's position on settlement privilege can be shortly put. The Commissioner submits that since the *Report of the Commission on Freedom of Information and Individual Privacy 1980* (the "Williams Commission Report") did not specifically mention settlement privilege and since settlement privilege is not specifically referred to in s. 19 of *FIPPA*, settlement privilege is of no consequence in this matter. At p. 17 of order PO-2538-R:

> 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.

[62] What may have been true in 1980 is not necessarily true in 2009. Almost thirty years have passed. From *Rush* to *Kelvin*, above, the common law has expanded settlement privilege from a rule of evidence to an overriding public interest in favour of settlement.

[63] In *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), the Court dealt with litigation privilege. Carthy J.A., writing for the majority at p. 332, found that litigation privilege had been narrowed in scope by succeeding amendments to the *Rules*:

> In a very real sense, litigation privilege is being defined by the rules as they are amended from time to time. Judicial decisions should be consonant with those changes and should be driven more by the modern realities of the conduct of litigation and perceptions of discoverability than by historic precedents born in a very different context.

[64] To paraphrase, in a very real sense, settlement privilege is being defined by the *Rules* as they are amended from time to time. Settlement privilege has expanded in scope through changes to the *Rules*. These changes provide for various settlement mechanisms, such as pretrial conferences, settlement conferences, case management, and mediation, both voluntary and mandatory.

[65] What follows from the IPC's view of the law regarding settlement negotiations? First, the details of negotiations and settlement of any dispute between a government institution and a third party will be available to the world at large, following a request. Apparently, a Requester need but ask anonymously and the IPC will undertake the heavy lifting, as in this case. There is a delicious irony in this matter whereby the IPC, in the name of transparency, labours for an anonymous Requester. Second, and perhaps more important, no third party would willingly entertain settlement discussions with a government institution, particularly where admissions are made and concessions offered that would enure to the detriment of the third party, if publicly disclosed. As this Court said in *Rudd*, above at para. 38:

> Parties may also reveal information to a mediator which they wish to keep confidential even after a settlement is reached, perhaps because the information is private, or because it may injure a relationship with others.

[66] Government institutions are not strangers to litigation. They are entitled to have disclosure of their settlements considered on a case-by-case analysis of their common law entitlement to settlement privilege.

SECTION 1 OF *FIPPA* VIEWED IN THE LIGHT OF STATUTORY INTERPRETATION

[67] The purposes of *FIPPA* are set out in s. 1:

> **1.** 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, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government ...

[68] As noted earlier, the IPC views the meaning of "exceptions" in s. 1(a)(ii) as those exceptions specifically set out in *FIPPA*. Our Court of Appeal has found with respect to *FIPPA* "the broad intention of the Act is to offer transparency to government functioning with exceptions where the interests of public knowledge are overbalanced by other concerns": *Ontario (Attorney General) v.*

Ontario (Information and Privacy Commission, Inquiry Officer) (2002), 62 O.R. (3d) 167 at para. 14 (C.A.) [*Big Canoe* (C.A.)]).

[69] This view of our Court of Appeal is consistent with the modem approach to statutory interpretation, which requires that all relevant and admissible indicators of legislative meaning must be considered.

[70] In *2747-3174 Quebec Inc. v. Quebec (Regis des permis d'alcool)*, [1996] 3 S.C.R. 919 at para. 164, L'Heureux-Dubé J. spoke in favour of what she termed the "modem approach" to the interpretation of statutes, citing a passage from Professor R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 131. The same passage from this text of Professor Sullivan was cited with approval in *Big Canoe* (CA.) and in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 66 O.R. (3d) 692 (Div. Ct.); aff'd (2005), 75 O.R. (3d) 309 (C.A.) [*Children's Lawyer*].

[71] In *Children's Lawyer* the Divisional Court noted the Court of Appeal's decision in *Big Canoe* at paras. 75-76:

> [75] Under the modern approach to statutory interpretation, the language of the statute must be addressed in its context. In referring to the context, the Court of Appeal said (pp. 172-73 O.R.):
>
> > Finally, 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.
> >
> > > [Emphasis added]

> Applying that test supports the plain meaning test. The broad intention of the Act is to offer transparency to government functioning with exceptions *where the interests of public knowledge are overbalanced by other concerns.* In the present case, the requester seeks assistance in a civil proceeding following a criminal prosecution concerning the same incident. The purpose and function of the Act is not impinged upon by this request. However, to open prosecution files to all requests which are not blocked by other exemptions could potentially enable criminals to educate themselves on police and prosecution tactics by simply requesting old files. Among other concerns that come to mind are that witnesses might be less willing to co-operate or the police might be less frank with prosecutors. It should be kept in mind that this is the *Freedom of Information Act* and does not in any way diminish the power of subpoena to obtain documents, such as those in issue here, where appropriate and relevant in litigation. I can therefore see no countervailing purpose or justification for an interpretation that would render the Crown brief available upon simple request.
>
> [Emphasis added]

> [76] This passage is very important. It illustrates the concerns to be addressed. They include balancing the objective of transparency of government functioning and the interests of public knowledge against other concerns; and considering whether the purpose and function of FIPPA are impinged upon by one interpretation or the other. Having performed this analysis, the court found many disadvantages and no countervailing purpose or justification for an interpretation that would render the Crown brief in a criminal case available to the public upon simple request. In our view, this is the sort of analysis which we must perform.

[72] In considering the purposes of *FIPPA*, as set out in s. 1(a), the language of the statute must be addressed 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. After considering all these indicators of legislative meaning, the court must adopt an interpretation of s. 1(a) 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 (see Professor R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 1, 3-4 [Sullivan, *Sullivan on the Construction of Statutes*]).

A Statutory Interpretation of Section 1(a) of *FIPPA*

[73] I conclude that the public policy interest in encouraging settlement as embodied in the common law concept of settlement privilege trumps the public policy interest in transparency of

government action, in the circumstances of this case. I turn, then, to analyze this conclusion within the context of the indicators of legislative meaning proposed by Professor Sullivan.

[74] This interpretation is plausible because it complies with the legislated text (s. 1(a) of *FIPPA*) which provides for "necessary exemptions" that are "specific and limited." The exemption is "necessary" to maintain confidentiality of negotiated settlements. The exemption is "specific" and "limited" in that it is specific to and limited by the circumstances of this case. A case-by-case analysis ensures settlement privilege will always be specific to and be limited by particular fact situations.

[75] This interpretation is efficacious because it promotes the legislative purpose of creating exemptions where necessary, provided the exemptions are limited and specific.

[76] This interpretation is acceptable because it leads to a conclusion that is both reasonable and just. As noted earlier in these reasons, no party would willingly entertain settlement discussions with a government institution if it knew its confidential settlement discussions would be made public. This is particularly so where admissions would be made and concessions offered that would be detrimental to that party. If required to discuss settlement by the Rules, those discussions would not, I suggest, be meaningful.

[77] The disputed records must remain confidential according to the terms of the agreement and minutes of settlement and may not be released to the Requester.

(b) Are records prepared by or for Crown counsel in respect of the mediation and settlement of ongoing litigation, exempt from disclosure under s. 19 of *FIPPA*?

[78] It will be recalled that Branch 2 of s. 19 of *FIPPA* exempts from disclosure records that were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[79] The IPC found the disputed records were not exempt because they were not prepared in contemplation of or for use in litigation. With respect, the IPC is wrong in law in its analysis of Branch 2 of s. 19 of *FIPPA*. The *Rules* have incorporated mediation into the litigation process by requiring parties in case-managed actions (and in all actions commenced in Toronto after January 4, 1999) to participate in a mandatory mediation.

[80] The Ontario Court of Appeal has recognized that mediation is an integral part of the litigation process, particularly in actions which are subject to the mandatory mediation rules (as were two of the matters mediated in the present case). In *Rogacki v. Belz* (2003), 67 O.R. (3d) 330 (C.A.), Abella J.A. (in concurring reasons) described the role of mediation as part of the litigation process at paras. 44, 47:

> [44] It 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. But it is also true that aspects of mandatory mediation directly engage the court's process. First

> and foremost, the fact that mediation is mandated by the commencement of a proceeding under the rules, directly implicates the mediation in the court's process ....
>
> . . .
>
> [47] Mandatory mediation is a compulsory part of the court's process for resolving disputes in civil litigation. Wilful breaches of the confidentiality it relies on for its legitimacy, in my view, represent conduct that can create a serious risk to the full and frank disclosures the mandatory mediation process requires. It can significantly prejudice the administration of justice and, in particular, the laudable goal reflected in Rule 24.1 of attempting to resolve disputes effectively and fairly without the expense of trial.

(See also Warren K. Winkler, C.J.O., "Access to Justice, Mediation: Panacea or Pariah?" (2007) 16 Canadian Arbitration and Mediation Journal 5.)

[81] Various alternative dispute resolution ("ADR") methods (such as, for example, pre-trial conferences) have been incorporated into the litigation process for many years. There is no valid reason for distinguishing among different forms of ADR based on where they occur in ongoing court proceedings. It makes no sense to treat some forms of ADR as part of the litigation process and others as not. All forms of ADR, including both mandatory and consensual mediation, are part of the litigation process and are equally deserving of confidentiality and the protection of the Branch 2 exemption under s. 19 of *FIPPA*. As explained by Power J., in *Bard*, above at para. 31:

> In recent years, there has been a significant emphasis on the desirability of encouraging settlement of disputes whether in the courts or before administrative and other tribunals. This has resulted in the use of various forms of alternative dispute resolutions and, as well, changes to our rules of practice which encourage case management, mediation, and court supervised settlement conferences (or pre-trial conferences). In my opinion, the logic for treating settlement discussions as privileged is, therefore, more pressing than ever. It follows, therefore, that this privilege should not be limited except.where there are strong and compelling reasons for doing so. I include in the term 'settlement discussions', pre-trials and settlement conferences as well as mediations. As aforesaid, I see no valid reason for distinguishing between pre-trials and settlement conferences. The privilege applies even in the absence of rule 50.03.

[82] The LCBO asserted before the IPC that the mediation materials were intended for use in litigation should the mediation fail. The IPC refused to consider this because of a finding that there was no evidence to this effect. It is unnecessary for me to resolve this dispute, other than to say it is obvious that some materials used in any mediation will subsequently be used by counsel to prepare for trial and at the trial itself.

A Statutory Interpretation of the Branch 2 Exemption

[83] Earlier in these reasons, an analysis of s. 1 of *FIPPA* used the so-called "modern approach" to statutory interpretation (see above at paras. [67] - [77]). To repeat, in interpreting Branch 2 of s. 19 of *FIPPA*, all relevant and admissible indicators of legislative meaning must be considered. The language of the statute must be addressed 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 (see Sullivan, *Sullivan on the Construction of Statutes*, above).

[84] Following consideration of these indicators of legislative intention, the court must choose an interpretation of the Branch 2 exemption that is "appropriate." To repeat the earlier analysis, an appropriate interpretation is one that can be justified in terms of its (a) plausibility; (b) efficacy; and (c) acceptability, that is, the outcome is reasonable and just (see: Sullivan, *Sullivan on the Construction of Statutes* at pp. 1, 3-4). In *Ontario (Attorney General) v. Big Canoe* (2001), 208 D.L.R. (4th) 327 (Div. Ct.) [*Big Canoe* (Div. Ct.)], this Court held that the language of the Branch 2 exemption is "clear and unambiguous." The wording of Branch 2 imposes no temporal limits on the protection provided nor limits it to particular types of litigation documents, nor specifies specific steps in the litigation. Nothing in the legislative text suggests that the term "litigation" should be given a different meaning than that adopted by the courts and reflected in the *Rules*. Such an interpretation complies with the legislative text.

[85] Such an interpretation of Branch 2 also promotes the purpose of *FIPPA* to provide transparency of government functioning "with exceptions where the interests of public knowledge are overbalanced by other concerns" (see *Big Canoe* (C.A.), above). To interpret Branch 2 in this manner recognizes that in the case of records prepared by or for Crown counsel for use in any aspect of litigation, the interests of the public in transparency are trumped by a more compelling public interest in encouraging settlement of litigation.

[86] The proposed interpretation of Branch 2 is acceptable because it arrives at an outcome that is reasonable and just. The IPC's narrow interpretation of Branch 2 would result in an unreasonable and unjust outcome, since it would deprive government institutions of the privilege attached to settlement discussions otherwise available to all other litigants. Moreover, the IPC's interpretation would discourage third parties from engaging in meaningful settlement negotiations with government institutions. In *Children's Lawyer*, above at para 94, this Court said:

> [94] We should not adopt an interpretation of legislation that places a public servant in such a position of conflict of interest if there is a reasonable alternative. It would be absurd to suppose that the legislature intended such a result. The respondent put it succinctly in para. 63 of its factum.
>
> > To read Branch 2 so as to exclude the child from access would lead to absurd consequences. The presumption that legislation is not intended to produce absurd consequences is a fundamental rule of interpretation. Moreover, "[a]bsurdity is not limited to logical contradictions and internal incoherence; it includes violations of

> justice, reasonableness, common sense, and other public standards ... " The primary 'absurd' results of reading Branch 2 in such a manner would be to put the Children's Lawyer in violation of its fundamental duties to the client/requester.
>
> R. Sullivan, *Driedger on the .Construction of Statutes* (Markham: Butterworths, 1994), at 85-86.

[87] To summarize, the following outcomes contribute to my conclusion that the IPC interpretation of Branch 2 of s. 19 would lead to an absurd result:

(a) where given a choice, private parties will avoid settlement discussions and mediation with government institutions;

(b) when faced with mandatory mediation, private parties will be inhibited from engaging in "full and frank" disclosure upon which the requirement for a successful resolution depends;

(c) the chances of a successful mediation will be remote;

(d) the legislative intentions in the *Rules* regarding mandatory mediation will be frustrated;

(e) confidentiality clauses negotiated between private parties and government institutions will be meaningless; and,

(f) the costs of litigation between private parties and government institutions will, by necessity, be greater than otherwise.

[88] For the foregoing reasons, I conclude that the disputed records are exempted from production by Branch 2 of s. 19 of *FIPPA*.

THE "ASYMMETRICAL PROTECTION" SUBMISSION

[89] The IPC refused to apply the Branch 2 exemption to protect the LCBO's mediation materials because (in the IPC's view) it would result in material prepared by or for Crown counsel having more extensive protection than the mediation materials of private parties. The IPC described this "asymmetrical protection" issue as follows:

> [I]t 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.

[90] I reject this interpretation for three reasons. First, the mediation and settlement materials of private parties are always subject to settlement privilege where the settlement privilege is granted pursuant to a case-by-case analysis as discussed above. It is only the introduction of a government institution into the equation that attracts the application of the second Branch of s. 19 to the settlement. The IPC appears to assume that if Branch 2 of s. 19 protects the Crown, nevertheless, a Requester would have access to the private party's documents used in the mediation and settlement process. Such is not the case. It would be open to the private party to establish settlement privilege on a case-by-case analysis.

[91] Second, in the IPC's interpretation of the Branch 2 exemption any "asymmetry" created by the LCBO's interpretation of Branch 2 pales into insignificance in comparison with the asymmetry created by the IPC's interpretation of Branch 2. It denies to all government institutions the privilege available to private litigants otherwise found to be applicable to mediation and settlement materials. All private litigants can engage in settlement discussions confident that settlement materials will remain confidential. The IPC would have it that the Crown can not. That is true asymmetry.

[92] Third, the IPC's interpretation is directly contrary to the interpretation given to the Branch 2 exemption by this Court in *Big Canoe* (Div. Ct.), above at para. 32, where it was held that:

> [32] A head may refuse to disclose 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. The language is clear and unambiguous. ... Thus, if it was not the intention of Branch 2 of s. 19 to enable government lawyers to assert a privilege more expansive or durable than that available at common law to solicitor-client relationships (the Inquiry Officer found it was not), it was open to the Legislature to say so.

[93] For the foregoing reasons, I conclude that the disputed records are exempted from production by Branch 2 of s. 19 of *FIPPA*.

[94] Whether by application of the common law doctrine of settlement privilege or by the application of Branch 2 of s. 19 of *FIPPA*, the disputed records are exempt from disclosure.

[95] An order will go setting aside the portions of the IPC's Order P0-2405 (as amended by Reconsideration Order PO-2538-R), which holds that Records 1, 6, 7, 8, 16 and certain pages of Records 54-58, specified in numbered para. 1 of those Orders, are not exempt from release.

[96] A further order shall go upholding the LCBO's decision to withhold disclosure of those records.

[97] As agreed upon by the parties, there shall be no order as to costs.

CARNWATH J.
BELLAMY J.
PIERCE J.

Released: 20090612

COURT FILE NO.: 64/07
DATE: 20090612

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CARNWATH, BELLAMY & PIERCE JJ.

B E T W E E N:

LIQUOR CONTROL BOARD OF ONTARIO
Applicant

- and -

MAGNOTTA WINERY CORPORATION AND MAGNOTTA WINERY LTD. AND MAGNOTTA WINES LTD. AND MAGNOTTA CELLARS CORPORATION AND MAGNOTTA VINEYARDS LTD. AND MAGNOTTA BREWERY LTD. AND MAGNOTTA DISTILLERY LTD., MAGNOTTA VINTNERS LTD. and INFORMATION AND PRIVACY COMMISSIONER
Respondents

ATTORNEY GENERAL OF ONTARIO

Intervenor

JUDGMENT

CARNWATH J.

Released: 20090612