



Order P22-05

**DUNCAN & FABER  
AND  
STEVENSON, LUCHIES & LEGH**

Celia Francis  
Adjudicator

September 16, 2022

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**Summary:** The Complainant said that two law firms (organizations) violated his privacy rights under the *Personal Information Protection Act* (PIPA) in collecting, using and disclosing his personal information. The organizations argued that issue estoppel applies, barring the Complainant from proceeding with his complaints, as a provincial court judge dealt with the same issue in an earlier proceeding and dismissed the Complainant’s claims against the organizations and lawyers involved. The adjudicator found that issue estoppel applies and that the Complainant is thus barred from proceeding with his PIPA complaints.

## **INTRODUCTION**

[1] This case concerns complaints to the Office of the Information and Privacy Commissioner (OIPC) against two law firms, Duncan & Faber (DF) and Stevenson, Luchies & Legh (SLL) (the organizations). The Complainant said that DF and SLL collected, used and disclosed his personal information in contravention of the *Personal Information Protection Act* (PIPA). Investigation and mediation of the complaints by the OIPC did not resolve the matters and they proceeded separately to inquiry.

## **PRELIMINARY ISSUE**

[2] SLL argued that the complaint is barred by cause of action estoppel and issue estoppel, as the Complainant has already litigated the issue of the alleged breach of his privacy before the Provincial Court of British Columbia. SLL said that this claim was dismissed in March 2020 when the judge ruled that “the exchange of information did not violate any unique privacy interests” of the

Complainant. SLL also argued that the Complainant is making a collateral attack on the judge's decision, that is, the Complainant is attempting to circumvent the judge's decision to get a different result.<sup>1</sup>

[3] Issue estoppel and collateral attack were not set out in the notice of inquiry or the OIPC investigator's fact report as issues for consideration in either 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.<sup>2</sup> DF did not raise issue estoppel or collateral attack in its submission. DF also did not have an opportunity to respond to SLL's arguments, as the two inquiries proceeded separately.

[4] SLL did not ask permission to add issue estoppel or collateral attack at this stage. Nor did it explain why it should be permitted to, so late in the process. However, as Order F22-05 noted,

... 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". 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."<sup>3</sup>

[5] In any event, I could see from the parties' submissions and evidence that issue estoppel or collateral attack may arise in both inquiries. The organizations provided a copy of reasons for judgement of a judge in the Provincial Court of British Columbia that addressed whether or not the organizations acted properly in collecting, using and disclosing the Complainant's personal information and related issues.<sup>4</sup> Moreover, the Complainant acknowledged that the issues in his court action and these complaints are similar.<sup>5</sup>

[6] I therefore wrote to the parties to say that the two complaints are linked and I was satisfied that issue estoppel or collateral attack is relevant to both inquiries. I said was, therefore, joining the two inquiries and would issue one order on both. I then directed the parties to exchange their submissions. I also invited and received a supplementary submission on issue estoppel and collateral attack from DF.

[7] The Complainant responded to SLL's and DF's arguments on issue estoppel and collateral attack as part of the inquiry process.

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<sup>1</sup> Stevenson, response submission, paras. 2 and 25.

<sup>2</sup> See, for example, Order F22-05, 2022 BCIPC 5 (CanLII).

<sup>3</sup> *ibid*, at para. 8.

<sup>4</sup> Schedule A, SLL's response submission; first attachment to DF's response submission. The reasons for judgement are unreported.

<sup>5</sup> Complainant's email to the OIPC, April 3, 2019, 8:41 AM.

[8] I will consider first whether issue estoppel or collateral attack applies. If I find that either applies, that decides the matter and I need not consider the complaints themselves.

## **ISSUES AND BURDEN OF PROOF**

[9] The issues I must decide here are these:

1. Does issue estoppel or collateral attack apply so that the Complainant is barred from proceeding with his complaints?
2. If issue estoppel or collateral attack does not apply, did the organizations contravene PIPA in collecting, using or disclosing the Complainant's personal information?

[10] SLL and DF, as the parties relying on issue estoppel or collateral attack, have the burden of proof.<sup>6</sup>

[11] As for the PIPA complaints, PIPA does not set out a burden of proof in an inquiry regarding the collection, use and disclosure of personal information. Past orders have said that, in such cases, it is in the interests of the parties to provide argument and evidence in support of their positions.<sup>7</sup> I agree with this approach.

## **DISCUSSION**

### **Background**

[12] A lawyer with SLL (SLL lawyer) represented the Complainant's wife in their divorce proceedings some years ago. The Complainant provided financial disclosure to his wife, as required for the divorce proceedings.

[13] A partner in DF (DF lawyer) represented the wife of the Complainant's brother (brother) in separate divorce proceedings, which occurred around the same time.

[14] The DF lawyer and the SLL lawyer met at one point to clarify the two brothers' linked financial affairs which were potentially relevant to their respective clients' (the two wives') interests in their divorce proceedings. The SLL lawyer also provided the DF lawyer with a number of documents related to the Complainant's finances.

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<sup>6</sup> Order F22-05, para. 17.

<sup>7</sup> Order P21-06, 2021 BCIPC 35 (CanLII), at para. 17; Order P09-02, 2009 CanLII 67292 (BC IPC) at para. 4.

[15] The DF lawyer then prepared a list of documents which she intended to use in the divorce proceedings of her client (the brother's wife). The list included the Complainant's financial documents that she had received from the SLL lawyer. The DF lawyer provided this list to the brother's lawyer as part of the divorce action.

[16] The brother later told the Complainant that he had received a copy of the list, along with the documents. The Complainant called the DF lawyer to complain that, without his consent, she had improperly, collected, used and disclosed his personal information. The DF lawyer returned the documents to the SLL lawyer and deleted any electronic versions from DF's server.

[17] The Complainant later sued DF, the DF lawyer and the SLL lawyer, claiming that the SLL lawyer had, without his consent, disclosed his (the Complainant's) personal information to the DF lawyer and that this disclosure was not related to the Complainant's own divorce proceedings. He further claimed that the DF lawyer stated an intention to disclose the Complainant's personal information to the brother's lawyer, in the brother's separate divorce action.

[18] The DF lawyer and the SLL lawyer applied to have the court action dismissed, arguing that there was no legal basis for the claim. The court agreed with the lawyers and dismissed the claim.<sup>8</sup>

[19] Since the PIPA complaint was made to the OIPC, DF has ceased operations and dissolved.<sup>9</sup> The DF lawyer provided an inquiry submission, not only on behalf of herself and her own law corporation, but also on behalf of DF.<sup>10</sup>

### ***Issue estoppel***

[20] Issue estoppel prevents the re-litigation of an issue that a court or tribunal has already decided in a previous proceeding.<sup>11</sup> Its purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.<sup>12</sup>

[21] For issue estoppel to apply, 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

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<sup>8</sup> This background information is drawn from SLL's and DF's submissions, their response to the Complainant's notice of claim and the reasons for judgement.

<sup>9</sup> DF response submission, para. 17.

<sup>10</sup> DF response submission, closing sentence.

<sup>11</sup> Order F22-05, para. 25.

<sup>12</sup> Order F17-39, 2017 BCIPC 43, para. 11.

3. The parties to both proceedings, or their privies, must be the same.<sup>13</sup>

[22] I deal with each of these requirements below. I must then exercise my discretion in deciding whether or not to apply issue estoppel. The Complainant, as the party seeking to invoke the discretion not to apply issue estoppel, has the burden of proof.<sup>14</sup>

*Is it the same issue?*

[23] The first question is whether the issue in these complaints is the same as the one decided in the earlier court proceeding.

[24] SLL and DF argued that the question of whether the Complainant's privacy rights were breached was central to the court case and was thus squarely before the judge. DF added that the facts on which the PIPA complaints are based are the same as in the court case.<sup>15</sup>

[25] The Complainant said that privacy was not a central issue in the provincial court litigation and that it was not squarely before the judge. The Complainant said he did not allege any PIPA violations had occurred and that the judge did not address PIPA. In the Complainant's view, "the Provincial Court does not hold jurisdiction to address violations of PIPA." He added that "the application before the Provincial Court was an application to dismiss and not a trial."<sup>16</sup> He said that, in the lawsuit, he was not seeking damages for breach of privacy but rather damages related to *tortious interference* and that he claimed a duty of care under Tort law".<sup>17</sup>

Discussion and findings

[26] The Complainant alleged in his complaint to the OIPC that the two organizations, SLL and DF, contravened PIPA in collecting, using and disclosing his personal information, without his consent, for purposes that were unrelated to the purpose for which he had provided his personal information (i.e., to his wife as part of their divorce proceedings).<sup>18</sup>

[27] In the court case, the Complainant claimed that the two lawyers violated his privacy in their collection, use and disclosure of his financial information,

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<sup>13</sup> Order F22-05, at para. 28; Order F17-39, 2017 BCIPC 43, at para. 11; Order 01-03, 2001 CanLII 21557 (BC IPC), at para. 18.

<sup>14</sup> Order F22-05, para. 29.

<sup>15</sup> SLL response, paras. 15-18, 23, 31; DF supplementary submission, paras. 3-4.

<sup>16</sup> Complainant's supplementary submission in DF inquiry.

<sup>17</sup> Complainant's reply and supplemental response in DF inquiry, para. 4. Italics in original.

<sup>18</sup> Complainant's initial submission in SLL inquiry, paras. 17-22.

without his consent. I have reviewed the judge's reasons for judgement and he explicitly listed this as an issue.<sup>19</sup>

[28] I acknowledge that the judge did not mention PIPA but I do not think this matters. I am satisfied that the issues in the court case and the PIPA complaints are substantively the same, namely, whether the organizations and, by extension, the two lawyers, violated the Complainant's privacy rights in exchanging his personal information. I find that the first requirement for successfully invoking issue estoppel is met.

*Is it a final judicial decision?*

[29] SLL and DF said that the judge's decision is a final judicial decision, that the time for an appeal has passed and the Complainant did not appeal.<sup>20</sup>

[30] The Complainant said an appeal was not appropriate.<sup>21</sup>

Discussion and findings

[31] The judge in the provincial court case dismissed the claim that the complainant's privacy had been breached on the grounds that the two lawyers had acted properly in exchanging the Complainant's personal information.<sup>22</sup> The judge noted that the rules specifically allow lawyers to use financial disclosure material they received for the purpose of valuations in divorce proceedings.<sup>23</sup> He said that the two lawyers "were doing exactly what is expected of them when they exchanged information", that they shared information appropriately to represent their clients in their respective family law cases and that the exchange of information between the two lawyers did not "violate any unique privacy interest" of the Complainant.<sup>24</sup>

[32] The judge dealt squarely with whether the two lawyers had acted properly in collecting, using and disclosing the Complainant's personal information. There is no evidence that the Complainant appealed the judge's decision. Indeed, the Complainant implicitly acknowledged that he had not appealed when he said an appeal was not appropriate. I find, therefore, that the court decision was a final judicial decision and that the second requirement for successfully invoking issue estoppel is met.

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<sup>19</sup> Para. 10, reasons for judgement.

<sup>20</sup> SLL response, paras. 25, 28; DF supplementary submission, para. 5.

<sup>21</sup> Complainant's supplementary response in DF inquiry.

<sup>22</sup> Para. 21, reasons for judgement.

<sup>23</sup> Para. 16, reasons for judgement, with reference to rule 5-1 of the Supreme Court Family Rules, B.C. Reg. 105/2019. Rule 9-1 is also relevant.

<sup>24</sup> Paras. 20-21, reasons for judgement.

*Are the parties or their privies the same?*

[33] Order F22-05 described the final requirement for issue estoppel as follows:

[39] The final condition often referred to as “mutuality” requires that the parties to both proceedings, or their privies, be the same.<sup>35</sup> 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.” Whether the two actions involve the same parties (or their privies) is determined on a case-by-case basis.

[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. 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.

[footnotes omitted]

[34] SLL said that it and the SLL lawyer are privies, as the SLL lawyer “performed the impugned disclosure by the Organization”.<sup>25</sup>

[35] DF said that, even though DF is the organization against which the PIPA complaint was brought, the DF lawyer was a partner in DF, and the DF lawyer and her law corporation were named as defendants in the provincial court case. She said, “Although differently named, all facts relate to the actions taken by [the DF lawyer], while working within the partnership of Duncan & Faber, and for all significant purposes they are privies.”<sup>26</sup>

[36] The Complainant said that the judge referred to the two lawyers by name throughout his reasons for judgment.<sup>27</sup> I take this to mean that he thinks that the lawyers and the organizations are, therefore, not privies.

Discussion and findings

[37] The Complainant, the SLL lawyer, the DF lawyer and DF itself were parties to the provincial court proceeding. In the OIPC inquiry, the PIPA complaints involve the Complainant and the two organizations, SLL and DF.

[38] The SLL lawyer was acting for SLL when he performed the actions complained about. I agree, therefore, that SLL and the SLL lawyer are privies.

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<sup>25</sup> Stevenson response submission, para. 30.

<sup>26</sup> DF’s supplemental submission, para. 6.

<sup>27</sup> Complainant’s supplementary response in DF inquiry.

Although DF has since dissolved, I find that, at the time of the disclosure of the complainant's personal information (the complained-about actions), the DF lawyer was operating her own law corporation and was a partner in DF. I am, therefore, satisfied that the DF lawyer and DF were privies at the time of the events the Complainant says breached his privacy rights.

[39] I find that the third requirement for successfully invoking issue estoppel is met.

*Residual discretion*

[40] Although I have found that all three requirements for issue estoppel have been met, I must still exercise my discretion to decide if issue estoppel ought to be applied. That is, would applying issue estoppel be unfair in the circumstances? As noted in order F22-05,

The discretion not to apply issue estoppel is limited to special circumstances, such as fraud, misconduct, or the discovery of fresh evidence that could not have been adduced in the earlier proceeding with the exercise of due diligence. There must be an overriding question of fairness that warrants a rehearing.<sup>28</sup>

[41] SLL argued that there is “no evidence of any such overriding questions of fairness in requiring the Complainant to abide by” the judge's decision.<sup>29</sup> DF did not address this issue, although it adopted SLL's submission.<sup>30</sup>

Discussion and findings

[42] The Complainant disagrees with the judge's decision in the court case. However, this does not make it a special circumstance that warrants a rehearing of the matter in the interests of fairness. He had ample opportunity to make his case in the court hearing and his claim was roundly dismissed. He could have appealed the decision but did not. I find there is nothing in the circumstances of this case to warrant exempting the Complainant from the usual operation of issue estoppel.

[43] I find, therefore, that the Complainant is estopped from complaining that the organizations contravened PIPA in collecting, using and disclosing his personal information. In light of this finding, I need not deal with the merits of the PIPA complaints or SLL's and DF's arguments about the rule against collateral attack.

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<sup>28</sup> Supra, para. 54.

<sup>29</sup> Stevenson response submission, para. 38.

<sup>30</sup> DF's supplementary submission.



## **CONCLUSION**

[44] For reasons given above, I find that the Complainant is barred from pursuing his PIPA complaints because issue estoppel applies. Accordingly, I exercise my discretion under s. 50(1) of PIPA not to hold an inquiry into the issue of whether the organizations contravened PIPA.

September 16, 2022

## **ORIGINAL SIGNED BY**

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Celia Francis  
Adjudicator

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P19-78767