Order F22-05

MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT

Lisa Siew
Adjudicator

January 17, 2022

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry) provide access to a letter. The Ministry provided the applicant with partial access to the letter, but withheld information under s. 14 (solicitor-client privilege) of FIPPA. During the inquiry, the Ministry also argued the doctrine of issue estoppel applied since the letter was part of a BC Supreme Court decision that held the letter contained information protected by solicitor-client privilege. The adjudicator determined the Ministry successfully invoked issue estoppel and declined to exercise her discretion not to apply issue estoppel. As a result, the adjudicator concluded the applicant was estopped from requesting a review, under FIPPA, on whether the information withheld in the letter is protected by solicitor-client privilege.

INTRODUCTION

[1] An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to a copy of a letter between a provincial government employee and a federal government employee. The applicant requested access to this record from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry).

[2] The Ministry provided partial access to the requested letter by withholding information under ss. 14 (solicitor-client privilege) and 16 (disclosure harmful to intergovernmental relations or negotiations) of FIPPA. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. Mediation by the OIPC did not resolve the issue between the parties and the matter proceeded to a written inquiry.

[3] During the inquiry, the Ministry withdrew its reliance on s. 16 and only argued that s. 14 applied to the information that it withheld in the letter. As

a result, I confirm s. 16 is no longer in dispute between the parties and will not consider it as an issue in this inquiry.

PRELIMINARY MATTERS

Additional issues in the Ministry's submission

[4] The Ministry submits that I should not hold this inquiry because the issue of whether solicitor-client privilege applies to the letter has already been decided by the BC Supreme Court. More specifically, the Ministry says that two different legal doctrines apply in this case: the rule against collateral attack and the doctrine of issue estoppel.

[5] In terms of collateral attack, the Ministry submits the applicant's access request under FIPPA is a collateral attack of a prior court decision regarding the requested letter.[1] The Ministry says the BC Supreme Court already considered and affirmatively decided that the letter is subject to solicitor-client privilege and that there was no waiver of the privilege since the parties shared a common interest.[2]

[6] The Ministry also argues issue estoppel applies in this case to bar the OIPC from holding this inquiry. The Ministry submits the requirements to successfully invoke issue estoppel have been met because the same issue that is the focus of this inquiry was already judicially decided and it was a final decision that involved the same parties.[3]

[7] These matters were not set out in the notice of inquiry or the OIPC investigator's fact report as issues for consideration in this inquiry. Previous OIPC orders have consistently said parties may raise new issues at the inquiry stage only if they request and receive permission to do so.[4] The Ministry did not seek permission to add these issues to the inquiry or explain why it should be permitted to do so at this late stage.

[8] However, the doctrine of issue estoppel and the rule against collateral attack are part of the body of law that "govern the interplay between different judicial decision makers."[5] The Supreme Court of Canada has said this body of law is "at the heart of the administration of justice" and that these rules and principles "call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions."[6]

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[1] Ministry's submission dated August 11, 2021 at para. 43.
[2] Ministry's submission dated August 11, 2021 at para. 44 and "Oral Reasons for Judgment" of the Honourable Mr. Justice Verhoeven attached as Exhibit "D" to D.S.'s affidavit.
[3] Ministry's submission dated August 11, 2021 at para. 49.
[4] For example, Order F19-41, 2019 BCIPC 46 at para. 5.
[5] *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63 (CanLII) [*Toronto*] at para. 15.
[6] *Toronto* at paras. 15 and 22.

[9] I can also determine from the parties' evidence that issue estoppel or collateral attack may be engaged. The Ministry provided a copy of a court judgment that addresses whether solicitor-client privilege applies to the letter. In her submission, the applicant criticizes that court judgment and other related court proceedings.[7] All of this evidence legitimately raises the issue of whether issue estoppel or collateral attack may apply here.

[10] Therefore, although the proper approach would have been for the Ministry to address these issues from the outset or bring them up during the investigation and mediation process, the parties' submissions establish that the common law doctrines of issue estoppel and collateral attack are relevant to this inquiry.

[11] I also note the applicant had the opportunity, as part of the inquiry submission process, to respond to the Ministry's arguments about whether these two principles apply and to its late addition of these issues when the inquiry process was underway. The applicant feels aggrieved by any accusations of "a collateral attack with this inquiry."[8] She says, among other things, that such accusations "shows that the bureaucrats of the Province have lost any sense of what is right and wrong."[9]

[12] Lastly, if I find the Ministry has successfully invoked issue estoppel or collateral attack, then that is sufficient to decide the dispute between the parties regarding the applicant's request for a review of the Ministry's decision regarding the letter.

[13] Taking all of the above into account, I find it appropriate in these circumstances to add issue estoppel and collateral attack to the inquiry and I will deal with those matters further below.

Additional issues in the applicant's submission

[14] The applicant's submission also includes other matters not set out in the OIPC investigator's fact report or the notice of inquiry. For instance, the applicant's submission includes various allegations of wrongdoing on the part of the federal government, the provincial government and a number of named individuals.[10]

[15] As the Commissioner's delegate, my role is limited to determining whether the Ministry was authorized or required to refuse access to the information

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[7] Applicant's submission at para. 22-25.
[8] Applicant's submission at para. 59 on p. 14.
[9] *Ibid*.
[10] For example, applicant's submission at para. 9 of p. 3 and paras. 37 and "29" on p. 8 and para. 45 on p. 11 (some paragraphs of the applicant's submission have been mis-numbered so I also cite page numbers for clarity).

withheld in the letter. To be clear, I do not have the jurisdiction to decide those other matters and will only refer to those submissions where it is relevant to the issues in this inquiry.

ISSUES AND BURDEN OF PROOF

[16] The issues I must decide in this inquiry are as follows:

1. Does issue estoppel or collateral attack apply so that the Ministry's decision to deny the applicant access to the information at issue should be confirmed?

2. If issue estoppel or collateral attack do not apply, is the Ministry authorized to refuse to disclose the information at issue under s. 14?

[17] Burden of proof for collateral attack and issue estoppel: The Ministry, as the party relying on issue estoppel or collateral attack, has the burden of proving those doctrines apply.[11]

[18] Burden of proof for s. 14: Section 57(1) of FIPPA places the burden on the Ministry to prove the applicant has no right of access to the information withheld under s. 14.

DISCUSSION

Background

[19] In 1999, the Government of Canada wanted to divest its interests in a number of docks and ports, many of which included provincial Crown land that had been reserved or transferred for federal use (i.e. foreshore and sea bed). The plan was for the federal government to return or transfer the lands to the Province and for the provincial government to allocate those lands to other parties with priority given to local governments.

[20] One of those federal docks was a public wharf located next to property first owned by the applicant and then later owned by a company in which the applicant is the president and sole shareholder (the Company). The divestiture plan for this wharf was for the federal government to transfer its interests to the provincial government who would then transfer the wharf to the Capital Regional District (CRD).[12]

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[11] Order 01-03, 2001 CanLII 21557 (BC IPC) at para. 7, citing *Nesbitt Thomson Deacon Inc. v. Everett*, 1989 CanLII 2763 (BCCA). Order F17-39, 2017 BCIPC 43 (CanLII) at para. 12, citing *Schweneke v. Ontario*, 2000 CanLII 5655 (ONCA) at para. 38.

[12] The CRD is the regional government for 13 municipalities and three electoral areas on southern Vancouver Island and the Gulf Islands.

[21] The applicant opposed the proposed transfer of this wharf and alleged the operation and public use of the wharf was a nuisance and a trespass and an infringement of her riparian rights. An owner of property that is located adjacent to a body of water enjoys certain rights related to the water, generally referred to as riparian rights, including the right of access to and from the water.

[22] In 2013, the Company was involved in litigation with Canada, the Province and the CRD (collectively "the defendants"). The Company sought, among other things, a declaration that the operation of the wharf facilities interferes with its riparian rights, damages for breach of its riparian rights and damages for nuisance and trespass.

[23] The trial judge ruled mainly in favour of the defendants. The litigation between the parties continued with an appeal of the trial decision, followed by an application to reopen resulting in a variation of the appeal decision and then an application to the Supreme Court of Canada where leave to appeal was refused. Overall, the defendants were mostly successful in the litigation.

Record at issue

[24] The record at issue is a three-page letter written by a provincial government employee to a federal government employee related to the proposed divestiture of the wharf and the issues raised by the Company over the proposed transfer. The letter is also copied to a CRD employee.

Issue estoppel

[25] As previously noted, the Ministry submits that I should not decide whether solicitor-client privilege applies to the letter since the doctrine of issue estoppel applies. Issue estoppel means that "a litigant is estopped because the issue has clearly been decided in the previous proceeding."[13] Put another way, issue estoppel prevents the re-litigation of an issue that a court or tribunal has already decided in a previous proceeding.[14]

[26] Issue estoppel is one branch of the doctrine known as *res judicata*.[15] The term *res judicata* is a Latin term that means "a thing adjudicated" and it is partly defined as "an issue that has been definitely settled by judicial decision."[16] *Res judicata* is one of a number of common law rules and principles that aims to

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[13] *Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24 (CanLII) at para. 30.
[14] *Schweneke v. Ontario*, 2000 CanLII 5655 (ONCA) at para. 25.
[15] The other branch is cause of action estoppel, which is not at issue here. Cause of action estoppel is broader than issue estoppel and means that "a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding": *Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24 (CanLII) at para. 30. The Ministry did not argue that this branch is relevant; therefore, I will not consider it.
[16] Black's Law Dictionary, 10th ed, *sub verbo* "res judicata".

prevent abuse of the decision-making process and promote a finality to litigation.[17]

[27] A common justification for the doctrine of *res judicata* is that "a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue."[18] Accordingly, the doctrine of issue estoppel prevents the parties from calling into question or re-litigating issues which have already been decided between them.[19]

[28] For issue estoppel to apply, the following three requirements must be satisfied:

1. The issue in the current proceeding must be the same as the one decided in the prior decision;

2. The prior judicial decision must have been final; and

3. The parties to both proceedings, or their privies, must be the same.[20]

[29] I will address each of these requirements below. However, if these three requirements are successfully established, then that is not the end of the matter. I must next consider whether, as a matter of discretion, issue estoppel ought to be applied.[21] Specifically, is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?[22] The party seeking to invoke the discretion has the burden of demonstrating that there is an injustice to applying issue estoppel in the circumstances.[23]

Is it the same issue?

[30] The first condition of issue estoppel requires that the issue at this inquiry is the same as the one in the prior decision. The issue in this inquiry is whether s. 14 applies to the information withheld in the letter because solicitor-client privilege applies and, if so, whether that privilege was waived.

[31] The Ministry submits that "the issue of whether the Letter could be withheld pursuant to solicitor-client and common interest privileges was already decided by Mr. Justice Verhoeven."[24] In support of its position, the Ministry

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[17] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII) at para. 18.
[18] *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63 (CanLII) [*Toronto*] at para. 50.
[19] *Comeau et al. v. Breau et al*., 1994 CanLII 4469 (NBCA) at para. 28.
[20] *Toronto* at para. 23.
[21] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII) at para. 33.
[22] *Schweneke v. Ontario*, 2000 CanLII 5655 (ONCA) at para. 38.
[23] *Ibid*.
[24] Ministry's submission dated August 11, 2021 at para. 49.

provided a copy of the "Oral Reasons for Judgment" of the Honourable Mr. Justice Verhoeven.[25] The Ministry contends that the applicant is, therefore, "estopped" from having this inquiry about whether solicitor-client privilege applies to the letter since there was a prior judicial decision about that issue.

[32] It is not in dispute that the letter was part of the prior decision. The applicant confirms that the record she has requested under FIPPA is the "very same document" considered by Justice Verhoeven in his judgment.[26]

[33] I am also satisfied that the issue in this inquiry is the same as the one in that prior decision. One of the issues before Justice Verhoeven was whether the letter was protected by solicitor-client privilege, and if so, whether that privilege had been waived.[27] Justice Verhoeven determined that the letter contained privileged communications between the government agencies and their respective lawyers.[28] He also found there was no waiver of that privilege because the parties shared a common interest.[29]

[34] As a result, I conclude that the matter in this inquiry is substantively the same as the issue that Justice Verhoeven decided in his judgment. As a result, I find the first requirement for successfully invoking issue estoppel has been met.

Is it a final judicial decision?

[35] The second condition of issue estoppel requires the prior decision, that is said to create the estoppel, is a final decision. To satisfy this second requirement, previous authorities have broken the analysis into two parts: (1) Can the previous decision be characterized as a judicial decision, and (2) If so, was it a final decision?[30]

[36] The Ministry submits Justice Verhoeven's judgment was a final decision that was not appealed.[31] The Ministry notes the trial judge's decision regarding the litigation between the parties was mostly upheld on appeal and then leave to appeal that decision to the Supreme Court of Canada was denied. However, it submits Justice Verhoeven's judgment regarding the letter was not appealed or overturned during any of the litigation.

[37] I find Justice Verhoeven's judgment is clearly a judicial decision. The remaining question is whether it is a final decision. Judicial decisions are

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[25] Attached as Exhibit "D" to D.S.'s affidavit. The judgment does not appear to have been indexed or published.
[26] Applicant's submission at para. 22 of p. 5.
[27] Justice Verhoeven's oral reasons for judgment at paras. 24-25.
[28] Justice Verhoeven's oral reasons for judgment at para. 24.
[29] Justice Verhoeven's oral reasons for judgment at para. 26.
[30] Order 01-03, 2001 CanLII 21557 (BC IPC) at para. 33.
[31] Ministry's submission dated August 11, 2021 at para. 49.

generally conclusive of the issues decided unless and until reversed on appeal.[32] Furthermore, a "final decision for the purposes of issue estoppel is a decision which conclusively determines the questions between the parties" and "when the decision-making forum pronouncing it has no further jurisdiction to rehear or to vary or rescind the finding."[33]

[38] In the present case, Justice Verhoeven's decision conclusively determined that the letter contained information protected by solicitor-client privilege. There is also no evidence that Justice Verhoeven's decision was challenged, appealed or overturned. The applicant discusses several court applications that the Company made, including an application to re-open the case to adduce additional evidence.[34] However, none of those court actions is about Justice Verhoeven's decision regarding the letter. The Company was entitled to appeal that decision, but there is no evidence that it did so. As a result, I conclude Justice Verhoeven's judgment is a final judicial decision and the second requirement for successfully invoking issue estoppel has been met.

Is it the same parties?

[39] The final condition often referred to as "mutuality" requires that the parties to both proceedings, or their privies, be the same.[35] Specifically, it requires that "the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies."[36] Whether the two actions involve the same parties (or their privies) is determined on a case-by-case basis.[37]

[40] A person is a party's privy where there is a community, privity or unity of interest between them such that they are not different in substance.[38] There must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is party.[39]

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[32] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII) at para. 19.
[33] *Toronto Dominion Bank v. Lineaux*, 2005 NSCA 97 (CanLII) at para. 32, leave to appeal to the SCC dismissed with costs at 2006 CanLII 1124 (SCC).
[34] Applicant's submission at para. 54 on p. 13.
[35] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII) at para. 30.
[36] *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 (CanLII) at para. 31.
[37] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII) at para. 60.
[38] *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600 (CanLII) at para. 45.
[39] *Machin v. Tomlinson*, 2000 CanLII 16945 (ON CA) at para. 19. *O'Hara v. BC (Royal British Columbia Museum and British Columbia Archives) and Mitchell*, 2005 BCHRT 184 (CanLII) at para. 54.

[41] The Ministry submits this final condition is satisfied since the parties in this inquiry, that is the applicant and the Province as represented by the Ministry, were also parties to Justice Verhoeven's decision.[40]

[42] Based on my review of the judgment, I can see that the Company and the Province were parties in that prior decision. The judgment arose from an application by the Company for disclosure of certain documents by the "defendants Attorney General of Canada and Capital Regional District."[41] It is also not in dispute that Her Majesty the Queen in Right of the Province of British Columbia (the Province) was a third party in those proceedings. Justice Verhoeven's judgment identifies the Province as participating in the hearing, through its legal counsel, on the issue of whether the letter is subject to solicitor-client privilege.[42] Therefore, the question is whether the Company and the Province, or their privies, are parties in this inquiry.

[43] For the reasons to follow, I find the Ministry and the Province share a unity of interest and are not different in substance for the purpose of the issue estoppel analysis. Under FIPPA, access requests are made to individual public bodies rather than the Province as a whole.[43] An OIPC inquiry reviews the decision or act of that public body.[44] The term "public body" is defined under Schedule 1 of FIPPA and includes "a ministry of the government of British Columbia", but does not include the Province.

[44] As a result, for the purposes of issue estoppel, the Province's interests in an OIPC inquiry will usually be represented by each provincial ministry, unless there is evidence to suggest otherwise. There is nothing about the circumstances of this case to suggest that the Ministry and the Province's interests in this inquiry are different. I am, therefore, satisfied that the Ministry is a privy of the Province in this inquiry.

[45] I turn now to consider whether the applicant in this inquiry is the same party who was involved in the prior judicial decision. As noted above, the Company was a party in the prior judicial decision. However, the access request that is the subject of this inquiry was made by a named individual. This individual does not clearly identify that she made the access request on behalf of the Company. For instance, some of the applicant's submissions are made from a personal and individual perspective and not as a representative of the

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[40] Ministry's submission dated August 11, 2021 at para. 49.
[41] Justice Verhoeven's oral reasons for judgment at para. 2.
[42] Justice Verhoeven's oral reasons for judgement at paras. 24-28.
[43] Section 4 of FIPPA states that "a person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body."
[44] Section 52 states, in part, that "a person who makes a request to the head of a public body…for access to a record…may ask the commissioner to review any decision, act, or failure to act of the head that relates to that request…."

Company.[45] Therefore, I am unable to conclude that the Company, as a distinct legal entity, is a party to this inquiry.

[46] However, I am satisfied the applicant is a "privy" of the Company for the purposes of issue estoppel. Prior jurisprudence has found that "a non-party in an earlier proceeding is a privy on the basis of being involved in the first proceeding by being present and by giving evidence."[46] Some factors that have been considered in establishing a privy of a party are "having knowledge of the previous proceeding, a clear interest in the proceeding, the ability to intervene as a participant but choosing to stand-by and watch, active participation in the previous proceedings by giving evidence, and being part of the litigation team."[47]

[47] In particular, the courts have found a non-party in an earlier proceeding will be a privy in a subsequent proceeding where that person is a director and officer of a company or an individual who owns or controls a company.[48] The idea is that a participant in the second proceeding should be bound by the determination in a previous proceeding because of his or her relationship, called privity, with the party in that prior proceeding.[49]

[48] Although the applicant was not individually named as a party in the earlier proceeding before Justice Verhoeven, I am satisfied the applicant did participate in that proceeding by being present at that hearing.[50] I also find it reasonable to conclude that the applicant had the opportunity to give evidence and had a clear interest in the proceeding as the Company's representative.

[49] The Ministry also notes that the applicant is the "president and director" of the Company.[51] It is well-established that a company is a distinct legal entity from its shareholders or officers.[52] However, there are a number of cases in which a principal or officer of a company was held to be a "privy" of the company for the purposes of issue estoppel.[53] In general, there must be a mutuality of interest between the principal and the company, so that the principal is the operating

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[45] For example, applicant's submission at paras. 41-45 on pp. 10-11.
[46] *Toronto Dominion Bank v. Lienaux*, 2005 NSCA 97 (CanLII) at paras. 39-41, citing Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, ON: Butterworths Canada Ltd., 2000) at p. 71.
[47] *Ibid*.
[48] *Toronto Dominion Bank v. Lienaux*, 2005 NSCA 97 (CanLII) at paras. 39, citing Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, ON: Butterworths Canada Ltd., 2000) at p. 71 and the cases cited therein.
[49] *Martin v. Goldfarb*, 2006 CanLII 23152 (ON SC) at para. 61.
[50] Affidavit of D.S. at para. 6.
[51] Affidavit of D.S. at para. 3.
[52] *Kosmopoulos v. Constitution Insurance Co*., 1987 CanLII 75 (SCC) at para. 12, citing *Salomon v. Salomon & Co*., [1897] A.C. 22 (H.L.).
[53] *Delane Industry Co. Ltd. V. Atkinson*, 2017 BCCA 79 at para. 25. *Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24 at para. 44 and the cases cited therein.

mind of the company, or a sufficient degree of identification between the two to justify binding one party to the judgment pronounced upon the other party.[54]

[50] In this case, I am satisfied the applicant is the operating mind of the Company and that her own interests are aligned with the Company's interests. The applicant acknowledges that she is the "principal", president, owner and sole shareholder of the Company.[55] As the sole owner and president, the applicant owned and controlled the Company at all material times and provided instructions and made decisions on behalf of the Company. For instance, the parties' submissions and evidence establish that the applicant was the Company's representative throughout the litigation and in any dealings or correspondence involving the Company and the dispute over the wharf.[56]

[51] The applicant's submission also indicates that she has a commonality of interests with the Company. Both the applicant and the Company shared the same goal of opposing the transfer of the wharf and seeking damages associated with any infringement of their property rights.[57] The applicant also disputes the finding made against the Company regarding the letter.[58] Therefore, while corporate law may treat the Company as a distinct legal entity, the evidence in this case shows that the applicant is closely aligned with the Company in terms of interests and identity.

[52] Taking all of the above into account, I find there is a sufficient degree of identification between the applicant and the Company to support and justify the conclusion that the applicant is a "privy" of the Company for the purposes of issue estoppel.

Residual discretion

[53] As previously noted, although I find the three requirements for issue estoppel are satisfied, I still have the discretion not to apply it if doing so would cause unfairness.[59] The discretion to refuse to give effect to issue estoppel recognizes that there may be circumstances where the inflexible application of issue estoppel works an injustice between the parties.[60]

[54] However, the discretion not to apply issue estoppel is limited to "special circumstances" which would include "fraud, misconduct, or the discovery of decisive fresh evidence that could not have been adduced at the earlier

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[54] *420093 BC Ltd. v. Bank of Montreal*, 1995 CanLII 6246 (AB CA).
[55] Applicant's submission at para. 24 on p. 6 and Exhibit "B 6" and Exhibit "L" at para. 24.
[56] For example, applicant's submission at Exhibit "B 6" & "B 11".
[57] For example, applicant's submission at paras. 9-11 on p. 3.
[58] For instance, applicant's submission at para. 2 on p. 1.
[59] *Chancellor v. Maynes*, 2021 BCSC 391 (CanLII) at para. 30.
[60] *Ibid* at paras. 62-64.

proceeding by the exercise of reasonable diligence."[61] There must be "some overriding question of fairness" that necessitates a rehearing.[62]

[55] The applicant submits that Justice Verhoeven's decision about the letter was "appropriate and applicable as to his reference to Common Interest at that time of ongoing litigation, not regarding Solicitor-Client privilege though."[63] In response, the Ministry emphasizes that, among other things, the applicant's submissions "appear to be an attempt to re-litigate matters previously decided by the British Columbia Supreme Court and British Columbia Court of Appeal."[64]

[56] In the present case, I can see no circumstances that support exercising my discretion not to give effect to issue estoppel. There is no allegation or evidence of any fraud, misconduct or a lack of natural justice in the proceedings before Justice Verhoeven. The applicant does not point to any newly-discovered evidence nor any alleged impropriety in that prior judicial proceeding.[65]

[57] I note that the applicant partly disagrees with Justice Verhoeven's decision, but I do not find this is a special circumstance that warrants a rehearing of the matter in the interest of fairness. The Company knew the case it had to meet and had the full and fair opportunity to present its case in that hearing. It was represented by legal counsel and the applicant was present during those proceedings as the Company's representative.

[58] To conclude, I find there is nothing in the circumstances of this case that warrants exempting the applicant from the usual operation of issue estoppel. As a result, I find the applicant is estopped from requesting a review under FIPPA of whether the information at issue in the letter is protected by solicitor-client privilege.

[59] Given my finding, I need not deal with the merits of the Ministry's case regarding the applicability of s. 14 to the information at issue in the letter or its arguments about the rule against collateral attack.

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[61] *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 (CanLII) at para. 44. Also accepted and applied in Order 01-03, 2001 CanLII 21557 (BC IPC) at para. 56.
[62] *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 (CanLII) at para. 44, citing *Saskatoon Credit Union Ltd. V. Central Park Enterprises Ltd*., 1988 CanLII 2941 (BC SC).
[63] Applicant's submission at para. 22 at p. 5.
[64] Ministry's submission dated October 15, 2012 at para. 4.
[65] For a similar conclusion, see Order 01-03, 2001 CanLII 21557 (BC IPC) at para. 57.

CONCLUSION

[60] For the reasons given above, under s. 58, I confirm the Ministry's decision to refuse access on the basis the applicant's request under FIPPA for a review of its decision that the information withheld in the letter is protected by solicitor-client privilege is barred by issue estoppel.

January 17, 2022

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F19-80874