CITATION: Liquor Control Board of Ontario v. Magnotta Winery Corporation,
2010 ONCA 681
DATE: 20101020
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COURT OF APPEAL FOR ONTARIO

MacPherson, Gillese and MacFarland JJ.A.

BETWEEN

Liquor Control Board of Ontario

Applicant (Respondent in appeal)

and

Magnotta Winery Corporation and Magnotta Winery Ltd. and Magnotta Wines Ltd. and Magnotta Winery Estates Limited and Magnotta Cellars Corporation and Magnotta Vineyards Ltd. and Magnotta Brewery Ltd. and Magnotta Distillery Ltd., Magnotta Vintners Ltd.

Respondents (Respondents in appeal)

and

Information and Privacy Commissioner

Respondent (Appellant)

and

The Attorney General for Ontario

Intervenor (Respondent in appeal)

William S. Challis and Allison Knight, for the appellant Information and Privacy Commissioner
Jill Dougherty for the respondent Liquor Control Board of Ontario
Ian N. Roher for the respondents Magnotta
Leslie McIntosh for the intervenor the Attorney General for Ontario

Heard: September 15, 2010

On appeal from the order of the Divisional Court (Justices James Carnwath, Denise E. Bellamy and Helen M. Pierce) dated June 12, 2009, with reasons by Carnwath J. and reported at (2009), 3 O.R. (3d) 59.

Gillese J.A.:

[1] Must confidential mediation and settlement records involving a government institution be disclosed, if sought under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended (*FIPPA*)? In my view, the answer to that question is "no".

OVERVIEW

[2] Between 1996 and 2003, the Magnotta companies (Magnotta) and the Liquor Control Board of Ontario (LCBO) were involved in litigation consisting of two judicial review applications and five defamation actions. Two of the defamation actions were subject to case management and mandatory mediation under the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, as amended.

[3] Between 1997 and 2000, the LCBO and Magnotta made several efforts to resolve all of the litigation between them by means of mediation and informal settlement attempts. These efforts were not successful.

[4] In 2000, the LCBO and Magnotta arranged to mediate all of the litigation in a single mediation. To participate, the parties were required to execute a mediation agreement containing the usual confidentiality provision.

[5] Prior to the mediation, the parties filed mediation briefs and other materials. The filed documents included confidential, highly sensitive and privileged information.

[6] The LCBO intended to use all of its filed materials in the mediation and, if the mediation were unsuccessful, in other aspects of the ongoing litigation between the parties.

[7] The LCBO and Magnotta succeeded in reaching a mediated settlement.

[8] For the balance of 2000 and most of 2001, counsel for the parties worked to draft Minutes of Settlement and then finalise and implement their terms. The executed Minutes of Settlement contain extensive confidentiality provisions.

[9] The LCBO then received a request under *FIPPA* from an unidentified person (the Requester). The Requester sought access to the complete record of the mediated settlement, including copies of all agreements pertaining to the settlement, the Minutes of Settlement and all related documentation (the Records).

[10] The LCBO granted partial access to the Records but, based on exemptions in *FIPPA*, denied access to the remainder (the Disputed Records). The Disputed Records included material that had been prepared for the mediation by Magnotta and which was in the LCBO's possession.

[11] Magnotta, as an affected party, also opposed the release of the Disputed Records.

[12] The Requester appealed the LCBO's decision to the Information and Privacy Commissioner (the IPC).

[13] The IPC allowed the appeal and ordered the LCBO to disclose the Disputed Records to the Requester (subject to a number of deletions that are not in issue on this appeal).

[14] The LCBO requested a reconsideration. In a further order, the IPC dismissed the reconsideration request. It ruled, among other things, that mediation is not litigation for the purposes of s. 19 of *FIPPA*.

[15] The LCBO applied for judicial review of the IPC orders. Magnotta supported the LCBO. The Attorney General of Ontario intervened. It, too, supported the LCBO.

[16] The Divisional Court allowed the application for judicial review and restored the LCBO's decision to withhold the Disputed Records.

[17] The IPC appeals. It submits that the Divisional Court erred in reasoning and result. Its appeal is largely founded on the absence of an express statutory exemption for settlement privilege in *FIPPA*.

[18] The LCBO, Magnotta and the Attorney General of Ontario all contend that the Divisional Court decision is correct, both in result and reasoning. They ask that the appeal be dismissed.

[19] For the reasons that follow, I would dismiss the appeal.

THE DIVISIONAL COURT DECISION

[20] Carnwath J., writing for the Divisional Court, gave thoughtful, detailed reasons in which he concluded that the Disputed Records were exempt from disclosure under both the second branch of s. 19 of *FIPPA* and the common law doctrine of settlement privilege.

[21] At the relevant time, section 19 of *FIPPA* read as follows:[1]

> 19. 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.

[22] Section 19 is accepted as having two branches. The first branch is an exemption for records that are subject to solicitor-client privilege. The second branch is for records that were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation".

[23] Carnwath J. held that the IPC erred in determining that the Disputed Records did not fall with the second branch of s. 19. Relying on *Rogacki v. Belz* (2003), 67 O.R. (3d) 330 (C.A.), he observed that mediation is an integral part of the litigation process, particularly in actions that are subject to the mandatory mediation rules. Two of the mediated matters were subject to such rules.

[24] At para. 81 of the reasons, Carnwath J. stated:

> All forms of [alternative dispute resolution], 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*.

[25] Carnwath J. went on to explain that interpreting the second branch of s. 19 in this way promotes the purpose of *FIPPA*, which is to provide "transparency of government functioning with

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[1] Section 19 was subsequently amended to include a third provision, which reads as follows:

> Or that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation. 2005, c. 28, Sched. F, s.4.

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 (C.A.), at para. 14 (*Big Canoe 2002*). He concluded that where records are prepared by or for Crown counsel for use in any aspect of litigation, the public interest in transparency is trumped by a more compelling public interest in encouraging settlement of litigation.

[26] Further, in his view, the IPC's narrow interpretation of the second branch 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.[2]

[27] In determining that settlement privilege applied to the Disputed Records, Carnwath J. began by considering the purposes of *FIPPA* set out in s. 1(a):

> **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 … . [emphasis added]

[28] In para. 72 of the reasons, he observed that:

> 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

[2] At para. 86 of the reasons.

> 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.

[29] Again, Carnwath J. concluded that the public policy interest in encouraging settlement, as embodied in the common law concept of settlement privilege, trumps the public policy interest in the transparency of government action. This interpretation he viewed as plausible and efficacious because it complies with s. 1(a), which provides for "necessary exemptions" that are "specific and limited". The exemption is necessary to maintain the confidentially of negotiated settlements. It is specific and limited by the circumstances of this case. Further, he opined, the interpretation is acceptable because it leads to a conclusion that is both reasonable and just. No one would willingly entertain settlement discussions with a government institution if it knew its confidential discussions would be made public. This is particularly so as during the settlement process the parties may make admissions and offer concessions that would otherwise be to their detriment.

THE ISSUES

[30] This appeal raises two issues. Did the Divisional Court err in:

1. holding that the Disputed Records fall within the second branch of s. 19 of *FIPPA*; and

2. concluding that settlement privilege applied to exempt the Disputed Records from disclosure?

DO THE DISPUTED RECORDS FALL WITHIN THE SECOND BRANCH OF S. 19 OF *FIPPA*?

[31] It will be recalled that the second branch of s. 19 provides that a record is exempt from disclosure if it was "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation".

[32] In the present case, there is no dispute that LCBO counsel are Crown counsel. The dispute is over whether documents prepared for mediation and settlement have been prepared for use in "litigation".

[33] The IPC submits that the word "litigation" should be construed narrowly, to exclude mediation and settlement discussions. Essentially, the IPC's position is that the second branch is co-extensive with litigation privilege for Crown counsel and litigation privilege does not include settlement privilege.

[34] The IPC also maintains that the Divisional Court's determination that records shared with opposing counsel are "prepared for use in litigation" conflicts with two of its earlier decisions: *Ontario (Attorney General) v. Big Canoe* (2006), 80 O.R. (3d) 761 (Div. Ct.), at para. 45 (*Big Canoe 2006*) and *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.), at para. 44 (*Goodis 2008*). The IPC submits that in both *Big Canoe 2006* and *Goodis 2008*, the Divisional Court held that documents sent to opposing counsel were not "prepared for use in litigation" within the meaning of the second branch of s. 19 because they fell outside any reasonable "zone of privacy" and because they were not prepared to assist counsel in the litigation.

[35] I would dismiss this ground of appeal for two reasons.

[36] First, I endorse the view of the Divisional Court on this issue. In summary, the Divisional Court said this. Alternative dispute resolution now forms an integral part of the civil litigation process in Ontario. Various alternative dispute resolution methods have been incorporated into the litigation process as can be seen by reference to the *Rules of Civil Procedure*,[3] which regulate and help define the parameters of the litigation process. The Disputed Records were delivered as part of a mediation. In *Rogacki v. Belz*, at paras. 44–47, this court observed that mandatory mediation is a part of the litigation process. There is no principled reason to treat mandatory and consensual mediations differently, when considering whether they are part of the litigation process. Furthermore, interpreting the word "litigation" in the second branch to encompass mediation and settlement discussions is consonant with public interest considerations because the public interest

[3] For example, the *Rules* provide for pre-trial conferences, settlement conferences and more recently, case management and mediation.

in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation.

[37] Second, in addition to the reasons of the Divisional Court on this issue, I would reject the narrow interpretation urged by the IPC because it runs contrary to basic principles of statutory interpretation. The IPC would limit the second branch to documents that fall within the ambit of litigation privilege. With respect, a plain reading of the second branch does not support such an interpretation. When the legislature wished to exempt records based on privilege, it did so using clear language. Witness the first branch of s. 19 which permits a head to refuse to disclose a record that is "subject to solicitor-client privilege". The words of the second branch follow immediately afterwards in the same provision and they do not use the words "litigation privilege". Rather, the second branch governs records "prepared by or for Crown counsel … for use in litigation". Therefore, the second branch should not be taken to be limited to documents that fall within the common law litigation privilege.

[38] Further, based on recent judgments of the Supreme Court of Canada, I understand that fundamental common law privileges, such as settlement privilege, ought not to be taken as having been abrogated absent clear and explicit statutory language: see *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, at para. 11 and *Lavallee, Rackel & Heintz v. Canada (Attorney-General)*, [2002] 3 S.C.R. 209, at para. 18. While both of these cases relate to solicitor-client privilege, many of the same considerations apply to settlement privilege. Section 19 does not contain express language that would abrogate settlement privilege. Accordingly, in my view, it ought not to be so interpreted.

[39] While this court's decision in *Big Canoe 2002* may appear to support the IPC's contention that the second branch is co-extensive with litigation privilege being extended to Crown counsel, a close examination of that decision reveals otherwise.

[40] In *Big Canoe 2002*, at paras. 7-8, this court said that the Divisional Court was correct to find that the inquiry officer erred in her interpretation of s. 19 by analyzing it as consisting of two branches: solicitor client privilege and litigation privilege. In para. 13, the court goes on to explain that "it is the plain meaning of the words used in branch two" that is to govern. It said that the inquiry officer erred by assuming that the intent behind the second branch was to simply extend litigation privilege to Crown counsel. The court concluded that the exemption provided by the

second branch was permanent. That is, the court concluded that the exemption provided by the second branch was significantly different than that which would have existed had the records been subject only to litigation privilege.

[41] In my view, *Big Canoe 2002* provides clear guidance of two sorts to courts called on to consider the ambit of the second branch. First, give the words in the second branch their plain meaning. Second, do not assume that the second branch is intended merely to extend litigation privilege to Crown counsel. Accordingly, I do not view *Big Canoe 2002* as standing for the proposition that the second branch is intended to cover only documents that fall within the ambit of litigation privilege.

[42] Nor do I read *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32 (*Goodis 2006*) as limiting the scope of the second branch to litigation privilege. That contention rests on para. 12 of *Goodis 2006*, which reads as follows:

> The Ministry has claimed that all the documents in the private record are exempt from disclosure under s. 19 of the *Access Act*, which provides:
>
> > **19.** 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 applies to two categories of documents: (1) communications between a solicitor and his or her client and (2) documents prepared in contemplation of or for use in litigation. *Section 19 recognizes these common law privileges: solicitor-client communication privilege and litigation privilege.* [Emphasis added.]

[43] The emphasized sentence in the quoted passage does not state that the second branch is limited to, or co-extensive with, litigation privilege. Rather, it says that s. 19 recognizes litigation privilege. The fact that the second branch recognizes litigation privilege does not mean that its scope is limited to documents that fall within litigation privilege. Further, as the Court acknowledged in the following paragraph in *Goodis 2006*, the focus of its decision was solely on the first branch, that is, solicitor-client privilege. Indeed, nothing more is said in *Goodis 2006* about the second branch. Thus, the fleeting reference in para. 12 to the second branch is *obiter*.

[44] Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records – both those prepared by Crown counsel and those prepared by Magnotta – fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions. To limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch. Furthermore, it is antithetical to the public policy interest in settlement of litigation because it would lead to situations in which the government entity's records would be exempt from production while the private party's mediation material would be producible.

[45] I do not view the Divisional Court decisions in *Big Canoe 2006* and *Goodis 2008* as inconsistent with the Divisional Court's interpretation of the second branch of s. 19 in the present case. In *Big Canoe 2006*, simple correspondence between counsel during the course of a prosecution was held to be outside the scope of the second branch. Simple correspondence is not a document that was prepared "for use in the litigation". Rather, it was a document that was prepared *during the course of litigation*. Nor would counsel reasonably expect that simple correspondence would fall within the "zone of privacy". Contrast that with the Disputed Records in the present case. The Disputed Records are documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions. Clearly, the Disputed Records fall within any reasonable "zone of privacy".

[46] Similarly, in *Goodis 2008* the Divisional Court held that a letter prepared by plaintiff's counsel listing undertakings, advisements and refusals given on behalf of the Crown was not within the ambit of the second branch. Again, in my view, while such a letter is prepared during the course of litigation, it was not prepared for "use in litigation" in the sense that counsel would reasonably expect such a letter to fall within the 'zone of privacy".

[47] Accordingly, I would dismiss this ground of appeal.

DOES SETTLEMENT PRIVILEGE AT COMMON LAW APPLY TO THE DISPUTED RECORDS?

[48] Having concluded that the Disputed Records fall within the second branch of s. 19, it is unnecessary to decide this issue. Whether common law settlement privilege is a free-standing exemption under *FIPPA* or whether *FIPPA* is a complete code is a complex, serious question that is better decided in a case that depends on the answer to that question.

AN ADDITIONAL ISSUE

[49] The parties have asked this court to address an additional issue that was argued before the Divisional Court but which was not addressed in its reasons. The additional issue is whether settlement privilege is included in the first branch of s. 19. Put another way, the court is asked to decide whether settlement privilege falls within the scope of solicitor-client privilege and, therefore, the Disputed Records are exempt from disclosure based on the first branch of s. 19.

[50] In view of the conclusion reached on the first issue, it is unnecessary to decide this matter.

DISPOSITION

[51] I would dismiss the appeal. As no party sought costs, none are ordered.

RELEASED: OCT 20 2010

Gillese J.A.

I agree. MacPherson J.A.

I agree. MacFarland J.A.