Appeal court upholds confidentiality principles

BY ROBERT TODD
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The Ontario Court of Appeal has issued a ruling that will reassure parties involved in confidential mediation and settlement talks that sensitive information disclosed during those proceedings won't become public through access to information requests.

WeirFoulds LLP lawyer Jill Dougherty, who acted as counsel to the LCBO in *Liquor Control Board of Ontario v. Magnotta Winery Corp.*, says the decision confirms the basis on which governments, private organizations, and citizens have been engaging in talks aimed at keeping disputes away from courthouses. The ruling makes clear that all mediation, whether conducted under mandatory mediation provisions within the Rules of Civil Procedure or consensually agreed upon by parties looking to come to a settlement, will remain confidential under the Freedom of Information and Protection of Privacy Act.

"It's not going to be treated as something that will be subject to disclosure simply upon a FIPPA request," Dougherty explains.

The issue arose in the context of ongoing litigation between Magnotta and the LCBO. The parties clashed in a pair of judicial review applications and five defamation actions, two of which went to case management and mandatory mediation pursuant to the Rules.

However, the two sides were unable to come to terms despite numerous efforts between 1997 and 2000 through mediation and settlement talks. That prompted a decision in 2000 to bring all of the issues together into a single mediation.

A mediation agreement that included a typical confidentiality provision governed the proceedings, according to the Court of Appeal decision written by Justice Eileen Gillese. That made way for the submission of mediation briefs, which included "highly sensitive and privileged information," she wrote.

The consolidated mediation led to a settlement, which counsel to the parties followed up on by drafting minutes of settlement and putting the finishing touches on the terms of the deal. The minutes of settlement also included "extensive confidentiality provisions," the court noted.

The LCBO subsequently received an application for material filed through the act. The unidentified requester asked for a copy of the full record of the mediated settlement.

The LCBO offered up some of the requested material but pointed to exceptions within the legislation for withholding some of the information. These disputed records included documents compiled by Magnotta and held by the LCBO. Magnotta also opposed the release of the disputed records.

The requester appealed the LCBO's decision to withhold the material to the Office of the Information and Privacy Commissioner, which ruled against the agency in ordering disclosure of the information. The information and privacy office later denied a request for reconsideration by the LCBO, ruling that mediation isn't litigation as referenced under solicitor-client privilege provisions within the act.

The LCBO, backed by Magnotta and the intervening attorney general of Ontario, successfully sought judicial review by the Divisional Court, which restored the agency's original decision to keep the disputed records private.

But the information and privacy office appealed that ruling at the Court of Appeal, principally arguing that the act lacks an "express statutory exemption for settlement privilege," Gillese wrote.

The relevant portion of the act, s. 19, consists of two branches. The first permits an exemption for records that are subject to solicitor-client privilege, while the second does the same for records "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation."

The Court of Appeal backed the Divisional Court panel's June 2009 ruling on the matter, which was written by Justice James Carnwath. In coming to its decision, the panel emphasized the importance of mediation within the litigation process.

"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," wrote Carnwath, as paraphrased by the Court of Appeal.

Carnwath also determined that the public interest in encouraging the settlement of litigation prevails over the interest in transparency surrounding records prepared by or for Crown counsel in relation to litigation.

The judge also pointed to a more practical concern raised by what the Court of Appeal called the information and privacy office's "narrow interpretation of the second branch." Carnwath suggested its view "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."

However, the information and privacy office argued the act intended a more restrictive interpretation of litigation and that provisions should 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," Gillese explained.

An earlier decision allowing for disclosure was of particular concern for government agencies, says Jill Dougherty.

The Court of Appeal disagreed with that view largely due to the importance of alternative dispute resolution within the province's civil litigation system. Gillese also determined that the legislature clearly states in the act when it wants to exempt records based on privilege. She pointed out that the first and second branches of s. 19 immediately follow one another and that the second clearly refers to 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," Gillese wrote.

The Court of Appeal added: "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."

Meanwhile, Dougherty says the Court of Appeal's ruling is in line with a number of the information and privacy office's own earlier decisions. However, it changed its approach to the issue in a decision submitted after the unidentified requester sought the LCBO-Magnotta mediation records.

The information and privacy office's shift threatened to cause confusion for government lawyers and those they face in mediation and settlement talks. As a result, the Court of Appeal's ruling seems to have settled the matter and offered certainty for those looking to turn to alternative dispute resolution in conflicts involving the Ontario government. "Obviously, when this decision came down from the IPC, it was something that I think it's fair to say was of concern to government agencies," says Dougherty. "The fact that the attorney general intervened in this matter was a reflection of, I think, the recognition that it was of concern to government agencies."

Dougherty emphasizes that parties would simply not be as candid in resolution efforts prior to litigation if someone else could later use the information against them.

"You may discuss things in your mediation brief for purposes of trying to reach a settlement that would be different from the way that you would deal with those matters in open court if the litigation proceeded," she says.

The information and privacy office didn't respond to a request for comment. LT