OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-03

BRITISH COLUMBIA LOTTERY CORPORATION

David Loukidelis, Information and Privacy Commissioner
January 26, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 3
Order URL: http://www.oipcbc.org/orders/Order01-03.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: The applicant made a request, in 1998, for access to contracts between BCLC and an actor, for the latter's services in television advertisements. In Order No. 315-1999, the previous commissioner upheld BCLC's decision to refuse access. The same applicant applied again for access to the same two contracts and two later renewal contracts. Doctrine of issue estoppel can apply under the *Freedom of Information and Protection of Privacy Act*. All three criteria for issue estoppel were met in this case: (1) the same question had previously been decided, (2) the previous decision was a final decision of a judicial character, and (3) the parties were the same in the previous case and this one. The applicant is not entitled to access.

Key Words: issue estoppel – *res judicata*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 17, 21, 56(1), 57, 58.

Authorities Considered: B.C.: Order No. 315-1999. **Ontario**: Order PO-1676, [1999] O.I.P.C. No. 69.

Cases Considered: *Nesbitt Thomson Deacon Inc.* v. *Everett* (1989), 37 B.C.L.R. (2d) 341 (C.A.); *Solomon* v. *Smith*, [1988] 1 W.W.R. 410 (Man. C.A.); *Saskatoon Credit Union Ltd.* v. *Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.); *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchleb*, [1965] 2 All E.R. 4 (N.L.); *Angle* v. *Minister of National Revenue*, [1975] 2 S.C.R. 248; *Carl Zeiss Stiftung* v. *Rayner and Keeler Ltd. et al. (No. 2)*, [1966] 2 All E.R. 536 (H.L.); *Minott* v. *O'Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321 (C.A.); *Bank of British Columbia* v. *Singh* (1987), 17 B.C.L.R. (2d) 256 (S.C.); *Cobb* v. *Hldg. Lumber Co.* (1977), 79 D.L.R. (3d) 332 (B.C.S.C.); *Raison* v. *Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C.C.A.); *Hamelin* v. *Davis*, [1996] 6 W.W.R. 341 (B.C.C.A.) (additional reasons at [1996] 6

W.W.R. 341, leave to appeal refused, (1997), 211 N.R. 320n (S.C.C.)); *British Columbia (Minister of Forests)* v. *Bugbusters Pest Management Inc.*, [1998] B.C.J. No. 1043 (C.A.); *Dayco (Canada) Ltd.* v. *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW – Canada)*, [1993] S.C.J. No. 53, [1993] 2 S.C.R. 230; *Axton* v. *BC Transit* (1997), 28 C.H.R.R. D/337; *Gold* v. *British Columbia (Ministry of Finance and Corporate Relations, Public Service Employee Relations Commission)*, [1998] B.C.H.R.T.D. No. 6; *Jonke* v. *Kessler*, [1991] B.C.J. No. 250 (S. C.); *British Columbia* v. *Tozer*, [1998] B.C.J. No. 2594 (S.C.); *Canada (Attorney General)* v. *Canada (Canadian Human Rights Commission)*, [1991] F.C.J. No. 334 (C.A.); *O'Brien* v. *Canada (Attorney General)*, [1993] F.C.J. No. 333 (C.A.); *Rasanen* v. *Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 (Ont. C.A.) (leave to appeal refused 115 D.L.R. (4th) viii (S.C.C.); *Danyluk* v. *Ainsworth Technologies Inc. et al.* (1999) 42 O.R. (3d) 235 (C.A.) (appeal heard and res. Oct. 31, 2000, [1999] SCCA No. 47); *Heynen* v. *Frito-Lay Canada Ltd. et al.* (2000), 45 O.R. (3d) 776(C.A.) (leave to appeal denied, [1999] S.C.C.A. No. 569); *Arnold* v. *National Westminster Bank plc*, [1991] 3 All E.R. 41 (H.L.).

1.0 INTRODUCTION

[1] As the British Columbia Lottery Corporation ("BCLC") sees it, the applicant in this case is asking me to revisit – and disagree with – my predecessor's decision in Order No. 315-1999. In 1998, the applicant made an access request to BCLC, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for a copy of its agreement with an actor. Two contracts, in the form of letter agreements, responded to that request. They were dated January 6 ("First Agreement") and December 3, 1997 ("Second Agreement"). They provided for the services of a well-known actor in an ongoing BCLC ad campaign.

[2] BCLC denied that request and my predecessor ultimately held an inquiry into the matter under s. 56 of the Act. In Order No. 315-1999, Commissioner Flaherty upheld BCLC's decision, under s. 17(1) of the Act, to deny access to both the First Agreement and the Second Agreement in their entirety. He rejected BCLC's argument that s. 21(1) of the Act required BCLC to withhold those records. As far as I am aware, the applicant did not apply for judicial review of that decision.

[3] On February 9, 2000, the applicant made a new access request to BCLC, in which he sought "copies of all contracts" with, and "records of payments" to, the actor "for his work in promoting the Lottery Corp's products." He stipulated that this request included "records generated since my last FOI request on this topic." BCLC's response indicated that it interpreted the new request to cover only records generated since the applicant's 1998 request. The response identified, as responsive to the new request, a contract for services dated December 2, 1998 ("Third Agreement"). BCLC refused to disclose the Third Agreement on the basis of ss. 17 and 21 of the Act.

[4] It appears the applicant subsequently clarified his new request verbally, to confirm that it covered records dealt with in Order No. 315-1999. In a letter dated March 24, 2000, BCLC confirmed this clarification and identified the responsive records as four "letters of agreement", *i.e.*, the First Agreement, the Second Agreement, the Third Agreement and a letter agreement dated December 20,1999 ("Fourth Agreement"). The

letter went on to refuse access, noting that disclosure "could put the current contract at risk" or result in the actor "insisting on a higher fee for the next contract".

[5] The applicant requested a review of BCLC's decision on March 7, 2000. Because the matter did not settle in mediation, I held a written inquiry under s. 56 of the Act.

2.0 ISSUES

[6] The issues raised in this case are as follows:

1. Does the doctrine of *res judicata* or the doctrine of issue estoppel apply, such that BCLC's decision to deny access should be confirmed?

2. If the answer to question 1 is no, is BCLC authorized by s. 17(1) of the Act, or required by s. 21(1) of the Act, to refuse access to information in the records?

[7] By virtue of s. 57(1) of the Act, the burden of proof on the second issue lies on BCLC. The courts have ruled that the burden of proof in demonstrating that issue estoppel or *res judicata* applies is on the party so alleging, which is BCLC. See, for example, *Nesbitt Thomson Deacon Inc.* v. *Everett* (1989), 37 B.C.L.R. (2d) 341 (C.A.).

3.0 DISCUSSION

[8] **3.1 Nature of BCLC's Case** – BCLC urges me, in effect, to confirm its decision to refuse access, on the basis that the issues raised here were conclusively decided by Order No. 315-1999 and cannot be decided again in this inquiry. It argues that the legal doctrines known as *res judicata* and issue estoppel – which I describe below – prevent the applicant from, in effect, collaterally attacking Order No. 315-1999 and achieving a result more palatable to him.

[9] At para. 45 of its initial submission, BCLC says the "Principles of Natural Justice and Procedural Fairness are embodied in an extensive group of doctrines, rules and precepts". It contends that two of these are the "closely linked Doctrines of *Res Judicata* and Issue Estoppel." BCLC argues that, as an "administrative body empowered to make quasi-judicial decisions", I must conduct the "process" under the Act "in a manner that is entirely consistent with the Principles of Natural Justice and Procedural Fairness." This argument is developed in the following passage, found at paras. 49-52 of BCLC's initial submission (with case citations removed):

> 49. Conversely, the Doctrines of *Res Judicata* and Issue Estoppel involve cases where, as in this matter, a party unsatisfied with the judicial or quasi-judicial determination improperly attempts to have the same question retried. The Doctrines of *Res Judicata* and Issue Estoppel hold that where a thing actually and directly in dispute has already been adjudicated upon, it cannot be litigated again.

> 50. Whereas the Current Commissioner may not be bound by the Doctrine of Judicial Precedent, a fact which is not admitted, he is obligated to conduct this proceeding in a manner that is entirely consistent with the Principles of Natural Justice and Procedural Fairness and as such, he is precluded from rendering a decision on the same facts and issues which have already been decided by the Former Commissioner.
>
> 51. There is by now considerable Canadian and other authority for the proposition that a person who has had a full and fair opportunity to meet the case against him should not generally be permitted to relitigate an adverse finding made, as an essential part of another application.
>
> 52. The purpose of the Doctrines of *Res Judicata* and Issue Estoppel is to prevent the retrial of any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, including administrative bodies such as the Information and Privacy Commissioner. As such, the redetermination of previously decided issues is precluded. Such redetermination would constitute a denial of the Principles of Natural Justice and Procedural Fairness. [emphasis in original]

[10] In my view, a threshold question that arises is whether, in my capacity as an administrative tribunal, I have the authority to apply *res judicata* or issue estoppel. Before addressing that question, however, I will describe each doctrine. Then, after dealing with the threshold issue, I will decide whether an order made after an inquiry under Part 5 can, in principle, be the basis for application of either rule. Last, I will decide whether either concept applies in this case.

[11] **3.2 *Res Judicata* and Issue Estoppel** – Canadian law recognizes many kinds of estoppel. An estoppel, in this context, is a legal principle that bars someone from doing or saying something. In essence, both *res judicata* (also known as 'estoppel by *res judicata* or cause of action estoppel') and issue estoppel prevent a party from re-litigating a matter or issue.

[12] These are exclusionary rules of evidence, not rules of natural justice or fairness, as argued by BCLC. The first rule prevents someone from re-litigating a cause of action; the latter precludes any attempt to re-litigate an issue that was decided in earlier proceedings. See J. Sopinka *et al.*, *The Law of Evidence in Canada*, 2nd ed. (Butterworths: Toronto, 1999), at para. 19.51. (The most recent edition of the leading English text on *res judicata* now says the doctrines are 'substantive rules of law', having formerly expressed the view that they are evidentiary rules. See G. Spencer Bower *et al.*, *The Doctrine of Res Judicata*, 3rd ed. (Butterworths: London, 1996), at para. 9. This does not accord with the prevailing Canadian view.)

[13] A major policy objective of both rules is to avoid the waste of public resources which results where a matter or issue is needlessly re-litigated. In *Solomon* v. *Smith*, [1988] 1 W.W.R. 410 (Man. C.A.), Lyon J.A. expressed it as follows, at para. 15:

> Maintaining open and ready access to the courts by all legitimate suitors is fundamental to our system of justice. However, to achieve this worthy purpose, we

> must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process – a waste of the time and resources of the litigants and the court and an erosion of the principle of finality so crucial to the proper administration of justice.

[14] These considerations apply to the conduct of inquiries under the Act.

[15] Lord Denning distinguished between *res judicata* (or cause of action estoppel) and issue estoppel in *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchleb*, [1965] 2 All E.R. 4, as follows (at pp. 8-9):

> The law [of *res judicata*, or cause of action estoppel], as I understand it, is this: if one party brings an action against another for a particular cause and judgement is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. … But within one cause of action there may be several issues raised which are necessary for determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule [of issue estoppel], neither party can be allowed to fight that issue all over again.

[16] Dickson J. (as he then was) clarified this area in his judgement in *Angle* v. *Minister of National Revenue*, [1975] 2 S.C.R. 248. He wrote there that estoppel by *res judicata* exists in two forms. The first is known as 'cause of action estoppel', the second as 'issue estoppel'. He described *res judicata*, at p. 254, as a rule that

> … precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction.

[17] The *res judicata* rule can apply even if the question raised in the subsequent proceeding between the parties was not actually determined in the earlier proceeding. The salient consideration is whether the cause of action in the two proceedings is the same. As was said in *Bank of British Columbia* v. *Singh* (1987), 17 B.C.L.R. (2d) 256 (S.C.), at p. 262, *res judicata* "stops a party from relitigating any issues that could have been, should have been or were litigated in the previous action." (The decision in *Singh* was overturned on other grounds on appeal: (1990), 51 B.C.L.R. (2d) 273 (C.A.).) See also *Cobb* v. *Hldg. Lumber Co.* (1977), 79 D.L.R. (3d) 332 (B.C.S.C.), and *Saskatoon Credit Union Ltd.* v. *Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.)

[18] Issue estoppel applies in cases where – even though the later proceeding involves a different cause of action – an issue in the later proceeding has already been decided in an earlier proceeding. In *Angle*, Dickson J. cited, with approval, the House of Lords judgement in *Carl Zeiss Stiftung* v. *Rayner and Keeler Ltd. et al. (No. 2)*, [1966] 2 All E.R. 536, where, at p. 565, Lord Guest summed up the requirements for issue estoppel as follows:

> The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[19] As Dickson J. made plain in *Angle*, at p. 254, it is not sufficient to establish an issue estoppel if the question that is allegedly the same as the one decided earlier only

> … arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgement. … The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings. …

[20] The earlier determination, therefore, must have been one that is so fundamental to the previous decision that the earlier decision cannot stand without it. See, also, *Saskatoon Credit Union*, and *British Columbia (Minister of Forests)* v. *Bugbusters Pest Management Inc.*, [1998] B.C.J. No. 1043 (C.A.).

[21] Last, issue estoppel applies to issues of fact, issues of law and issues of mixed fact and law, see *Minott* v. *O'Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321 (C.A.), *per* Laskin J.A., at p. 331.

[22] In its submissions, BCLC consistently refers to the doctrines of "*Res Judicata* and Issue Estoppel", as if they invariably go together. Its argument does not distinguish between the two doctrines. This apparent hedging of bets is understandable. As McEachern C.J.S.C. (as he then was) observed in *Saskatoon Credit Union*, "the principle of *res judicata* in its various manifestations [including issue estoppel] has become far too complicated." Although BCLC's submissions refer jointly to *res judicata* and issue estoppel, the cases it cites all deal with issue estoppel, not *res judicata*. The applicant has also argued his case on the basis of issue estoppel. It is, therefore, sufficient for the purposes of this case to deal only with issue estoppel. The extent to which *res judicata* applies in inquiries under the Act can be left for another day, although I am inclined to the view that it can also apply in the right circumstances.

[23] **3.3 Authority to Apply *Res Judicata* and Issue Estoppel** – The British Columbia Court of Appeal has ruled more than once that an administrative tribunal's decision can be the basis for the application of *res judicata* or issue estoppel in subsequent court proceedings. See *Raison* v. *Fenwick* (1981), 120 D.L.R. (3d) 622, *Hamelin* v. *Davis*, [1996] B.C.J. No. 109 (additional reasons at [1996] 6 W.W.R. 341, leave to appeal refused, (1997), 211 N.R. 320n (S.C.C.)), and *Bugbusters*.

[24] The question here, of course, is whether I have the authority – acting as an administrative tribunal in an inquiry such as this – to apply either *res judicata* or issue

estoppel on the basis of an earlier inquiry order under the Act. The applicant, in his reply submission, cites authority for the proposition that these doctrines do not necessarily apply in the administrative tribunal context or do not apply with the same vigour as they do in court. For its part, BCLC contends that I am bound to apply the doctrines here.

[25] Issue estoppel and *res judicata* are, again, rules of evidence. They prevent a party from attempting, in a proceeding, to prove the contrary of that which has been proved in a previous proceeding. Section 56(1) of the Act provides that the commissioner "may decide all questions of fact and law arising in the course of an inquiry". In my view, this section – especially when viewed in the context of Part 5 and the Act as a whole – gives me the authority to determine whether *res judicata* or issue estoppel applies in the circumstances of a given case.

[26] Quite apart from s. 56(1), I conclude in the alternative that these rules can apply in an inquiry under the Act. Although it does not deal with the issue estoppel question specifically, the Supreme Court of Canada decision in *Dayco (Canada) Ltd.* v. *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada)*, [1993] 2 S.C.R. 230, [1993] S.C.J. No. 53, is noteworthy. In that case, LaForest J. observed, at p. 22 (S.C.J.), that arbitrators acting under the authority of labour relations statutes "obviously tap into common law principles every day in the course of their decision-making." This observation did not turn on the wording of any relevant statute. Both issue estoppel and *res judicata* are, of course, common law principles.

[27] Human rights tribunals have applied issue estoppel and *res judicata*. In *Axton* v. *BC Transit* (1997), 28 C.H.R.R. D/337, the British Columbia Council of Human Rights applied the doctrines in proceedings under the *Human Rights Act*. See, also, *Gold* v. *British Columbia (Ministry of Finance and Corporate Relations, Public Service Employee Relations Commission)*, [1998] B.C.H.R.T.D. No. 6, where issue estoppel and *res judicata* were considered by the British Columbia Human Rights Tribunal.

[28] Courts in British Columbia have also taken the view that issue estoppel or *res judicata* can apply in an administrative tribunal context. In *Jonke* v. *Kessler*, [1991] B.C.J. No. 250, MacDonald J. held that *res judicata* applied in proceedings under the *Residential Tenancy Act*. In *British Columbia* v. *Tozer*, [1998] B.C.J. No. 2594, MacKenzie J. (as he then was) considered that the British Columbia Human Rights Tribunal has the authority to apply issue estoppel. The Federal Court of Appeal has also, on a number of occasions, held that issue estoppel can be applied by statutorily-created administrative tribunals. That Court held, in *Canada (Attorney General)* v. *Canada (Canadian Human Rights Commission)*, [1991] F.C.J. No. 334, that issue estoppel can apply in the human rights context. It later confirmed that issue estoppel can be applied by administrative tribunals generally, not just in the human rights arena. See *O'Brien* v. *Canada (Attorney General)*, [1993] F.C.J. No. 333.

[29] See, also, Donald J. Lange, *The Doctrine of Res Judicata In Canada* (Butterworths: Toronto, 2000), at p. 93ff, where it is said the doctrines can apply in administrative tribunal proceedings.

[30] To my way of thinking, there is no reason to conclude that my functions in an inquiry under Part 5 of the Act differ from those of a human rights tribunal, labour arbitrator or residential tenancy tribunal in any way relevant to the question of my authority to apply *res judicata* or issue estoppel. None of the cases that I have read draw, or would support, such a distinction. As Décary J. noted in *O'Brien*, above, at p. 3, application of the principle of issue estoppel is "consistent with the interests of justice and administrative efficiency". I conclude that, as a general proposition, I have the authority to apply these doctrines.

[31] I note, in passing, that this issue was recently considered, but not decided, under Ontario's *Freedom of Information and Protection of Privacy Act*, in Order PO-1676, [1999] O.I.P.C. No. 69, at paras. 16-18.

[32] **3.4 Are Inquiry Orders Final Judicial Decisions?** – All three of the criteria for issue estoppel articulated in *Carl Zeiss Stiftung* must be satisfied before the rule applies. They are, again, (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. The second of these criteria raises the general question of whether a decision made under Part 5 of the Act, including a s. 58 order made after completion of a Part 5 inquiry, is in principle a 'final judicial decision'. I will tackle this issue first.

[33] Ontario courts have broken this criterion into two parts. They have asked whether the previous decision can be characterized as a 'judicial' decision and whether it was a 'final' decision. This analysis applies whether the previous decision was a court decision or was made by an administrative tribunal. In *Minott*, Laskin J.A. held that the decision of the Board of Referees under the *Employment Insurance Act* (Canada) was a final decision. The Board had no statutory power to revise or rescind its decision, which conclusively decided the plaintiff's rights under the *Employment Insurance Act*. It was, moreover, a final decision even though it could have been appealed to an umpire. As for whether the decision was judicial in character, Laskin J.A. concluded, at p. 335, that it was a judicial decision for the purposes of the issue estoppel rule:

> In my opinion, the Board's decision was also a judicial decision. The decision of an administrative tribunal may be a judicial decision for the purpose of issue estoppel though the tribunal's procedures do not conform to the procedures in a civil trial. Provided the tribunal's procedures meet fairness requirements and provided the tribunal is carrying out a judicial function, its decision will be a judicial decision. The words of L'Heureux-Dubé J. in *Knight* v. *Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 685, 69 D.L.R. (4th) 489 at p. 512, bear stating:
>
> > It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow

> administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (*Judicial Review of Administrative Action*, 4th ed. (1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case at bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the board, the requirements of procedural fairness will be satisfied even if there was no structured "hearing" in the judicial meaning of the word.
>
> Fairness requirements were satisfied because Minott knew the case he had to meet, he was given a reasonable opportunity to meet it and he was given an opportunity to state his own case. Procedural differences between a hearing before a Board of Referees and a civil trial do not make the Board's decision any less "judicial". But these differences may trigger the exercise of the court's discretion to refuse to apply issue estoppel in appropriate cases, as I will discuss. In my view, however, the Board's procedures were sufficient to satisfy the judicial component of the second requirement of issue estoppel.

[34] Similar considerations were applied by the Ontario Court of Appeal in *Danyluk* v. *Ainsworth Technologies Inc. et al.* (1999) 42 O.R. (3d) 235, and *Heynen* v. *Frito-Lay Canada Ltd. et al.* (2000), 45 O.R. (3d) 776 (leave to appeal refused, [1999] S.C.C.A. No. 569). (The Supreme Court of Canada heard an appeal in *Danyluk* on Oct. 31, 2000 and reserved judgement. See [1999] S.C.C.A. No. 47.)

[35] The Ontario cases are consistent with the approach taken by the British Columbia Court of Appeal in *Bugbusters*. That case arose out of a lawsuit brought by the Province to recover damages from a tree-planting contractor whose employees had, it was alleged, negligently started a forest fire. The contractor had been ordered, under the *Forest Act*, to assist in putting the fire out. Also in accordance with the *Forest Act*, the contractor later submitted a compensation claim for its fire fighting expenses. The Ministry of Forests' regional manager denied the claim on the ground that the contractor's employees had started the fire. The Deputy Chief Forester upheld the contractor's appeal from that finding of fault and ordered compensation.

[36] The Province later sued for damages in the British Columbia Supreme Court, where the contractor argued that the Deputy Chief Forester's decision under the *Forest Act* was conclusive on the issue of whether the contractor was at fault for starting the blaze. That decision, the contractor contended, gave rise to issue estoppel, which meant that the Province was precluded from re-litigating the fault issue in the court case. Finch J.A. cited, at paras. 31-32, two main reasons for deciding that issue estoppel did not apply:

> There are two principal reasons for rejecting issue estoppel as a defence in this case. The first is that a final decision on the Crown's right to recover its losses

> was not within the reasonable expectation of either party at the time of those proceedings. The second is that unlike the relevant statutes in the *Raison* and *Rasanen* cases, *supra*, the *Forest Act* did not provide that the decisions of the Deputy Chief Forester (or other levels of administrative tribunal) would be final and binding. To the contrary, s. 129 of the *Forest Act* said:
>
> > Nothing in this Part [10] limits, interferes with, or extends the right of a person to commence and maintain a proceeding for damages caused by fire.
>
> I do not suggest that either the presence of this provision, or the absence of a provision such as could be found in the *Teachers Act* in *Raison*, or the *Employment Standards Act* in *Rasanen*, is conclusive on the question of issue estoppel. But the statutory provisions touching on the nature and quality of decisions by administrative tribunals are in my view an *indicium* as to how the court should apply issue estoppel, because they may be considered as factors which would affect the parties' reasonable expectations.

[37] In the end, he found it would be "quite unfair" to hold that the Province was bound by the Deputy Chief Forester's decision.

[38] Finch J.A.'s observations about "statutory provisions touching on the nature and quality" of a tribunal's decision – and about the parties' reasonable expectations as to the nature and outcome of the original proceeding – complement comments made by Abella J.A. (albeit in dissent) in *Rasanen* v. *Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 (Ont. C.A.) (leave to appeal refused, 115 D.L.R. (4th) viii (S.C.C.)):

> As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action.

[39] Is my predecessor's decision in Order No. 315-1999, therefore, a final judicial decision that can give rise to issue estoppel? This question must be addressed bearing in mind Finch J.A.'s judgement in *Bugbusters*. The Ontario authorities are also, in my view, of assistance here.

[40] Part 5 of the Act lays out the powers of the commissioner in resolving requests for review through an inquiry. On its face, Order No. 315-1999 resulted from a Part 5 inquiry held in response to the applicant's request, under s. 52, for a review of BCLC's decision on the applicant's 1998 access request. In Order No. 315-1999, Commissioner Flaherty laid out the issues before him, noted that the burden of proof was on BCLC by virtue of s. 57(1) of the Act, made findings of fact and law as contemplated by s. 56(1) and then, as required by s. 58(1), made appropriate orders under s. 58.

[41] Such inquiries are conducted in accordance with this Office's published policies and procedures. As provided in those policies and procedures, this Office issues a notice of inquiry to the parties in advance of the inquiry. The notice sets out the issues to be addressed in the inquiry, sets out the burden of proof and describes the schedule for delivery and exchange of the parties' initial and reply submissions. It also notes that the parties may submit affidavit evidence. The parties to a Part 5 inquiry, therefore, have advance notice of the case they have to meet and an opportunity to be heard.

[42] The parties to Order No. 315-1999 would, accordingly, have been aware of the issues to be addressed and the process for submitting written argument and evidence. It is also reasonable to conclude that they expected, in light of s. 56(1) of the Act, that my predecessor would make findings of fact and law on the issues before him. They would also have expected, in light of s. 58(1), that he would make appropriate orders under s. 58. In light of s. 59, which provides that a public body must comply with a s. 58 order unless a judicial review application is brought within 30 days, they would have expected those s. 58 orders to be binding and final. That expectation would, in my view, be unaffected by the right to seek judicial review of Order No. 315-1999. It is reasonable to conclude, therefore, that the parties expected the inquiry would lead to a final decision – based on findings of fact and law – that would affect their rights.

[43] The statutory powers given to the commissioner, the character of decisions made under Part 5 and the nature of the remedies afforded under s. 58 all support the conclusion that an order made under s. 58, after an inquiry, is judicial in character and is final. Bearing in mind *Bugbusters*, *Hamelin*, *Rasanen* and *Minott* (and the trial decision of Sigurdson J. in *Bugbusters*, reported at [1996] B.C.J. No. 2381, notably at paras. 42 and 43), I conclude that, for present purposes, such a decision is a final judicial decision. In arriving at this conclusion, I have also noted Ontario Order PO-1676, in which Assistant Commissioner Mitchinson reached the same conclusion with respect to orders issued after an appeal under Ontario's *Freedom of Information and Protection of Privacy Act*.

[44] In Order No. 315-1999, my predecessor made a s. 58 order, after an inquiry under Part 5 of the Act, that confirmed BCLC's s. 17 decision, but overturned its s. 21(1) decision. Having decided that orders under s. 58, made after an inquiry, are in principle final judicial decisions, I find that this criterion is satisfied with respect to Order No. 315-1999.

[45] **3.5 Have the Other Requirements Been Met?** – One of the *Carl Zeiss Stiftung* criteria is that the parties to the earlier decision must be the same as the parties to the present proceedings (or, in each case, their privies). BCLC's material establishes that the applicant is the same, the public body is the same and the third party actor is the same as those in Order No. 315-1999. I find that this element of the issue estoppel rule is satisfied.

[46] The final question is whether Order No. 315-1999 decided the same issue as the one before me. As I noted above, Order No. 315-1999 dealt only with the First

Agreement and the Second Agreement. This case covers both those records. It also deals with the Third Agreement and the Fourth Agreement. BCLC argues that all of the agreements are, in all material respects, effectively the same. It says, therefore, that Order No. 315-1999 has decided the issue as regards all four records – not just the First Agreement and the Second Agreement – and that the merits of BCLC's decision to refuse access cannot be revisited here.

[47] I have reviewed all four agreements and agree with BCLC that they are substantially the same. Their provisions differ only as to details, *i.e.*, the number of commercials to be produced under each contract, the kinds of commercials and promotional material covered, the production schedule and the amounts of the fees charged by the actor. One would expect these variations in such periodically-renewed contracts.

[48] Although Order No. 315-1999 only dealt with BCLC's decision regarding the First Agreement and Second Agreement, it is clear from that order that the focus of the applicant's request – and BCLC's case – was on the fees charged by the actor and the harm that allegedly would be caused by disclosure. Submissions in this inquiry similarly focus on the ss. 17 and 21 harm arguments associated with the fees under the agreements. The Notice of Written Inquiry in this case frames it as one involving ss. 17 and 21.

[49] I am of the view that the issue before me is the same as that decided in Order No. 315-1999. Differences in detail between the Third and Fourth Agreements and those covered by Order No. 315-1999 do not alter this conclusion. Nor does the fact that the fees charged under each of the four agreements may, or may not, differ in amount mean the issues in the two cases are different. There is no operative difference between the questions decided in Order No. 315-1999 and the issues presented here. Further, the issues decided in Order No. 315-1999 were fundamental to that decision, as they are here, and did not arise collaterally or incidentally in that case. The final element of issue estoppel is also satisfied.

[50] I find that all of the elements of issue estoppel have been established by BCLC and that issue estoppel prevents the applicant from seeking a result different from that in Order No. 315-1999. I need not, therefore, consider the merits of BCLC's s. 17 or s. 21 submissions nor, I would note, the correctness of Order No. 315-1999. It should be noted here that, if the issue were before me, I would almost certainly find that, for the reasons given above, BCLC is estopped from arguing that s. 21(1) applies to the disputed records. My predecessor decided, in Order No. 315-1999, that s. 21(1) did not apply and it is, to say the least, difficult to see how that decision could be attacked collaterally by BCLC.

[51] The next question is whether 'fairness' should prevent my application of issue estoppel.

[52] **3.6 Fairness and Issue Estoppel** – The applicant urges me not to apply issue estoppel, arguing that I should exercise a discretion not to apply it. He cites a number of

authorities in which it has been said the decision-maker retains a discretion not to apply issue estoppel or *res judicata* where doing so would be unfair. He relies on the Ontario Court of Appeal decision in *Minott*, where Laskin J.A. said (at pp. 340-341) that, even if all three elements of issue estoppel had been met, "the court has always retained discretion to refuse to apply issue estoppel when to do so would cause unfairness or work an injustice."

[53] He also relies on Lord Keith's observation, at p. 50 of *Arnold* v. *National Westminster Bank plc*, [1991] 3 All E.R. 41 (H.L.), that

> … one of the purposes of estoppel being to work justice between the parties, it is open to courts to recognize that in special circumstances inflexible application of it may have the opposite result.

[54] At para. 32 of *Bugbusters*, Finch J.A. said that issue estoppel "inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case." In that case, Finch J.A. concluded it would be unfair to apply the rule because the parties had not, in the earlier *Forest Act* proceedings, entertained a reasonable expectation that the outcome of those proceedings could be used later in the lawsuit.

[55] In *Saskatoon Credit Union*, McEachern C.J.S.C. said, at p. 438, that a party should not be allowed to re-litigate an issue that has previously been decided against her or him

> … in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires rehearing.

[56] The examples given by McEachern C.J.S.C., at pp. 438-439, of cases where a rehearing may be allowed are

> … fraud or other misconduct in the earlier proceedings or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence.

[57] The applicant argues that 'fairness' should prevent application of issue estoppel. He argues that the issue in this inquiry is not the same as that in Order No. 315-1999, "because harm must be shown and evidence on this issue constantly changes". He also says that "perhaps the final two contracts have a material bearing on the decision on whether the initial two contracts should have been revealed." The applicant does not point to any newly-discovered evidence, nor to any alleged impropriety in the Order No. 315-1999 inquiry, to support this argument.

[58] The points made by the applicant are not, in my view, fairness arguments. They relate to whether the issue in Order No. 315-1999 and the issue here are the same. I find no grounds for applying, in this case at least, any concept of fairness. Assuming that

I have authority, under the issue estoppel rule, not to apply that rule on the grounds of fairness or justice between the parties, I am not persuaded that fairness militates against its application here.

4.0 CONCLUSION

[59] In light of my finding that issue estoppel applies, and prevents the applicant from arguing that BCLC is not authorized or required by the Act to refuse access to the disputed records, I need not deal with the merits of BCLC's case respecting the applicability of s. 17 or s. 21. Accordingly, I make no findings of fact or law respecting those exceptions and no order under s. 58(2) is required. I confirm BCLC's decision in this matter on the basis of issue estoppel.

January 26, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-03

CORRECTION

BRITISH COLUMBIA LOTTERY CORPORATION

David Loukidelis, Information and Privacy Commissioner

January 29, 2001

On January 26, 2001, Order 01-03 was issued. In that order, I overlooked expressing my conclusions with respect to one issue – the applicability of s. 25(1)(b) of the Act – which the applicant introduced for the first time in his initial submission on the inquiry. At p. 2, the applicant says the following:

> For many gambling critics in B.C., the advertisements in question here, in total, do more social harm than good. If you the Commissioner accept this view, you may consider invoking Sec. 25(1)(b).

At p. 3, the applicant says the "policy issue" associated with the disputed records is "an important one." He also refers to specific social ills caused by gambling. In his reply submission, the applicant says that, even if harm for the purpose of s. 17 or s. 21 had been established by the public body in this case, s. 25 should override those provisions.

This is all that is before me with respect to s. 25(1)(b). That provision was not raised by the applicant in his request for review, it is not in the Notice of Written Inquiry issued by this Office to the parties and it is not addressed in any of the submissions of the British Columbia Lottery Corporation. In these circumstances, I think it reasonable to conclude that s. 25(1)(b) has not been properly put in issue by the applicant. If I am wrong in this, I intend to express my conclusions about the applicability of s. 25(1)(b). Section 25 reads as follows:

> **Information must be disclosed if in the public interest**
>
> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
>
> (a) any third party to whom the information relates, and
>
> (b) the commissioner.
>
> (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form
>
> (a) to the last known address of the third party, and
>
> (b) to the commissioner.

Previous orders have established that the applicant bears the burden of establishing that this section applies.

Nothing in the applicant's submission persuades me that s. 25(1)(b) applies and requires disclosure of these records. The fact that gambling (including lotteries) may, as the applicant argues, contribute to social ills does not mean that disclosure of these contracts for acting services is required as being "clearly in the public interest", as those words are used in s. 25(1)(b). The connection between these records and the public interest, as perceived by the applicant, is tenuous. As well, the applicant has not shown that disclosure of these records is "clearly" in the public interest, as contemplated by s. 25(1)(b) of the Act.

The ss. 17 and 21 issues raised in this case are, as I said in Order 01-03, the same as those addressed by my predecessor in Order No. 315-1999 in relation to the same applicant, the same records and the same public body. This conclusion would not be affected if s. 25(1)(b) were properly before me. Issue estoppel applies to the applicant with respect to the s. 17 and s. 21 issues.

January 29, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia