

CITATION: Liquor Control Board of Ontario v. Vin de Garde Wine Club, 2013 ONSC 5854
DIVISIONAL COURT FILE NO.: 126/13
DATE: 20131105

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
ASTON, HIMEL AND LINHARES DE SOUSA JJ.

BETWEEN:

LIQUOR CONTROL BOARD OF
ONTARIO

Applicant

- and -

VIN DE GARDE WINE CLUB, HER
MAJESTY THE QUEEN IN RIGHT OF
ONTARIO, AS REPRESENTED BY THE
MINISTRY OF FINANCE AND
INFORMATION AND PRIVACY
COMMISSIONER OF ONTARIO

Respondent

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)
)
) *M. Jill Dougherty and Jordan Glick, for the*
) *Applicant*

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)
) *Ian A. Blue Q.C. and Arnold B. Schwisberg*
) *for the Respondent Vine de Garde Wine*
) *Club*

)
) *Lawren Murray, for the Respondent*
) *Information and Privacy Commissioner of*
) *Ontario*

)
) *William J. Manuel and Ananthan*
) *Sinnadurai, for the Respondent Her Majesty*
) *the Queen in Right of Ontario*

)
) **HEARD at Toronto: September 12, 2013**

THE COURT:

[1] The Liquor Control Board of Ontario ("LCBO") applies for judicial review of Order PO-3171 of the Information and Privacy Commissioner of Ontario ("IPC"). The order was that the LCBO cease its practice of collecting personal information of wine club members when those clubs place special orders through the LCBO's private ordering system. The IPC also ordered that the LCBO destroy previously collected personal information. In making this decision, the IPC held that the collection of information contravenes section 38(2) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*"). The application is in the nature of *certiorari* to quash or set aside the order. For the reasons that follow, we are of the view that the process followed in the circumstances of this case breached the IPC's duty of fairness and that the matter must be remitted to the IPC for reconsideration.

FACTUAL BACKGROUND:

The Legislative Context of Liquor Control

[2] The LCBO is a Crown agency that reports to the Ministry of Finance ("Ministry"). It is the sole importer of liquor into Ontario and has broad authority to control the sale, transport and delivery of liquor within the province. It operates over 600 retail stores and has a private ordering department which allows consumers to obtain products that are not sold in the LCBO's retail stores, provided the orders comply with LCBO rules and regulations. It must take precautions to prevent intermediaries from operating as unauthorized retailers of liquor. The LCBO sells approximately \$100 million in liquor annually through its private ordering department. One aspect of that program is the sale of alcohol to members ordering through clubs. Wine clubs are not licensed by the Alcohol and Gaming Commission of Ontario ("AGCO") and have no special status, entitlements or recognition under the *Liquor Control Act*, R.S.O. 1990, c. L.18 ("LCA") or the *Liquor Licence Act*, R.S.O. 1990, c. L.19 ("LLA"). However, wine clubs may make special orders on behalf of club members if they register with the LCBO. Once they register, they are subject to LCBO procedures set out in the *Business Process & Program Guidelines - Spirit, Beer or Wine Clubs* ("Guidelines"). The procedures in the *Guidelines* are not based on requirements in either the *LCA* or the *LLA* but, rather, have been developed by the LCBO. The specific information gathering procedures at issue in this case are set out in the *Guidelines*. The *Guidelines* allow for sales to be made through wine clubs provided the order is accompanied with a list of the members ordering products and the details of the products being ordered. The names and contact information of members, as well as the details of the products being ordered are required from customers who are placing special orders whether through a club or individually.

[3] The legislative framework for the sale of liquor includes section 3 of the *LCA* which establishes the LCBO's mandate and broad authority over liquor sales, and section 5 which prohibits anyone from keeping for sale, offering for sale or selling liquor as well as canvassing for, receiving or soliciting orders for the sale of liquor, unless licenced by the AGCO. Her Majesty the Queen in right of Ontario as represented by the Ministry is the government department ultimately responsible for overseeing the control of liquor in the province.

Freedom of Information and Protection of Privacy Act

[4] *FIPPA* is a statute which contains provisions governing both freedom of information and access to records, as well as the protection of individual privacy in the province. The IPC is established under *FIPPA* to investigate government breaches of individual privacy. Its goal is to balance individual privacy rights with the need for government to collect personal information. The powers and duties of the IPC are set out in s. 59 of *FIPPA*. Section 38(2) of *FIPPA* prohibits government institutions from collecting personal information except in three circumstances:

No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

[5] *FIPPA*'s general regulation, R.R.O. 1990, Reg. 460, defines "institutions" to include the LCBO and defines the "head" of the LCBO as the Chair or the Board.

The Complaint

[6] In 2004, Vin de Garde registered as a wine club with the LCBO. The club says that from 2004 to 2012, club members were not asked for personal information when the club submitted special orders. In 2012, the LCBO refused to process Vin de Garde's special orders until it disclosed the personal information of the individual members. On July 5, 2012, Warren Porter, the manager and director (and a member) of Vin de Garde filed a privacy complaint. The Club objected to the LCBO collecting personal information of club members and argued the practice violated the members' privacy. It took the position that the information being collected was not "absolutely necessary to complete the customer's order" and that members should be afforded the same level of privacy that an LCBO retail customer is afforded.

[7] The IPC began an investigation. The IPC's investigator contacted the LCBO and referred it to the IPC's website for an outline of the procedures governing the investigation. The LCBO and the complainant provided information to the IPC and made submissions to the investigator. The parties agreed that the information being collected was personal information. The LCBO relied on the third ground in s. 38(2) to justify its practice, namely, that the collection of personal information was "necessary to the proper administration of a lawfully authorized activity."

[8] The LCBO responded to Vin de Garde's complaint by explaining that Vin de Garde is not established under the LCBO, rather they are simply a wine club registered with the LCBO. It gave the IPC copies of the *Guidelines* for private ordering. It also said that Vin de Garde's past ability to make orders without providing members' personal information was an error, as the club would often place orders using the names of related businesses or agents. It provided the IPC with the reasons for requiring clubs to submit members' names and details of products ordered, including: (a) to facilitate joint ordering by wine club members in a manner consistent with the requirements for a transaction where goods purchased are to be delivered at a later time; (b) to be able to notify customers of product defects if these are discovered after the sale; (c) to provide an audit trail to support review of the program; and (d) to deter the use of the Private Ordering program by parties who wish to illegally stockpile and resell wine, or to artificially deflate the cost of the wine in order to profit at the expense of provincial revenues. The IPC was particularly interested in the argument that collecting the personal information is necessary to enable LCBO spot audits and to prevent fraud involving intermediaries operating within the Private Ordering or Consignment programs. In correspondence with the LCBO, the IPC's investigator said that the IPC "may forward a Draft Privacy Complaint Report after considering the responses from the LCBO and the club."

The Decision of the IPC

[9] In its decision of February 27, 2012, the IPC interpreted and applied s. 38(2) of *FIPPA* to the LCBO's practice of collecting information. It confirmed that the personal information of club members fell within the scope of "personal information" under *FIPPA*. It also held that the LCBO failed to establish that the collection practice was necessary to the proper administration of its spirit, beer, and wine club program. It applied the meaning of "necessary" from *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, 86 O.R. (3d) 401, at para. 40, which held that personal information collected must be "more than merely ... helpful to the activity", and that if the purpose of collection can be achieved another way, then the institution should take that route. The IPC found that the LCBO practice was not necessary to process transactions, was

not more than merely helpful for facilitating recalls, was not more than merely helpful for audits and was not more than merely helpful at deterring fraud and illegal activities. It concluded that the LCBO had not established that the collection of personal information relating to wine club purchases was necessary for the operation and management of the LCBO's wine club program.

[10] The IPC ordered the LCBO to cease collecting personal information of club members when special orders are made through clubs on members' behalf, except when individual members intend to pick up the products ordered. The LCBO was also ordered to destroy all personal information previously collected from that practice. The order, made under s. 59(b), represented only the second time the IPC had made such an order since 1987. While the order was a response to the privacy complaint of Vin de Garde, the IPC decision would apply generally to orders made through the LCBO's Private Ordering Department by any club.

The Application for Judicial Review

[11] The LCBO applies for an order quashing the IPC's decision directing the LCBO to cease collecting personal information from wine club members in relation to special orders and ordering it to destroy such information that it has already collected. The LCBO argues that the IPC decision prevents the LCBO from collecting basic information from customers who are ordering products through clubs and effectively treats the club, rather than the club members, as the LCBO customer. This is not in keeping with the statutory scheme governing liquor sales under which a club cannot be the customer while the end customer remains anonymous. It submits that the collection of this information is necessary to the proper administration of lawfully authorized activities, namely, filling special orders for liquor not available in its retail stores and importing and selling liquor to club members through its Private Ordering Department.

[12] The Ministry supports the view that it is necessary for this information to be collected in order for the LCBO to meet its statutory responsibility to control the sale and distribution of alcohol in Ontario, which is intended for the public benefit. It also argues that the legislative scheme in Ontario is premised on the sale of liquor to purchasers, not to intermediaries, and that identification of the purchaser is essential to the scheme. The LCBO submits that the decision of the IPC fails to appreciate the statutory framework governing the LCBO's mandate and is unreasonable in its conclusion.

[13] In support of its application to quash the decision, the LCBO and the Ministry also argue that the IPC failed to comply with its duty of procedural fairness by failing to advise the LCBO and the Ministry that it was contemplating the remedy of an order under s. 59(b) of the *FIPPA*. This effectively deprived the LCBO and the Ministry of the opportunity to be heard on this point, an important one given the unusual nature of an order under s. 59(b). They had relied upon the description of procedure outlined on the IPC's website, which was referenced by the IPC's own staff, and had expected to have an opportunity to review a Draft Privacy Complaint Report rather than abruptly face the sanctions ordered under s. 59(b).

[14] The IPC disputes the LCBO position that the decision turns on the interpretation of liquor legislation, that the legal question is one of broad significance and that the appropriate standard of review is correctness. It argues that the interpretation and application of s. 38(2) and s. 59(b) of *FIPPA* are matters where the IPC has recognized expertise. Given its responsibility for

privacy issues in the province, and its acknowledged expertise in balancing individual privacy rights and the public interest, the IPC's decision should be entitled to a high degree of deference on findings of fact and the weighing of evidence. It argues that the Commissioner's process was fair and that the IPC did not breach the duty of fairness or s. 59(b) of *FIPPA*. Vin de Garde supports the IPC's position that it acted fairly. It submits that the IPC never promised to show the LCBO a copy of the Commissioner's proposed report and there is no requirement in the Act or the jurisprudence that the subject of an investigation must be shown a copy of a proposed report before it is made public.

Section 59 of the FIPPA

[15] The LCBO argues that the IPC breached the duty of fairness and the LCBO's legitimate expectation of the right to be heard by issuing a s. 59(b) *FIPPA* order without advising the LCBO that it was contemplating such a remedy and providing it with a real opportunity to be heard on the matter. Section 59(b) states:

The Commissioner may,...

(b) after hearing the head, order an institution to,

(i) cease collection practices, and

(ii) destroy collections of personal information,

that contravene this Act;

[Emphasis added.]

[16] The LCBO was given an opportunity to make representations to investigate staff concerning the privacy complaint filed on behalf of Vin de Garde but was not afforded a hearing regarding the s. 59 order. It argues that it was denied fairness by becoming the subject of an order without being given: (1) notice that such an order might result from a finding that the LCBO's collection of personal information was in violation of section 38(2) of *FIPPA*; and (2) an opportunity to make further submissions with respect to the proposed order of the IPC. The LCBO says it relied on the IPC's investigator who had said that "a Draft Privacy Complaint Report may be sent to you and the complainant".

[17] The Ministry supports the LCBO position that there was a breach of the duty of fairness. It submits that it was incumbent on the IPC to notify the LCBO and the Ministry that it was contemplating orders under section 59(b) as a remedy if it found the collection of personal information by the LCBO contravened section 38(2) of *FIPPA*. The failure to give this notice is a breach of its duty of procedural fairness.

[18] The IPC maintains that the LCBO had adequate notice that the IPC might consider ordering the LCBO to cease collecting the personal information of wine club members, and to destroy information previously collected, as those powers are set out in the legislation. The LCBO and the Ministry should be taken to have known of the Commissioner's authority under s. 59(b). The IPC says no assurances were ever given that the IPC would not make any orders without a further hearing. With respect to the Draft Privacy Complaint Report, the IPC argues that there is no requirement in s. 59 that the IPC must show the subject of an investigation a copy of a proposed report before it is made public. Accordingly, the IPC submits that the LCBO did

not have a legitimate expectation that the Commissioner would discuss or share a draft of her findings from the privacy complaint investigation before releasing them, or that the Commissioner would not order it to cease collecting personal information.

[19] Vin de Garde takes the position that the head of the LCBO was effectively heard by the IPC before the Commissioner made her order, participated fully in the investigation and availed itself of a full opportunity to place anything it wanted to say before the Commissioner.

ANALYSIS:

[20] We are satisfied that the LCBO representative who dealt with the Commissioner's investigator was clothed with the authority to act for the head of the LCBO concerning the complaint. In fact, the LCBO takes no issue with this. The basis for the application to set aside the order is that the process that followed the receipt of the privacy complaint was faulty. What occurred is detailed below:

1. The registrar of the IPC notified the LCBO of the privacy complaint by giving notice dated July 11, 2012, to Mona Wong, Freedom of Information Coordinator at the LCBO. The registrar directed her to a flow chart on the IPC's website for information about the IPC's process for dealing with privacy complaints.
2. The flow chart lists the steps in the complaint process and the possible consequences of an investigation into a privacy complaint as: (1) settlement; or (2) a Privacy Complaint Report. The flow chart says the following concerning a Privacy Complaint Report: "If a privacy complaint is not settled, the Investigator will prepare a Privacy Complaint Report, which disposes of the conflict. The report may include: a summary of the complaint; a discussion of the investigation; conclusions; findings; and recommendations."
3. On October 31, 2012, the president of Vin de Garde Wine Club, requested that the IPC make a recommendation to the LCBO.
4. This request was repeated in correspondence dated November 29, 2012, between the president of the Vin de Garde Wine Club and the IPC analyst assigned to the complaint.
5. In correspondence dated December 17, 2012, Trisha Coyle, the IPC investigator wrote to Ms. Wong at the LCBO requesting a response to the complaint and said concerning the next steps: "Once I have received and considered your response, a Draft Privacy Complaint Report may be sent to you and the Complainant. If a decision is made to prepare a Draft Privacy Complaint Report, it may also include recommendations regarding the institution's collection, retention, and use of personal information."
6. Subsequently, an Assistant Deputy Minister from the Ministry wrote to Trish Coyle to support the LCBO position and to say that Ms. Coyle should contact him if he could be of any assistance.

The Duty of Procedural Fairness

[21] The duty of procedural fairness applies to a public authority making an administrative decision that affects the rights, privileges or interests of an individual. A Crown corporation may be a holder of procedural rights, privileges or interests protected by the duty of fairness: see Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 2, looseleaf (Toronto: Canvasback Publishing, 1998), at p. 7-54. In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, Madame Justice L'Heureux-Dubé noted, at para. 22, that the duty of fairness is flexible and dependent upon the circumstances:

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[22] Justice L'Heureux-Dubé then listed a number of factors relevant to determining the content of the duty of fairness in a given circumstance. They are summarized by David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 5th ed., (Edmonton: Carswell, 2009), at pp. 256-57:

1. The nature of the decision being made and the process followed in making it. The closer the administrative process is to judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required.
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates. The role of the decision in the statutory scheme helps determine the content of the duty of fairness. Greater procedural protections are required when there is no appeal procedure or the decision determines the issue and further requests cannot be submitted.
3. The importance of the decision to the individual or individuals affected. The more important or the greater impact the decision has, the more stringent are the procedural protections. This is a significant factor. The court commented [in *Baker*, at para. 25]:

The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.), at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake...A disciplinary suspension

can have grave and permanent consequences upon a professional career.

4. The legitimate expectations of the person challenging the decision. The doctrine of legitimate expectations is part of the doctrine of procedural fairness. If a claimant has a legitimate expectation that a certain procedure will be followed, the duty of fairness requires this procedure to be followed. If a claimant has a legitimate expectation that a certain result will be reached, fairness may require more extensive procedural rights than might otherwise be accorded. The doctrine of legitimate expectations does not create substantive rights outside the procedural domain. The "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers. It will be generally unfair of the decision-makers to act contrary to their representations as to procedure or to go back on substantive promises without giving the person affected significant procedural rights.
5. The choices of procedure made by the agency itself, particularly if procedure is a matter of discretion or if the agency possesses expertise in determining appropriate procedures. Important weight must be given to the choice of procedures made by the agency and its institutional restraints.

[23] In applying the factors outlined in *Baker*, a court must look at whether the procedure used was in fact, "fair, impartial, and open". What constitutes a fair procedure will depend on the circumstances and the "statutory, institutional, and social context" of the administrative decision. There is no standard of review analysis for alleged breaches of the duty of fairness: see *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 129; *Marttunen v. Workplace Safety and Insurance Appeals Tribunal*, 2013 ONSC 4317 (Div. Ct.), at para. 19.

[24] A party's right to adequate notice regarding the administrative proceeding they are involved in is a "fundamental component of the administrative process": see Guy Regimbald, *Canadian Administrative Law*, 1st ed., (Toronto: LexisNexis Canada Inc., 2008), at p. 254. The right to adequate notice is inherently linked to the right to a fair hearing, one of the core principles that gives rise to the duty of fairness: see *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 53. The purpose of adequate notice is that it "allows parties to possess sufficient information to allow them to make representations, submit evidence, or appear before the decision maker; essentially, notice provides an opportunity to prepare the case adequately": see Regimbald, at pp. 254-255.

[25] The concept of adequate notice includes knowing the consequences that may flow from an administrative proceeding: see *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165. The rationale for this is explained by Brown and Evans in *Judicial Review of Administrative Action in Canada*, at p. 9-45:

[S]ince fairness requires that a person who has been found liable must normally be given an opportunity to address the decision-maker on the question of the appropriate penalty, the parties should be given notice of the range of penalties to

which they may be exposed: *DeSoto Developments Ltd. v. Ontario New Home Warranty Program* (1992), 8 O.R. (3d) 792 (Ont. Div. Ct.), aff'd (1994), 21 O.R. (3d) 738 (Ont. C.A.); *Dudnik v. York Condominium Corp. No. 216* (1991), 3 O.R. (3d) 360 (Ont. Div. Ct.).

[26] Another aspect of the duty of fairness is the doctrine of legitimate expectations, a concept that was listed in *Baker* as the fourth factor affecting the content of the duty of fairness. It was recently defined by the Supreme Court of Canada in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68:

Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty.

[27] As noted in *Mavi*, the breach of a party's legitimate expectations only applies to representations which are procedural in nature. It does not limit the range of outcomes an administrative decision-maker may employ under their statutory authority. This was explained in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78, where the Supreme Court, in deciding whether the duty of fairness had been breached because the Judicial Council had not put a Provincial Court judge on notice that it was considering a penalty more severe than the one recommended by the investigative panel, held that:

The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision maker in order to mandate any particular result: see D. Shapiro, *Legitimate Expectation and its Application to Canadian Immigration Law* (1992), 8 J.L. & Social Pol'y 282, at p. 297.

Conclusions

[28] While the decision under review in this case is one that affects a body created by government and not an individual, as an affected party the LCBO also benefits from the notion of procedural justice before being confronted with the consequences of that decision. Procedural fairness is a variable concept which must be determined in the context of each case. It involves adequate notice of the nature of an investigation and its possible consequences in order to ensure meaningful participation in the process.

[29] In reviewing the procedure that was followed in the case at bar, we observe that: (1) the evidence and submissions made by the parties were directed only to the investigator and not to the decision-maker; (2) the LCBO relied upon the correspondence from the IPC including its reference to the web site which did not list a s. 59 order as one of the possible consequences of a privacy complaint, but implied that before such an order issued there would be recommendations and settlement discussions based on a report; (3) there was reason to believe that the parties would have benefited from a discussion of the type of remedy being considered by the

Commissioner, given that Vin de Garde had only suggested recommendations as a remedy and the LCBO was anticipating a draft report might be sent to them for review; and (4) the LCBO and Ministry were not notified that the IPC's decision might result in an unusual order under s. 59(b) to stop collecting this personal information and to destroy personal information it had already collected.

[30] We find that the IPC should have given the LCBO notice that the Commissioner was considering an order under s. 59(b) as a potential remedy. This finding is supported by case law on what constitutes adequate notice in an adjudicative administrative proceeding, by the wording of s. 59(b) which requires a head to be "heard" before an order is issued, and by the fact that an order is an almost unprecedented remedy in the context of IPC privacy complaint proceedings. Applying the analysis in *Baker*, we conclude that, in light of the nature of the decision of the IPC and the process followed in making it, the nature of the statutory scheme and the framework within which the body operates, the importance of the decision to the affected parties, and the choices of the procedure made, there has been a breach of the duty of fairness.

[31] We are not of the view, however, that the LCBO had a legitimate expectation that the range of potential consequences in the complaint process would not include an order. Neither the referral to the IPC website, nor Ms. Coyle's comment that a draft report might be sent to the LCBO for review, constitute sufficiently "clear, unambiguous and unqualified" undertakings that could give rise to a legitimate expectation: see *Mavi*.

DECISION:

[32] In light of the breach of procedural fairness, we remit the case back to the IPC for reconsideration on the basis that the LCBO was not afforded a fair opportunity to be heard on the matter of remedy. The LCBO should be permitted to submit further evidence and representations knowing that an order under s. 59(b) is a possible consequence of the investigation of Vin de Garde's privacy complaint. Perhaps the parties will be able to discuss possible outcomes and may reach some resolution. Failing that, the IPC should conduct a reconsideration of the matter.

[33] Because the IPC's Order is quashed on procedural grounds, it is not necessary for us to address the substantive issues raised on the appeal. However, it may be helpful to the reconsideration process for us to offer some observations and comments. We do so in no particular order of importance.

[34] First, in reading Order PO-3171, it is not clear whether the IPC actually made a clear or consistent finding on the issue of whether the LCBO's customer is the club or the club member.

[35] Both the LCBO and the complainant submitted that wine club members, not the clubs themselves, are the LCBO customer. However, the LCBO's submission on this point is premised on the assumption that its customers must be identifiable for it to be able to discharge its statutory duties and responsibilities. The basic foundation of the LCBO's position is that it cannot properly administer or discharge its responsibilities under the *Liquor Control Act* or *Liquor Licence Act* if it is required to sell alcohol to anonymous or fictitious individuals. It says that club members can only be LCBO customers if they are identifiable. Without that identification, the wine club becomes its customer.

[36] The IPC seems to accept the premise that club members are the customer. The decision is replete with references to the club processing and submitting purchase orders "on behalf of" its members. However, the IPC also seems to accept that individuals cannot purchase alcohol from the LCBO anonymously. In the third paragraph on page 4 of the decision the IPC states:

I accept that in these limited circumstances [where the club member is picking up his or her order directly from the LCBO rather than from the wine club] the collection of personal information may be necessary to the administration of the LCBO's business of selling liquor through the Private Ordering Department to clubs; without proof of purchase including identifying personal information, it would not be possible to process this type of sale.

[37] Consistent with that finding, the actual Order of the IPC contains an exemption. The LCBO is permitted to obtain personal information from club members who intend to pick up ordered product from the LCBO and is not required to destroy the personal information collected in those circumstances.

[38] If club members are purchasing the product from the LCBO in both instances, what logical reason is there to distinguish them on the basis of where they pick up the product? The answer may be that the IPC considered the club, not its members, to be the entity to which the LCBO is selling when a club takes delivery for its members. In the passage from the IPC's reasons quoted above, the Commissioner referred to "the LCBO's business of selling liquor through the Private Ordering System to clubs" [Emphasis added]. In the last paragraph on page 7 of the decision the IPC states:

I accept that the LCBO has the legal authority ... to sell to clubs ... and in doing so, the LCBO is engaged in a lawfully authorized activity.

[39] Club members pay the club, not the LCBO, for their purchases and they pay more than the club paid the LCBO for that product. The transaction between the club and its members has all the hallmarks of a purchase and sale. It is hard to understand how the members' purchases can be characterized as purchases from the LCBO, unless the LCBO recognizes them as such. However, the LCBO position is unequivocal - if the club member is anonymous (and possibly fictitious) the LCBO does not recognize the club member as its customer.

[40] If product picked up from the LCBO by a club member is a sale to the club member, but product picked up by a club is a sale to the club, it would be helpful to have that finding clearly articulated. If, on the other hand, the IPC's decision accepts that in both instances the LCBO is selling the product to the club member, not the club, it would be helpful to know why some LCBO customers may remain anonymous and others may not.

[41] The beginning of an explanation is found in the first paragraph on page 4 of the decision:

[In the case of members picking up their orders directly from the LCBO] the only way for the LCBO to confirm that the individual seeking to pick up the product is the one who ordered it, and to confirm that the customer is receiving the correct product and quantity ordered, is for the LCBO to ask for identification and proof of purchase.

[42] However, this explanation begs the question of why, when the wine club takes delivery, the IPC Order effectively requires the LCBO to delegate its responsibility in this regard to unlicensed wine clubs it does not necessarily trust. Even if the complainant in this case satisfied the IPC that Vin De Garde would not breach any provision of the *LCO* or *LLA*, other clubs certainly might, given the financial incentives for those who might engage in the illicit sale of alcohol.

[43] The IPC considered the evidence of LCBO audits, and its ability to conduct inspections and investigations. The Commissioner concluded that the LCBO had "not provided any substantive information to demonstrate that fraud is a significant problem" in the case of wine clubs. However, she fails to address the LCBO submission that, by reasonable inference, the provision of personal information is a primary reason it has not been a problem before now.

[44] This issue of investigations and enforcement is connected to another matter upon which we wish to comment.

[45] The focal point of this case is the interpretation of s. 38(2) of the *Freedom of Information and Protection of Privacy Act*, which reads:

38. (2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

[46] In particular, the phrase "necessary to the proper administration" is at the heart of this case. The parties agree the leading authority on this statutory provision is the Court of Appeal's decision in *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, the decision recognized by the IPC in her order. However, the parties in this case do not agree on how the IPC interpreted or applied that case.

[47] Vin De Garde contends the IPC found the personal information in this case would be "merely helpful"; therefore, not "necessary". The LCBO contends the IPC erred by applying an "absolutely required" standard rather than a "reasonably required" standard in her interpretation of the word "necessary". Unfortunately, the parties did not have an opportunity to address this subtle but critical issue directly with the adjudicator of their dispute, only with the investigator in her office.

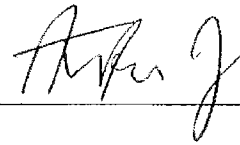
[48] We express no opinion on this issue of interpretation because the expert tribunal ought to be afforded the first opportunity to interpret its home statute. However, we do agree it would be helpful if the IPC would address the issue raised by the LCBO.

[49] If the LCBO is correct in saying the test is "reasonably" necessary, what factors need to be taken into account or balanced? For example, if the purpose of collecting personal information may be achieved by other means, is it legitimate to take into account the cost of those alternative means? Does the LCBO need to demonstrate that alternative means of "properly administering" its statutory responsibilities are impossible, or only that alternative means are not practically viable? These are questions not definitively answered by the *Cash Connections* case,

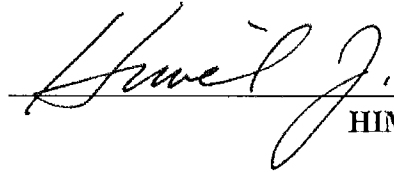
and this case seems to provide a good opportunity for the Tribunal to address at least some of them.

RESULT:

[50] For these reasons, the case is remitted back to the IPC for reconsideration. The parties have agreed that there shall be no costs concerning the IPC or the Ministry of Finance. As between the LCBO and Vin de Garde, although counsel for the LCBO requested costs for her client, we exercise our discretion and deem this an appropriate case to order no costs.



ASTON J.



HIMEL J.



LINHARES DE SOUSA J.

Released: *November 5, 2013*

CITATION: Liquor Control Board of Ontario v. Vin de Garde Wine Club, 2013 ONSC 5854
DIVISIONAL COURT FILE NO.: 126/13
DATE: 20131105

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

ASTON, HIMEL AND LINHARES DE SOUSA JJ.

BETWEEN:

LIQUOR CONTROL BOARD OF ONTARIO

Applicant

- and -

VIN DE GARDE WINE CLUB, HER MAJESTY THE
QUEEN IN RIGHT OF ONTARIO, AS
REPRESENTED BY THE MINISTRY OF FINANCE
AND INFORMATION AND PRIVACY
COMMISSIONER OF ONTARIO

Respondent

REASONS FOR JUDGMENT

Released: November 5, 2013