IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Angel Acres Recreation and Festival Property Ltd. v. British Columbia (Attorney General),* 2019 BCSC 1421

Date: 20190823
Docket: S1811423
Registry: Vancouver

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996, c. 241

Between:

Angel Acres Recreation and Festival Property Ltd., Mitchell Kenneth Riley, John Peter Bryce, Stanley Thomas Gillis, Kim Blake Harmer and Ronald Barry Cameron, Richard Goldammer and Damiano Di Popolo

Petitioners

And

The Attorney General of British Columbia, The Attorney General of Canada, The Director of Civil Forfeiture

Respondents

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Petitioners:	J.J.M. Arvay, Q.C. G. DelBigio, Q.C. A.M. Latimer D.J. Song
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Counsel for the Respondent, the Attorney General of Canada:	B. Sokhansanji C. Ko
Place and Date of Trial/Hearing:	Vancouver, B.C. April 2, 3, 5 and 8, 2019
Place and Date of Judgment:	Vancouver, B.C. August 23, 2019

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INTRODUCTION

[1] The petitioners are defendants in two related proceedings brought by the Director of Civil Forfeiture.

[2] In those related proceedings the Director seeks to have the clubhouses of three chapters of the Hells Angels Motorcycle Club (the Hells Angels) in British Columbia forfeited to the Director under the provisions of the *Civil Forfeiture Act*, S.B.C. 2005, c. 29 [the *Act*].

[3] One of the related proceedings concerns the Nanaimo Hells Angels Clubhouse and has been ongoing since November 2007. The other concerns the East End Hells Angels Clubhouse and Kelowna Hells Angels Clubhouse. That proceeding was commenced in November 2012.

[4] The two proceedings were joined for trial on common evidence in August 2015.

[5] In these reasons I will refer to the three Clubhouses collectively as the Clubhouses and individually by reference to the chapter of the Hells Angels to which they belong.

[6] In the related proceedings the Director had originally relied on allegations that the Clubhouses should be forfeited as "proceeds of unlawful activity" and also because they had in the past been used as instruments of unlawful activity. Those "proceeds" and "past use" allegations were abandoned in August of 2015 when the proceedings were joined.

[7] Since then, the Director has only sought the forfeiture of the Clubhouses based upon the allegation that each Clubhouse is an "instrument of unlawful activity" under s. 5(2) of the *Act* because they are, in future, likely to be used to engage in unlawful activity that may result in the acquisition of an interest in property and/or cause serious bodily harm to persons.

[8] The defendants in the related proceedings have defended the Director's claims and have filed counterclaims that assert that the "instruments of unlawful activity" provisions of the *Act* are *ultra vires* the legislative authority of the Province of British Columbia and thus unconstitutional.

[9] The trial of the related forfeiture proceedings commenced on April 23, 2018.

[10] In October 2018, while the trial was still ongoing the petitioners filed the petition that is the subject of this judgment under the provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 41 [*JRPA*].

[11] In the petition, amongst other relief the petitioners sought orders in the nature of *certiorari* quashing the Director's decision to commence the related proceedings and orders in the nature of *prohibition* prohibiting the Director from continuing the proceedings.

[12] Success on either basis would require dismissal of those forfeiture proceedings.

[13] Counsel for the petitioners and counsel for the Director (who is also counsel for the Attorney General of British Columbia on this petition as well as on the defendants' counterclaim in the two related proceedings) agreed that notwithstanding the potential impact of the consequences of this petition on the related trial proceedings, hearing of this petition would be held in abeyance until the close of the evidence in the Director's case. That agreement also required that, as the trial judge in the related forfeiture proceedings, I would also hear and decide the issues raised by the petition.

[14] The Attorney General for Canada was subsequently served with the petition.

[15] The petition was argued before me for four days beginning on April 2, 2019.

[16] After the hearing of the petition (on which I reserved judgment) the trial of the related proceedings continued and was completed on April 30, 2019.

[17] Decisions on the Director's forfeiture applications as well as on the defendants' Counterclaim in the related proceedings are under reserve.

[18] Given the importance of the decision on this petition to the issues in the related trial proceedings this judgment had to be delivered before judgment in the forfeiture proceedings can be delivered.

ISSUES

[19] The petitioners seek the following orders:

1. A declaration that the Director of Civil Forfeiture (the "Director") had no authority to collect information from the Royal Canadian Mounted Police ("RCMP") nor to commence or conduct proceedings on the basis of such information:
2. A declaration that the Civil Forfeiture Office [the "CFO"] had no authority to assign a CFO RCMP Program Manager Position within the RCMP's Operations Support Group Federal Serious and Organized Crime;
3. An order in the nature of *certiorari,* quashing the decisions of the Director to commence and conduct proceedings SCBC Action No. S157799, Vancouver Registry (the "Nanaimo Action") SCBC Action No. S-128066, Vancouver Registry (the "Vancouver Action");
4. An order in the nature of *prohibition,* prohibiting the Director from continuing, commencing or conducting proceedings under the *Civil Forfeiture Act,* SBC 2005. c 29 *("CFA')* on the basis of the same information;
5. A declaration that to the extent that the Director acted without statutory authority in receiving information from the RCMP, the petitioner's s. 8 rights under the *Canadian Charter of Rights and Freedoms* (the *"Charter"),* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Constitution Act, 1982* have been unjustifiably infringed and orders in the nature of *certiorari* and *prohibition* pursuant to s. 24(1) of the *Charter,*
6. In the alternative, an order excluding such evidence pursuant to s. 24(2) of the *Charter,*
7. A declaration that the RCMP had no authority to disclose personal information to the Director;
8. A declaration that to the extent that the RCMP acted without authority in disclosing information to the Director, the petitioner's s. 8 *Charter* rights have been unjustifiably infringed an order excluding such evidence pursuant to s. 24(2) of the *Charter,*

9. In the alternative, a declaration that to the extent that s. 22(4) of the *CFA* authorizes information-sharing agreements with RCMP, provincial or municipal law enforcement agencies, it unjustifiably infringes s. 8 of the *Charter* and is of no force and effect pursuant to s. 52 of the *Constitution Act 1982*;

10. In the further alternative, a declaration that to the extent that section 8(2) of the *Privacy Act,* RSC 1985, c P-21 authorizes disclosure of personal information by the RCMP to the Director, it unjustifiably infringes s. 8 of the *Charter and* is of no force and effect pursuant to s. 52 of the *Constitution Act 1982*;

[20] At the hearing of this petition the petitioners withdrew their application under para. 7 for "a declaration that the RCMP had no authority to disclose personal information to the Director."

[21] The petitioners, however, continued to submit that this Court has jurisdiction to consider "the (il)legality of the RCMP's conduct as part of the factual matrix informing this judicial review" which they submitted contributed to *Charter* breaches "over which this Court certainly has remedial jurisdiction".

BACKGROUND

[22] I will, to the extent necessary, address the history of the related proceedings that are relevant to the issues raised by this petition.

(a) The Nanaimo Clubhouse Proceedings

[23] The Nanaimo Clubhouse forfeiture proceeding was commenced on November 8, 2007. It was commenced after the Civil Forfeiture Officer (CFO) for which the Director is responsible received a referral together with binders of information from a Combined Forces Special Enforcement Unit (CFSEU) of the Royal Canadian Mounted Police (RCMP) and municipal police forces concerning the Nanaimo chapter of the Hells Angels Motorcycle Club obtained through a CFSEU investigation entitled "Project Halo".

[24] When that referral was made to the Director criminal charges were no longer being pursued against any member of the Nanaimo chapter of the Hells Angels in relation to the Project Halo investigation.

[25] The Director has taken the positon in the related forfeiture litigation that the referral letter and information provided to the Director by the CFSEU that resulted in the commencement of the Nanaimo Clubhouse litigation (as well as the two referrals by the RCMP that I will later discuss that resulted in the commencement of the East End and Kelowna Clubhouse litigation) were authorized by an information sharing agreement dated July 27, 1983 (the 1983 Agreement) entered into between British Columbia and Canada.

[26] The petitioners assert that the 1983 Agreement does not authorize collection, use, or disclosure of personal information to the Director. That submission is at the heart of the petitioners' submissions.

[27] The petitioners submit that since the Director did not have the authority to collect, use, or disclose personal information under the 1983 Agreement, orders in the nature of *certiorari* and *prohibition* under the provisions of the *JRPA* quashing the related forfeiture proceedings and prohibiting their conduct must follow.

[28] When the Nanaimo Clubhouse forfeiture proceeding was commenced by then Director, Mr. Robert Kroeker, the Director applied for and obtained a without notice interim preservation order (IPO) under the *Act*.

[29] That IPO was granted by D. Smith J. (as she then was) on November 8, 2007 on a without notice basis. The Director, with the assistance of the police, then took possession of the Nanaimo Clubhouse and all of its contents that day.

[30] After D. Smith J. was elevated to the Court of Appeal the defendants in the Nanaimo Clubhouse proceedings applied to set aside the IPO.

[31] I heard that application as well as the Director's competing application for a continuing preservation order over many days commencing in May of 2008 and ending in September of that year.

[32] In reasons for judgment dated March 11, 2009, indexed as *Director of Civil Forfeiture v. Angel Acres Recreation and Festival Property Ltd.*, 2009 BCSC 322

(*Angel Acres 2009*) I denied the defendants application to set aside the IPO and also allowed the Director's application for a continuing preservation order, except with respect to three motorcycles that had been seized pursuant to the IPO.

[33] The Nanaimo Clubhouse and the remaining contents (except to the extent that some contents have been released to the defendants in that proceeding by agreement of the parties) have therefore now been in the continuing possession of the Director for almost 12 years.

(b) Commencement of the East End and Kelowna Clubhouse Proceedings

[34] On October 31, 2012 the CFO received a referral letter from the RCMP concerning the possible forfeiture of the East End Clubhouse. That letter concerned a police investigation entitled "Project E-Pandora".

[35] On November 1, 2012 the CFO also received a referral letter from the RCMP concerning the possible forfeiture of the Kelowna Clubhouse. That letter concerned police files from the "Project E-Pandora" investigation as well as from another investigation entitled "Project E-Predicate".

[36] On November 19, 2012, the current Director, Mr. Philip Tawtel (appointed to that position after Mr. Kroeker had retired) commenced proceedings seeking the forfeiture of both the East End and Kelowna Clubhouses.

[37] When the East End and Kelowna Clubhouse proceedings were brought by the Director with issues virtually identical to those in the Nanaimo Clubhouse proceeding I was assigned as the case management and trial judge in the related proceedings.

(c) The Memorandum of Understanding

[38] The RCMP is by far the largest source of referrals to the CFO.

[39] On November 6, 2013 approximately one year after commencing the East End and the Kelowna Clubhouse litigation the Director signed a Memorandum of

Understand ("MOU") that, among other things, created a positon called the "CFO RCMP Program Manager".

[40] The MOU was ratified by the RCMP on April 24, 2014.

[41] The positon of CFO RCMP Program Manager under the MOU was created to facilitate the referral of files to the CFO from the RCMP as well as to facilitate any questions the CFO may have for the RCMP in regards to file referrals.

[42] Mr. Gordon Mooney was appointed to the position of CFO RCMP Program Manager under the MOU after November 6, 2013 and still holds that positon. After his appointment Mr. Mooney became an employee of the British Columbia public service appointed under the *Public Service Act*, R.S.B.C. 1996, c. 385.

[43] Mr. Mooney had previously been an active RCMP officer who after retirement become a temporary civilian employee of the RCMP. In that capacity, before his appointment as the CFO RCMP Program Manager Mr. Mooney had been involved with RCMP officers in October 2012 in working on the draft referral from the RCMP to the CFO concerning the East End Clubhouse.

[44] Although he now works within the CFO under the Director's supervision and management, Mr. Mooney's physical office is still located within the RCMP's Federal Serious Organized Crime Asset Forfeiture Unit in Surrey, British Columbia.

[45] The petitioners seek a declaration that the Director had no legislative authority to assign the CFO RCMP Program Manager Position within the RCMP.

[46] The petitioners also allege that doing so resulted in the receipt of information by the CFO from the RCMP that breached their s. 8 rights under the *Charter* so that evidence obtained in breach of those rights should be excluded in the related forfeiture proceedings under s. 24(2) of the *Charter*.

[47] In addition to the 1983 Agreement between British Columbia and Canada (which the respondents submit authorize information sharing between the RCMP and the Director) and the MOU, the Director has entered into information sharing

agreements with: the Vancouver Police Department; various other municipal British Columbia police forces; the Ontario Provincial Police; the United States Department of Justice; the Criminal Assets Bureau of Ireland; and, with the Ministers of Justice or other provincial public safety agencies in: Ontario, Alberta, Manitoba, New Brunswick, and Nova Scotia.

(d) Disclosure Issues

[48] Issue is taken by the petitioners concerning what they say is the late disclosure (shortly before trial) of the three referral letters in the related forfeiture proceedings.

[49] The petitioners have also raised concerns about what was or was not included by the police in the referral packages and disclosed by the Director in the related forfeiture proceedings.

[50] I have concluded that those concerns are not issues that I should substantively address in my determination of the many issues raised by this petition.

[51] I say that because in the related proceedings:

(1) Many lists of documents have been delivered by the Director over the many years during which the litigation was ongoing and as the pleadings evolved. I understand that the Director has listed over 6,500 documents.

(2) There were many applications for particulars upon which I was required to rule that had an impact upon the document disclosure obligations of the parties as well as upon the parameters of oral discovery.

(3) In 2008, Pearlman J. heard an application by the Director seeking third party disclosure by the police in respect of the disclosure of wiretap communication arising from the Project Halo investigation from which the Nanaimo Clubhouse proceedings arose.

(4) The defendants in that proceeding opposed that application on the basis that those individuals whose communications had been intercepted were entitled to notice of that disclosure application. Pearlman J. accepted that submission and ruled accordingly.

(5) That ruling was, however, overturned by the Court of Appeal in reasons indexed as *Director of Civil Forfeiture v. Angel Acres Recreation and Festival Property Ltd.*, 2009 BCCA 124.

(6) The Court of Appeal held that although notice to the potentially affected individuals was not necessary, disclosure by the police to the parties in the forfeiture litigation had to include measures that recognized and protected those individual's privacy interests.

[52] What those applications and others, (including an application by the Director for production by the police of a computer seized during the E-Predicate project that I dismissed because it was not brought until the eve of trial) demonstrate, is that not all information that the police may have in relation to alleged criminal activity is always delivered to the Director as part of a referral package.

[53] While I am concerned with the extent to which disclosure by the police to the Director may be selective and could also be compromised by the Director's claims of litigation privilege over a referral package, the evidence on this petition and in the related proceedings does not establish that any lack of disclosure of information by the police to the Director or by the Director to the defendants has impacted the defence of the Director's forfeiture allegations.

[54] Having said all of that, I must observe that when the police deliver a referral letter and a package of information to the Director for possible forfeiture action, I can see no reason why (subject to the possible exception of privilege or evidentiary issues that the police are entitled and required to address by way of redaction or limited disclosure) the referral letter, and all information delivered to the Director with that referral, is not material and relevant if forfeiture litigation does ensue.

[55] I must also observe that, if litigation privilege is claimed by the Director over the referral letter or documentation provided by the police, the Director must, in compliance with *Rule* 7-1 (6) and (7) of the *Rules of Court,* list any documents over which privilege is claimed with sufficient identifying particularity to allow application to be made by an affected defendant to address any pertinent disclosure issues that may arise.

[56] I make those observations at this time because, as I will later address, a choice made by the police (either in conjunction with Crown counsel or otherwise), to refer a matter to the CFO for civil forfeiture proceedings rather than pursue criminal charges against an accused or seek the forfeiture of offence related property under the provisions of the *Criminal Code*, R.S.C. 1985 c. C-46, will result not only in a less onerous burden of proof than would apply in a criminal proceeding, but also potentially less onerous disclosure obligations than those that govern disclosure by the Crown in criminal proceedings.

[57] Selective disclosure by either the police or the Director to a defendant could not only compromise the ability of that defendant to substantively defend a civil forfeiture action but also preclude the defendant from knowing the existence of potential *Charter* breaches that could impact the conduct of the forfeiture litigation.

[58] While it may be in the interest of the state to resort to civil forfeiture rather than criminal processes, I am satisfied that the right of a defendant whose property is at risk to know the case to be met in defending state action should not be compromised by such choices made by the state.

[59] That is especially so when, as I will later discuss, the operational relationship between the police with powers of investigation for law enforcement purposes and the CFO with power to affect citizen’s property interests without the protections afforded by criminal processes is as integrated and close as it is in practice under the MOU in British Columbia.

ANALYSIS AND DISCUSSION

[60] The petitioners' submissions seeking to preclude the continuation of the related forfeiture proceedings are based upon two separate but related legal theories.

[61] The first of those theories posits that the Director did not have lawful authority to collect information from the RCMP and to commence and conduct the related proceedings on the basis of that information. That submission calls into question issues of statutory interpretation and contests not only whether the 1983 Agreement authorizes the information sharing between the RCMP and the Director but also whether the 1983 Agreement contravenes provisions of the Federal *Privacy Act*, R.S.C. 1985, c. P-21.

[62] The petitioners submit that those issues are reviewable under the *JRPA* because the Director's actions were either taken without jurisdiction or in excess of his statutory authority.

[63] The second theory advanced by the petitioners is founded upon the proposition that unauthorized disclosure by the RCMP to the Director of the petitioners' private information breached their s. 8 *Charter* rights to be free from unreasonable search and seizure so that prerogative relief in the nature of *certiorari* and *prohibition* quashing the related proceedings and prohibiting their continuation is available under s. 24(1) of the *Charter*.

[64] Alternatively, the petitioners submit that evidence obtained by the CFO in breach of their s. 8 *Charter* rights should be excluded from consideration in the related forfeiture proceedings under s. 24(2) of the *Charter*.

[65] In the further alternative, the petitioners submit that if the disclosure by the RCMP and the Director's decisions and actions are statutorily authorized the statutes themselves constitute unreasonable searches contrary to s. 8 of the *Charter* and thus are of no force and effect under s. 52 of the *Constitution Act*, 1982.

[66] In response the Director and the AGBC have submitted that the petition should be dismissed because:

1) The impugned decisions of the Director are not subject to review under the provisions of the *JRPA*.

2) The petitioners' delay in seeking the mid-trial relief they seek is not only inordinate and tactical but constitutes an impermissible collateral attack on evidentiary rulings that were made during the trial of the related proceedings without objection on the bases now advanced by the petitioners.

3) It was lawful for the Director to receive and use information from the police as he has done.

4) The petitioners' arguments to the contrary were previously rejected in *Angel Acres 2009* so that issue estoppel applies to prevent re-argument of those issues.

5) The *Charter* arguments advanced by the petitioners must fail because: *Charter* remedies are personal; the petitioners have not proven that any of their personal information was provided by the police to the Director; and, the petitioners have failed to establish that they had a reasonable expectation of privacy in any information provided by the police to the Director.

[67] I will first address the petitioners' administrative law and jurisdictional issues including a related submission by Canada concerning the exclusive jurisdiction of the Federal Court.

[68] I will next address the extent to which issues of delay, collateral attack and *res judicata* raised by the respondents may preclude the granting of the administrative relief sought under the *JRPA*.

[69] I will then, to the extent necessary, address the petitioners' *Charter* submissions.

(a) Is the relief sought by the petitioners available under the *JRPA*?

[70] The petitioners assert that the relief sought in the petition is available because the Director lacked legal authority to:

1) Collect information from the RCMP;

2) Commence or conduct the related forfeiture proceedings on the basis of that information; or

3) Assign the CFO RCMP Manager Position within the RCMP's Operations Support Group Federal and Serious Crime.

[71] They submit that the Director's lack of authority renders relief in the nature of *certiorari* and *prohibition* both available and necessary under the provisions of the *JRPA*.

[72] Section 2 of the *JRPA* provides, in part:

> 2(1) An application for judicial review must be brought by way of a petition proceeding.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> (a) relief in the nature of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power;
>
> [Emphasis by petitioners.]

[73] Section 12 of the *JRPA* provides:

> 12(1) No writ of mandamus, prohibition or certiorari may be issued.
>
> (2) An application for relief in the nature of mandamus, prohibition or certiorari must be treated as an application for judicial review under s. 2. [Emphasis by petitioners.]

[74] The petitioners rely upon the decision of our Court of Appeal in *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500 in submitting that relief in the nature of that *certiorari* is available as a general remedy for the supervision of the machinery of government decision making and is available against any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person.

[75] The petitioners submit that the Director exercises state authority under the *Act* in deciding whether to commence and conduct forfeiture proceedings, which they say affects the rights, interests, property and privileges of individuals.

[76] The petitioners further submit that the mandatory language of ss. 2(1) and 12(1) of the *JRPA* requires that prerogative relief of the type sought by them has required that such relief be sought by way of petition rather than by application in the related forfeiture proceedings to which the relief applies.

[77] In making that admission the petitioners rely upon the decision of this Court in *Blackmore v. British Columbia (Attorney General),* 2009 BCSC 1299 [*Blackmore*] in which Stromberg-Stein J. (as she then was) ruled that an application by the accused for an order of *certiorari* to quash the information in the criminal trial over which she was presiding (because of the process adopted by the Attorney General in appointing a Special Prosecutor under s. 7 of the *Crown Counsel Act*, R.S.B.C. 1996, c. 87 who approved bigamy charges against the accused when another appointed Special Prosecutor had refused to approve those charges) had to be brought under the *JRPA*.

[78] In the subsequent proceedings then brought by the accused under the *JRPA* Stromberg-Stein J. granted orders in the nature of *certiorari* quashing the appointment of Mr. Robertson as a subsequent Special Prosecutor as well as his decision approving charges against the accused.

[79] The petitioners also submit that even if s. 2(2)(a) of the *JRPA* is not applicable because the Director was authorized by statute to commence the related

forfeiture proceedings (which they deny) the Director's decision remains subject to judicial review pursuant to s. 2(2)(b) of the *JRPA* in relation to the manner by which the Director has improperly exercised the statutory powers granted to him by the *Act.*

[80] In answer to the respondents' assertions that the alternate *Charter* relief they seek should not have been brought by way of petition under the *JRPA* the petitioners say that "determination of whether the petitioners' s. 8 *Charter* rights were unjustifiably infringed as a result of the Director acting without lawful authority is properly determined in the same [*JRPA*] proceeding".

[81] In response to all of the petitioners' submissions concerning the relief sought under the *JRPA* the Director and AGBC submit that irrespective of the substantive merits of the petitioners' claims about information sharing between the Director and the RCMP, the relief sought by the petitioners concerning the Director's decisions to commence and conduct the related forfeiture proceedings on the basis of information received from the RCMP is unavailable under the *JRPA* because those decisions are not subject to judicial review.

[82] Those respondents submit that a decision will be subject to judicial review under the *JRPA* only if the decision was made "in the exercise of a statutory power" or if it could be set aside at common law on an application for relief in the nature of *certiorari*.

[83] More specifically, the Director and AGBC submit that:

1) A "statutory power of decision" is defined by s. 1 of the *JRPA* to be a "power or right conferred by an enactment to make a decision prescribing the legal rights, powers, privileges or liabilities of a person, or the eligibility to receive or to continue to receive a benefit or license, whether or not the person is legally entitled to it";

2) At common law, as established by the Supreme Court of Canada in *Martineau v. Matsqui Disciplinary Board,* [1980] 1 S.C.R. 602 at 628,

> relief in the nature of *certiorari* is available against "any public body with the power to decide any matter affecting the rights, interest, property, privileges or liberty of any person"; so that,
>
> 3) A decision is thus subject to judicial review only if the decision itself affects a person's rights, powers, privileges, immunities, duties, liabilities or eligibility to receive a benefit or license (My Emphasis).

[84] The Director and AGBC submit that neither the decision to commence the related forfeiture proceedings nor continue them affected the petitioners' rights, powers, privileges, immunities, duties, liabilities or eligibility to receive a benefit or license.

[85] They submit that the commencement and continuation of the related forfeiture proceedings only began and continue a process at the end of which a decision may be made by the Court (not the Director) that affects the petitioners' interests.

[86] In making those submissions the Director and AGBC rely upon the decision of the Federal Court of Canada in *F.K. Clayton Group Ltd. v. Minister of National Revenue*, 89 DTC 5186 (FC) [*F.K.Clayton*] cited with approval by the Federal Court of appeal in *Blerot v. Minister of National Revenue*, 2012 FCA 124 at para. 6.

[87] In *F.K. Clayton* the Court determined that the Minster's decision to apply for a search warrant in connection with an income tax matter was not judicially reviewable. At para. 7 Dube J. wrote:

> 7 In my view, the preliminary, discretionary decision of the Minister to apply under the new section 231.3 for a search warrant is not reviewable by the court under section 18 of the *Federal Court Act*. It is not a decision which by itself affects the rights or interests of any person. It is merely an administrative decision to apply to the court and it is the court, not the Minister, who will consider the evidence and decide whether or not to issue a search warrant. It is the decision of the judge hearing the application and granting the warrant which is reviewable.
>
> 8 Parliament provided that the application of the Minister under subsection 231.3(1) is to be *ex parte* implying, of course, that the taxpayer is not to be heard at that stage. The Minister's decision to apply for a warrant is purely a procedural step and as such does not release the general

> supervisory mechanism of the court. There cannot be found a breach of the duty to act fairly in the mere application to the court for a warrant. That precursory step does not afford the taxpayer the procedural protection envisaged by Dickson J. in*, supra*.

[88] The Director and AGBC submit that the same is true in this case: it is the Court's decision not that of the Director that may affect the rights of the petitioners in the related forfeiture proceedings.

[89] The respondents further submit that the petitioners' reliance on *Blackmore* as establishing that a decision to commence proceedings – whether criminal or civil – is reviewable under the *JRPA* is misplaced.

[90] They submit that the decision in *Blackmore* arose in unique circumstances in which it was not prosecutorial discretion that was at issue but rather the actions of the Attorney General under s. 7(5) of the *Crown Counsel Act* in issuing a directive to the Deputy Attorney General to appoint a subsequent Special Prosecutor that was judicially reviewable.

[91] The respondents further submit that by having specifically determined in *Blackmore* that it was not the exercise of prosecutorial discretion that was at issue Stromberg-Stein J. at least inferentially determined that, in the normal course of criminal litigation, a determination to commence proceedings is not judicially reviewable.

[92] The respondents submit that the same is true for the Director's decisions in exercising the statutory power to commence forfeiture proceedings under the *Act.*

[93] The Director and AGBC further submit that unlike the circumstances in *Blackmore* where the issue concerned the statutory authority of the Attorney General to direct the appointment of another Special Prosecutor, in this case the petitioners do not take issue with the Director's statutory authority to bring proceedings under the *Act*. The petitioners' arguments rest solely upon the receipt of the evidence used by the Director to commence and conduct the related forfeiture litigation concerning the Clubhouses.

[94] Canada has adopted the submissions of the Director and the AGBC and has also submitted that this Court has no jurisdiction to judicially review the decisions of the RCMP.

[95] I agree with Canada's submissions that the petitioners had no authority to seek declaratory relief against the RCMP that they initially sought in respect of the RCMP's alleged breaches of the federal *Privacy Act.*

[96] I am, however, also persuaded that, so long as no relief is sought against the RCMP as a federal government institution, it is open for this Court to consider the actions of the RCMP in the context of the relationship of such actions to the impugned actions of the Director.

[97] In result, after considering the submissions of all parties I am satisfied that although I have serious concerns about the procedure adopted by the petitioners in bringing the petition seeking relief under the *JRPA* I have, with some reluctance, determined that given the substantive importance of the issues raised not only to the related forfeiture proceedings, but also generally in respect of the Director's decision making powers under the *Act*, I will decide those substantive issues notwithstanding potential procedural irregularities.

(b) Does the Director have lawful authority to collect information from the RCMP?

[98] Fundamental to the petitioners' submissions concerning the Director's alleged lack of lawful authority to collect information from the RCMP is their submission that the Director is a statutory body whose powers are constrained by statute.

[99] The petitioners rely upon the Supreme Court of Canada's decision in *R. v. 974649 Ontario Inc*., 2001 SCC 81 at paras. 70 and 71 as authority for the basic principle of public law that a body created by statute has only those powers delegated to it by the executive pursuant to statute and, by implication, those powers that are necessary to perform its intended function.

[100] The petitioners assert that s. 22 of the *Act* confers express powers and functions upon the Director and also constrains and circumscribes those powers.

[101] Section 22 of the *Act* provides:

> **Powers, functions and duties of director**
>
> **22** (1) In this section, **"public body"** means public body as defined in the *Freedom of Information and Protection of Privacy Act*.
>
> (2) The director may administer and dispose of property or the whole or a portion of an interest in property under this Act in accordance with the orders of the court, this Act and the regulations.
>
> (3) Without restricting section 21 (2), the director's powers, duties and functions include
>
> (a) collecting and managing the use and disclosure of information and maintaining records for the purposes of this Act and, on the basis of information collected, determining if proceedings should be commenced under this Act,
>
> (b) commencing and conducting proceedings under this Act, and
>
> (c) managing the distribution of proceeds from property, an interest in property or a portion of an interest in property forfeited to the government under this Act.
>
> (4) Subject to the regulations, the director may enter into information-sharing agreements that are reasonably required by the director in order to exercise his or her powers or perform his or her functions and duties under this Act with the following:
>
> (a) Canada, a province or another jurisdiction in or outside of Canada;
>
> (b) a public body.
>
> (5) Subject to the regulations, the director is entitled to information that is
>
> (a) in the custody or control of a public body prescribed by the Lieutenant Governor in Council, and
>
> (b) reasonably required by the director in order to exercise his or her powers or perform his or her functions and duties under this Act.
>
> (6) A public body that has custody or control of information to which the director is entitled under subsection (5) must, on request, disclose that information to the director.
>
> (7) This section applies despite any other enactment, but is subject to a claim of privilege based on a solicitor-client relationship.
>
> [My Emphasis.]

[102] The petitioners submit that in exchange for those limited powers the Director receives personal liability protection under s. 22.1 of the *Act* for the performance or intended performance of his functions and duties under the *Act* or in the exercise or intended exercise of any power under the *Act*.

[103] The petitioners further submit that the Director's power to commence proceedings is limited to or constrained by information that he "collects" and that without such evidence the Director cannot commence or continue proceedings under the *Act.*

[104] In response, counsel for the Director and AGBC submits that, like any other litigant, although the Director bears the burden of proving his case with admissible evidence, there is no legal requirement for him to have admissible evidence before commencing forfeiture litigation.

[105] In making that submission the Director and AGBC also point to information in the public domain, including judicial decisions about the Hells Angels in British Columbia and elsewhere, upon which the Director could have commenced the related proceedings without the impugned evidence provided by the RCMP.

[106] In response, the petitioners submit that the position advanced by the Director is inconsistent with the express terms of the *Act* as well as the Director's own understanding of his obligation to exercise his statutory discretion in light of the public interest – one example of which is the sufficiency of the available evidence to support a case for forfeiture.

[107] The substance of the petitioners' submissions turns upon what they say is the proper interpretation of the words "collecting" and "collected" as used in s. 22(3)(a) of the *Act.*

[108] The petitioners submit that the "collecting [of information]" as used in s. 22(3)(a) of the *Act* must be interpreted using the modern approach to statutory interpretation taking into account the ordinary meaning of the word "collect",

harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of the legislature. See: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42.

[109] The petitioners submit that in its plain and ordinary meaning the term “collect” means to “go out and gather” and does not mean or include to “passively receive”.

[110] They submit further that s. 22(3) of the *Act* implies the “going out and gathering” of information [by the Director] and that ss. 22(4) and (5) then delineate specific ways in which the Director can go out and gather information.

[111] The petitioners thus submit that the Director did not have the power to passively receive information from the RCMP and accordingly did not have the power to commence or conduct the related forfeiture proceedings on the basis of such information passively received from the RCMP.

[112] I do not accept the petitioners’ underlying statutory interpretation argument that “collecting information” does not include the receiving of information by the Director from other sources (whether passively or otherwise) upon which he may determine to commence and/or continue litigation under s. 22(3)(a) and (b) of the *Act*.

[113] In reaching that conclusion I agree with counsel for the Director and AGBC that the interpretation advanced by the petitioners is not only unduly restrictive but strained.

[114] Read in the way advanced by the petitioners the Director would also be precluded from using information obtained by way of those information sharing agreements specifically authorized under s. 22(4) even when such information is “reasonably required to by the Director to exercise his or her powers or perform his or her functions and duties under this *Act*”.

[115] Those powers, duties and functions specifically include “commencing and conducting proceedings” provided for by s. 22(3)(a) and (b) of the *Act*.

(c) Can the Director use information received from the RCMP under the 1983 Agreement to commence and conduct litigation under the Act?

[116] The petitioners submit that the 1983 Agreement is not a means authorized by which the Director can obtain information because the RCMP is not an entity with which the Director can enter into an information sharing agreement under s. 22(4) of the *Act*.

[117] The 1983 Agreement provides that:

> THIS AGREEMENT made in duplicate this 27th day of July, 1983
>
> BETWEEN: THE GOVERNMENT OF CANADA as represented by the Minister of Justice, and Attorney General,
>
> (hereinafter referred to as Canada
>
> - and -
>
> THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA as represented by the Attorney General of British Columbia (hereinafter referred to as British Columbia
>
> Interpretation
>
> 1. In this Agreement
>
> (1) the terms government institutions and personal information have the meanings ascribed to them in the Privacy Act, S.C. 1980-81-82-83, c. 111;
>
> (2) provincial institution includes any municipal or regional government; any board, commission, corporation, agency, body or office established by or under any Act of British Columbia and which administers or enforces any law or carries out a lawful investigation; any police force, board or commission established pursuant to the Police Act, R.S.B.C. 1979, c. 331; and in particular, and without restricting the generality of the foregoing, the Co-ordinated Law Enforcement Unit of the Ministry of the Attorney General
>
> (3) Administering or enforcing any law or carrying out a lawful investigation includes the investigation, detection, prevention or suppression of crime and other offences including offences against the bylaws of a municipality, the preservation of the peace and the gathering of intelligence information for law enforcement purposes.

Purpose

2. The purpose of this Agreement is to provide for access to, and the use and disclosure of personal information under the control of a government institution to British Columbia or a provincial institution for the purpose of administering or enforcing any law or carrying out a lawful investigation pursuant to paragraph 8(2)(f) of the Privacy Act.

Undertaking

3. Canada and British Columbia agree that any personal information disclosed pursuant to this Agreement shall only be used or disclosed for the purpose of administering or enforcing any law or carrying out a lawful investigation or for a subsequent use which is consistent therewith.

Request

4. (1) Where a request is made to a government institution by British Columbia or a provincial institution for access to o disclosure of personal information, British Columbia or the provincial institution (as the case may be) shall indicate to the government institution:

   (1) the personal information being requested; and

   (2) the purpose for which the personal information is being requested.

   (2) Wherever practicable, a request under subsection 4(1) shall be made in writing.

Direct Access

5. (1) Where British Columbia or a provincial institution has direct access to a data bank listed in Schedule containing personal information under the control of a government institution, section 4 of this Agreement does not apply.

   (2) Where British Columbia or a provincial institution has direct access to personal information as described in subsection 5(1), British Columbia or the provincial institution shall use their best efforts to ensure that the information is only accessed, used or disclosed in accordance with this Agreement.

Amendment

6. This Agreement and the Schedule to this Agreement may be amended at any time by the mutual consent of the parties and such amendment may be effected by an exchange of letters between the parties to this Agreement.

Application

7. (1) This Agreement does not apply to personal information under the control of a government institution which may be disclosed

   (1) pursuant to any Act of Parliament or any regulation made thereunder, other than the Privacy Act, that authorizes its disclosure; or

(2) for the purpose of administering or enforcing any law or carrying out a lawful investigation pursuant to any other agreement which meets the requirements of this Agreement.

(2) Any existing agreements or arrangements between Canada or a government institution and British Columbia or a provincial institution will continue in effect to the extent that they are not inconsistent with this Agreement.

Duration

8. This Agreement shall come into force on the 1" day of July, 1983, and shall remain in effect until terminated by either party upon the giving of six months written notice to the other party.

SCHEDULE A

1. Canadian Police Information Central Data Bank (C.P.I.C)
2. Automated Criminal Intelligence Information System Data Bank (AA.C.I.I.S.)
3. Criminal Records Level II (ACR IIS)

[118] The petitioners submit that because the 1983 Agreement does not constitute an information sharing agreement of the type authorized by s. 22(4) of the *Act*, the Director's use of information received from the RCMP by way of the file referrals that were the genesis of the related Clubhouse forfeiture proceedings and were comprised (at least in part) of private information about the petitioners was not lawfully authorized under the *Act*.

[119] Those submissions are based upon the propositions that:

1) The RCMP is not "Canada" with whom British Columbia entered into the 1983 Agreement since Canada is defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238 s. 29 to mean "Her Majesty in right of Canada or Canada as the context requires";

2) The RCMP is not a "public body" as defined by the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 [*FIPPA*] as required by s. 22(1) of the *Act;*

3) Since unlike local police boards or municipal police boards, the RCMP is not included in the list of public bodies in *FIPPA* with whom the

Director is authorized to enter into information sharing agreements the *Act* should be interpreted to mean that the legislature did not intend the Director to be authorized to enter into an information sharing agreement with the RCMP;

4) The Director is also not entitled to information from the RCMP pursuant to s. 22(5) of the *Act* which provides that the Director is entitled to information in the custody or control of a prescribed public body because the RCMP is not a prescribed public body under s. 8 of the *Civil Forfeiture Act Regulations*, B.C. Reg. 164/2006;

5) There is thus no authority under the *Act* that allows the Director to enter into an information sharing agreement with the RCMP, to receive information from the RCMP, or, to enter into the MOU with the RCMP under which the position of CFO RCMP Program Manager was created to facilitate the referral of files to the CFO from the RCMP;

6) The federal *Privacy Act* does not confer any powers on the Director. It only regulates the protection of privacy of individuals with respect to personal information held by federal bodies, including the RCMP; and

7) Even if the RCMP was authorized by the federal *Privacy Act* to transmit referral letters and information to the Director under the 1983 Agreement (which is disputed) it does not follow that the Director was entitled to receive or rely on that information because the Director's powers are specific rather than general and are limited by the *Act* and the Court should not imply more general powers.

[120] This is not the first time that issues concerning the validity of the 1983 Agreement as an information sharing agreement and its interaction with the federal *Privacy Act* have been raised in the long standing litigation over the forfeiture of the Clubhouses.

[121] In *Angel Acres 2009* I addressed and rejected some of the petitioners' arguments that are now the subject of this petition.

[122] One of those arguments concerned whether private information used by the Director to obtain the IPO in November 2007 over the Nanaimo Clubhouse and its contents was disclosed by the RCMP and received by the Director in breach of the federal *Privacy Act.*

[123] That issue also involved the extent to which the 1983 Agreement authorized the use of information provided by the RCMP and used by the Director.

[124] In their Outline of Argument filed in support of their application to set aside that IPO of the Nanaimo Clubhouse the defendants in that proceeding stated at paras. 40 to 45 under the heading "Privacy Act Concerns" that:

> 40. Much of the information put forward in the Plaintiffs Affidavits [in support of the IPO] appears to have derived from RCMP investigations of persons thought to be members of the NHAMC, or persons allegedly associated with the NHAMC. Any RCMP information relating to these persons is "personal Information" as the term is used under the federal *Privacy Act*
>
> 41. For purposes of the *Privacy Act*, the RCMP is a "government Institution". Under Section 7 of the *Privacy Act*, personal information under the control of a government Institution shall not, without the consent of the individual to whom it relates, be used by the institution except for the purpose for which the Information was obtained or compiled by the Institution or for a use consistent with that purpose, or for a purpose for which the information may be disclosed to that institution under subsection 8(2).
>
> 42. On November 8, 2007, the Plaintiff did not address the issue of whether the RCMP was permitted under the *Privacy Act* to have provided the personal Information in question to the Director.
>
> 43. Section 8(2)(f) of the *Privacy Act* permits the disclosure of personal information by federal government Institutions to provincial government Institutions for law enforcement purposes, if an Information sharing agreement Is In place between the Institutions in question. Although not put Into evidence before the Court on November 8, 2007, Plaintiff's counsel provided the Defendants' counsel on April 30, 2008 with a copy of an information sharing agreement dated July 27, 1983 (the "July 1983 Agreement") between the Government of British Columbia and the Government of Canada which the Plaintiff contends Is an information sharing agreement

> under Section 8(2) of the *Privacy Act* that permits the RCMP to provide personal Information to the Director.
>
> 44. The July 1983 Agreement was, of course, dated over 20 years before *Civil Forfeiture Act* came info existence.
>
> 45. The Plaintiff has not established that the July 1983 Agreement applies to the Director, and therefore has not established that the Agreement permits the information sharing from the RCMP to the Director that occurred in the present case before the commencement of this Action. Furthermore, Section 22(4) of the *Civil Forfeiture Act* provides that the Director "may enter into" information sharing agreements with the Government of Canada for the purpose of carrying out the Director's duties under the *Act* There is no evidence that the Director has chosen to enter Into such an agreement with the Government of Canada, despite the power to do so having been expressly delegated to the Director.

[125] In relation to those submissions under the heading “Alleged filing of evidence obtained in violation of the *Privacy Act*” I wrote in *Angel Acres 2009* at paras. 78 to 81:

> [78] The defendants submitted that because much of the information filed by the Director to obtain the Original Interim Order was improperly obtained by the Director from investigations by the RCMP into the activities of some or all of the defendants, any RCMP information related to those defendants is “personal information” as defined by the *Privacy Act*, and that as a “government institution” under its provisions, the RCMP was bound not to disclose that information to the Director.
>
> [79] I find that even if the information complained of is “private information” protected by the provisions of the *Privacy Act* as alleged (allegations in respect of which I make no findings) it is not necessary to address the defendants’ argument in depth.
>
> [80] I reach that conclusion due to s. 8(2)(f) of the *Privacy Act*, the relevant portions of which provide:
>
> > (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
> >
> > …
> >
> > *(f)* under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province…<u>for the purpose of administering or enforcing any law or carrying out a lawful investigation</u>
> >
> > [My emphasis]
>
> [81] Notwithstanding the submissions of the defendants to the contrary, I am satisfied that an information sharing agreement entered into between the Government of British Columbia and the Government of Canada dated July

> 27, 1983, constitutes such an agreement so that the defendants' *Privacy Act* submissions must be rejected.

[126] An appeal of my decision in *Angel Acres 2009* was dismissed by the Court of Appeal in reasons for judgment indexed as *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.,* 2010 BCCA 539.

[127] The respondents submit that application of principles of *res judicata* and issue estoppel precludes re-argument by the petitioners of arguments that were advanced by the defendants in the Nanaimo Clubhouse proceeding and rejected.

[128] In response the petitioners submit that application of the principles underlying the doctrines of issue estoppel and *res judicata* do not bar the arguments now advanced by them.

[129] In *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44 [*Danyluk*] the Supreme Court of Canada addressed application of the doctrine of issue estoppel in the context of administrative law proceedings.

[130] At paras. 18 to 20 in *Danyluk* Binnie J. for the Court wrote:

> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.
>
> 20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894),

> 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21§17 *et seq*. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

[131] Binnie J. went on to state at paras. 24 and 25 that**:**

> 24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]
>
> This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> 25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:
>
> > (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.

[132] After adopting those three pre-conditions to the operation of issue estoppel in respect of the potential for an abuse of process by way of re-litigation of a decided issue Binnie J. also considered the extent to which application of the doctrine may be subject to the exercise of judicial discretion.

[133] In doing so he stated at paras. 62 and 63 that:

> 62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.
>
> 63 In *Bugbusters*, *supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:
>
> > It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.
>
> Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke*, *supra*, at paras. 38 and 43:
>
> > The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> . . .
>
> > . . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the

> finding relied on to support the doctrine was made by a tribunal and not a court.
>
> See also *Braithwaite*, *supra*, at para. 56.

[134] Although addressed in the context of finality in relation to administrative rather than in judicial proceedings the principles enunciated by the Court in *Danyluk* apply equally to the issues now before me.

[135] The petitioners say that the three preconditions to the application of issue estoppel and *res judicata* in this case arising from my decision in *Angel Acres 2009* do not apply to preclude the arguments they now advance.

[136] In making that submission the petitioners say:

1) The issue in *Angel Acres 2009* was whether the RCMP was bound not to disclose certain information in light of the federal *Privacy Act.* They say that issue is not the same as those now in issue because it was limited to the Nanaimo Clubhouse proceeding and to only a "fraction of the evidence ultimately disclosed and now at stake" in the forfeiture proceedings concerning all three Clubhouses;

2) *Angel Acres 2009* did not determine: (a) whether the Director had authority to collect the same information from the RCMP or to commence proceedings on the basis of such information; (b) whether there was statutory authority to assign a CFO RCMP Program Manager Positon within the RCMP's Operations Support Group Federal and Organized Crime; or (c) whether provisions of either the *Act* or the federal *Privacy Act* were constitutionally valid;

3) The parties who participated in the application in which *Angel Acres 2009* was decided (other than the petitioner Angel Acres Recreational and Festival Property Ltd. and the Director) are not also the parties in this proceeding; and

4) The judicial determination in *Angel Acres 2009* was in respect of an interim application not a final judgment.

[137] Alternatively, the petitioners submit that if *Angel Acres 2009* stands for the proposition that the Director was authorized by the 1983 Agreement or the federal *Privacy Act* to take the decisions and actions taken in the related forfeiture proceedings it was wrongly decided and should now be reconsidered because of, among other things, the many years of litigation that have transpired and the far more complete evidentiary record now available.

[138] I have concluded that the fact that *Angel Acres 2009* was a ruling on an interim interlocutory application does not, preclude application of principles of *res judicata*.

[139] In *Angel Acres 2009* I determined that the 1983 Agreement is an information sharing agreement under s. 8(2) (f) of the federal *Privacy Act* that allows the disclosure of personal information under the control of a government institution (the RCMP) “for the purpose of administering or enforcing any law or carrying out a lawful investigation.” I am satisfied that determination is binding upon the petitioners.

[140] I reach that conclusion notwithstanding that the petitioners were not all parties in the litigation that gave rise to the decision in *Angel Acres 2009* or that the petitioners present arguments that are now framed in somewhat different terms.

[141] I say that not only by application of principles of issue estoppel but because of the dismissal by the Court of Appeal of the defendants’ appeal of my decision in *Angel Acres 2009*.

[142] The decision of the Court of Appeal is binding upon this Court so that *stare decisis* precludes any reconsideration of *Angel Acres 2009* by me.

[143] If I am wrong in that analysis and if it were open for me to reconsider my decision in *Angel Acres 2009* in light of all that has transpired in this and the related litigation since that decision was reached and in the context of the petitioners’

present arguments I am satisfied that the conclusions that I reached in *Angel Acres 2009* remain correct.

[144] I say that because:

1) The federal *Privacy Act* governs the disclosure of personal information by federal government institutions of which the RCMP is one.

2) Section 8(2) of the federal *Privacy Act* authorizes the discretionary disclosure of personal information in a number of circumstances which include s. 8 (2)(a) and (f) which provide:

> [8] (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> …
>
> (f) under an agreement or arrangement between the Government of Canada or any of its institutions and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation as defined in subsection 2(1) of the First Nations Jurisdiction over Education in British Columbia Act, the council of a participating First Nation as defined in section 2 of the Anishinabek Nation Education Agreement Act, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

3) Evidence filed by Canada on this petition (Affidavit of Kabo Yan Exhibit R page 136) establishes that the RCMP collects personal information in the course of investigating crimes which is "compiled in the administration or enforcement of the law and in the detection, prevention or suppression of crime generally" (My Emphasis).

4) In *Chatterjee v. Ontario (Attorney General),* 2009 SCC 19 [*Chatterjee*] the Court discussed the purpose for which the Ontario *Civil Remedies*

Act (with forfeiture provisions similar to those under the *Act* now at issue in these proceedings) was enacted. In doing so, at para. 3 Binnie J. wrote for the Court:

> [3] …The *CRA* was enacted to deter crime and to compensate its victims. The former purpose is broad enough that both the federal government (in relation to criminal law) and the provincial governments (in relation to property and civil rights) can validly pursue it. The latter purpose falls squarely within provincial competence. Crime imposes substantial costs on provincial treasuries. Those costs impact many provincial interests, including health, policing resources, community stability and family welfare. It would be out of step with modern realities to conclude that a province must shoulder the costs to the community of criminal behaviour but cannot use deterrence to suppress it. [My Emphasis.]

5) I agree with the submission of counsel for Canada that disclosure by the RCMP of personal information obtained in the course of a criminal investigation to the CFO for possible forfeiture proceedings is consistent with the purpose for which the RCMP collected that information.

6) As stated by the Supreme Court of Canada in *Bernard v. Canada (Attorney General)*, 2014 SCC 13 at para. 31:

> [31] A use need not be identical to the purpose for which information was obtained in order to fall under s. 8(2) (a) of the *Privacy Act*; it must only be consistent with that purpose. As the Federal Court of Appeal held, there need only be a sufficiently direct connection between the purpose and the proposed use, such that an employee would reasonably expect that the information could be used in the manner proposed.

7) By its terms s. 2 of the 1983 Agreement provides for access to and the "use and disclosure of personal information under the control of a government institution [as defined by the federal *Privacy Act* and which includes the RCMP] to British Columbia or a provincial institution [which includes any agency, body, or office established under any Act of British Columbia and which administers or enforces any law or carries out a lawful investigation] for the purpose of administering or

enforcing any law or carrying out a lawful investigation pursuant to para. 8(2)(f) of the *Privacy Act*".

8) I am satisfied that administering or enforcing any law or carrying out a lawful investigation as defined by para. 3 of the 1983 Agreement includes the "prevention or suppression of crime and other offences".

9) I thus conclude that the information sharing provisions in the 1983 Agreement align with the provisions of s. 8(2)(f) of the federal *Privacy Act*.

10) Since the Director is responsible for the administration of the *Act*, I am satisfied that the Director's receipt and use of information from the RCMP is authorized by the 1983 Agreement and by s. 8(2)(f) of the federal *Privacy Act.*

[145] In addition, I must observe that it would be at best anomalous for the Director to have the power to receive and act upon referrals and information from municipal police agencies and extra-jurisdictional policing agencies pursuant to the many information sharing agreements entered into with such agencies and not have those same powers with respect to the receipt and use of referrals and information from the RCMP which is the largest source of referrals to the CFO and that also acts in British Columbia as not only a federal policing agency but also in some municipalities as a contracted municipal policing agency.

[146] I am not prepared to interpret the *Act* or the powers of the Director or the CFO in a way that would breathe life into such an anomaly.

[147] For all of the foregoing reasons, I am satisfied that the Director had lawful authority to collect information from the RCMP and to commence and conduct the related forfeiture proceedings.

[148] The relief sought in paras. 1, 3 and 4 of Part 1 of the petition is accordingly dismissed.

(d) Does the Director have the power to assign a CFO RCMP Program Manager Position?

[149] The remaining administrative law submission advanced by the petitioners concerns their application (in para. 2 of Part I of the petition) for a "declaration that the CFO had no authority to assign a CFO RCMP Program Manager Position within the RCMP's Operations Support Group Federal Serious and Organized Crime".

[150] Clauses 1.1 to 1.3 of the MOU record its "Purposes and Objectives." They state:

> 1.1 The purpose of this Memorandum of Understanding (MOU) is to record the understanding of the arrangement between the CFO and the RCMP pertaining to the assignment of the CFO RCMP Program Manager within the RCMP's Federal Serious and Organized Crime (FSOC) Operations Support Group (OSG) Asset Forfeiture Unit AFU). This MOU represents the good faith and spirit of cooperation between the CFO and the RCMP. The MOU is not intended to be and is not in any way legally binding on either party or any related governments in Canada or British Columbia.
>
> 1.2 The objective of FSOC AFU in British Columbia is to work together in an integrated environment to deprive organized crime members of their criminally obtained assets. The role of FSOC members includes, but is not limited to;
>
> (a) Endeavouring to identify, seize and forfeit criminal assets throughout the Province of British Columbia, recommending for prosecution the persons associated therewith and co-operating with other jurisdictions for such purposes;
>
> (b) Gathering of intelligence and identifying, developing and managing human sources.
>
> 1.3 The objective of the CFO is to disrupt criminal organizations and reduce crime by removing the instruments and proceeds of unlawful activity and provide funding to communities in support of crime prevention initiatives. The CFO receives referrals from enforcement agencies such as the RCMP, and based upon a consideration of the evidence, public interest and financial viability of the referrals, commences actions through civil forfeiture proceedings against the property only. The RCMP is the single largest referral agency to the CFO.

[151] Clause 2.1 of the MOU states that it is entered into by the Director and the RCMP pursuant to the authority of the 1983 Agreement.

[152] As I apprehend the petitioners' submissions concerning the creation of the impugned CFO RCMP position by the Director under the MOU they are founded upon the same or similar assertions made by them concerning the Director's lack of statutory authority to receive referrals and information from the RCMP under the 1983 Agreement.

[153] I have rejected those submissions and accordingly also reject the submission that the Director did not have authority to enter into the MOU or to create the impugned position.

[154] The petitioners also, however, submit that by its terms the 1983 Agreement, and thus the MOU do not authorize the referral process adopted by the Director and the RCMP because s. 4 of the 1983 Agreement provides that information from the RCMP sought by the CFO is to be sent "upon request".

[155] The petitioners submit that the policy adopted by the CFO of accepting referrals from the RCMP rather than specifically initiating requests for information is thus not authorized by the 1983 Agreement or the MOU.

[156] The short answer to that argument is that I accept that the Director has instituted referral policies and procedures that can appropriately be characterized as "standing requests" and that any failure to follow the procedure articulated by the 1983 Agreement does not vitiate the Director's authority to receive and use files referred by the police.

[157] The relief sought by the petitioners in para. 2 of Part 1 is accordingly dismissed.

[158] Having reached that conclusion as a matter of administrative law I must, however, observe that I remain concerned, as I earlier noted (at paras. 54 to 59) with respect to disclosure issues that the operational relationship between the CFO RCMP Program Manager and the RCMP's Operations Support Group Federal Serious and Organized Crime Asset Forfeiture Unit not only in sharing physical office space but in pursuing their shared objectives has the potential to blur the

distinction between police powers of investigation for criminal law enforcement purposes (with attendant criminal law protections afforded to an accused person under the *Code* and the *Charter*) and the CFO's powers to impact citizen's property interests under a civil regime.

[159] Accordingly, while I find that entering into the MOU with the RCMP by the Director and the creation of the CFO RCMP Program Manager Position was lawfully authorized, I am also satisfied that, in some circumstances, the relationship between the police and the CFO with the attendant possibility of conflict arising from the intersection of criminal law substance and procedure and civil forfeiture law substance and procedure may require not only evidentiary oversight by the Court but also engage *Charter* scrutiny.

(e) Have the petitioners established entitlement to the relief sought arising from alleged *Charter* breaches?

[160] The *Charter* relief sought by the petitioners (in paras. 5, 6 and 8 of Part 1 of the petition) is all premised upon allegations that the Director acted without lawful authority in receiving information from the RCMP and that the RCMP acted without authority in disclosing information to the Director.

[161] My conclusion that the Director acted with lawful authority in both receiving and using information from the RCMP under the 1983 Agreement, the federal *Privacy Act* and the MOU and that the RCMP was authorized to provide that information precludes a finding that the petitioners' s. 8 *Charter* rights to be free from unreasonable search or seizure were infringed as alleged.

[162] Also, privacy rights under s. 8 of the *Charter* are personal so that a complainant must establish that his or her personal rights to privacy have been violated, including establishing a reasonable expectation of privacy in the information seized. See: *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45(3) and *R. v. Marakah*, 2017 SCC 59 at paras. 10 to 12.

[163] The Director has not alleged that any of these petitioners have ever been convicted of a criminal offence or have committed any criminal offences for which they were not charged.

[164] The information disclosed by the police to the Director that has been adduced in the related forfeiture proceedings relates to the alleged unlawful activity of other members or associates of the Hells Angels, some of whom are (or were) defendants in the related actions but are not petitioners in this proceeding.

[165] Like *Charter* rights, *Charter* remedies are also personal. A complainant may seek an order under s. 24 on the basis of infringement of his or her own *Charter* rights but not on the basis of an infringement of the rights of other people. See: *R. Ferguson*, 2008 SCC 6 [*Ferguson*] at paras. 59-61.

[166] None of these petitioners adduced cogent evidence in support of their allegations that their personal information was disclosed by the RCMP or received or used by the Director or that they had an expectation of privacy in any personal information that was disclosed, received or used.

[167] I have accordingly concluded that *Charter* relief sought in paras. 5, 6 and 8 of Part 1 of the petition must also be dismissed.

[168] Having reached that conclusion I must, however, also observe that the issues raised by the petition call into question the admissibility of copious amounts of intercepted communication that was adduced at the trial of the related proceedings and was the subject of evidentiary rulings which impacted the conduct of that trial.

[169] Issues related to admissibility as a consequence of any alleged s. 8 *Charter* breach were known to the petitioners when that evidence was addressed. Such issues could and should have been raised and resolved at that time by those petitioners who were also defendants in those proceedings or by other defendants in those proceedings who were represented by the same counsel.

[170] To now seek to make additional admissibility arguments when all of the evidence in the Director's case has been adduced would not only compromise trial fairness but also constitute a collateral attack on previous rulings.

(f) Are the petitioners entitled to relief under s. 8 of the *Charter* and s. 52 of the *Constitution Act*, 1982?

[171] In para. 9 of Part I of the petition the petitioners seek: "a declaration that to the extent that s. 22(4) of the *Act* authorized information sharing agreements with the RCMP, provincial or municipal law enforcement agencies it unjustifiably infringes s. 8 of the *Charter* and is of no force and effect pursuant to s. 52 of the *Constitution Act*, 1982".

[172] For ease of reference I will again record the provisions of s. 22(4) of the *Act* which states:

> (4) Subject to the regulations, the director may enter into information-sharing agreements that are reasonably required by the director in order to exercise his or her powers or perform his or her functions and duties under this Act with the following:
>
> (a) Canada, a province or another jurisdiction in or outside of Canada;
>
> (b) a public body.

[173] Section 52(1) of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 provides:

> 52 (1) The Constitution of Canada is the Supreme law of Canada, and any law that is inconsistent with the provisions of the Constitutions is, to the extent of the inconsistency, of no force or effect.

[174] Unlike remedies under s. 24 of the *Charter*, remedies under s. 52(1) of the *Constitution Act,* 1982 are not personal. As explained by the Court in *Ferguson* at para. 59:

> [59] When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter.* A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s.

> 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: *Big M*;

[175] The petitioners' submissions under s. 52 of the *Constitution Act*, 1982 are thus not barred as they were under s. 24 of the *Charter* because they have not established a reasonable expectation of privacy in the information seized or that their personal rights to privacy had been violated.

[176] The petitioners' submissions with respect to the constitutional invalidity of s. 22(4) of the *Act* are based upon the assertion that when judicial authorization is granted for the interception of private communications or for the search of a person's property it is only for the purpose of the enforcement of the criminal law. The petitioners submit that for the police to then give evidence collected pursuant to such authorization to a different arm of government is not authorized and is thus unreasonable.

[177] The petitioners submit that the dissemination of lawfully obtained evidence to unauthorized users for unauthorized purposes under s. 22(4) of the *Act* (if it is constitutionally valid provincial legislation which they deny) is devoid of mechanisms to "hold authorities accountable for their disclosure".

[178] The petitioners then assert (at para. 226 of their written submissions): "There are no prior authorizations required, no notice or record keeping requirements (unless an action is commenced and even then only if the person whose privacy interests are at stake has an interest in the property), and the information can be further disseminated by the Director including extra-provincially."

[179] I share some of the concerns raised by the petitioners with respect to the potential that exists for lack of notice and lack of record keeping in the transmission of information and have observed that the relationship between the police and the CFO with the attendant possibility of conflict arising from the intersection of criminal law substance and procedure and civil forfeiture law substance and procedure may require not only evidentiary oversight by the Court but may also engage *Charter* scrutiny.

[180] I have also, however, determined that there is no evidentiary foundation for an argument that any lack of notice or record keeping has compromised the ability of these petitioners or any of the other defendants in the related forfeiture proceedings to defend those proceedings.

[181] In addition, as far as I am aware, to the extent that wiretap interceptions were disclosed by the RCMP to the Director in the related forfeiture proceedings, such disclosure was pursuant to third party disclosure applications (such as those to which I earlier referred in the decisions of Pearlman J. and the Court of Appeal in the Nanaimo Clubhouse proceedings) or was information already in the public domain in criminal proceedings against members of the Hells Angels.

[182] I am accordingly satisfied that the petitioners have not established an evidentiary, as opposed to an argumentative, basis upon which to conclude that the provisions of s. 22(4) of the *Act* have infringed their s. 8 *Charter* rights or the s. 8 *Charter* rights of any other member or associate of the Hells Angels in the related forfeiture proceedings.

[183] That lack of evidence precludes the granting of the declaratory relief sought in para. 9 of Part 1 of the petition.

[184] In para. 10 of Part 1 of the petition, the petitioners apply for "a declaration to the extent that s. 8(2) of the [federal] *Privacy Act* authorizes disclosure of personal information by the RCMP to the Director, it unjustifiably infringes s. 8 of he *Charter* and is of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*".

[185] The petitioner's submissions on this issue are brief.

[186] At paras. 229 and 230 of their written submission they assert:

> 229. … if s. 8 of the *Privacy Act* authorized disclosure by the RCMP to the Director in this case, then s. 8 of the *Privacy Act* unjustifiably infringes s. 8 of the *charter* for all the reasons set out above in respect of s. 22(4) of the *CFA*.
>
> 230. In Summary:
>
> (a) There is no independent judicial officer authorizing the search;

> (b) There is no statutory requirement which protects ongoing privacy interests protected by s. 8 and balances those against the purposes of disclosure;
>
> (c) There is no requirement of a record of a disclosure having been made;
>
> (d) There is no requirement of notice to the person whose privacy interests are engaged;
>
> (e) And therefore no guaranteed opportunity for that person to challenge the legality of the disclosure;
>
> (f) There is no transparency, openness, oversight or accountability.
>
> [*R. v. Tse*, [2012] 1 S.C.R. 531, 2012 SCC 16 at para. 53]

[187] As with the petitioners' submissions asserting that the provisions of s. 22(4) of the *Act* are unconstitutional because they conflict with s. 8 of the *Charter* there is no evidentiary foundation for the same arguments advanced with respect to the provisions of s. 8 of the federal *Privacy Act.*

[188] In addition, as with the petitioners submissions concerning s. 22(4) of the *Act*, (with respect to para. 9 of Part 1 of the petition), there is no evidence that wiretap intercepts were disclosed by the RCMP to the Director except by way of third party disclosure applications or that consisted of information not already in the public domain.

[189] That lack of evidence is sufficient to require that the relief sought in para. 10 of Part 1 of the petition also be dismissed.

[190] In reaching that conclusion, although it is not necessary to my decision, I also note that while the Supreme Court of Canada's decision in *Wakeling v. United States of America*, 2014 SCC 72 [*Wakeling*] which was decided based upon the constitutionality of s. 193(2)(e) of the *Code* rather than that of s. 8(2) of the federal *Privacy Act*, similar arguments to those now advanced by the petitioners (in para. 230 of their written submission) were made by Mr. Wakeling and the British Columbia Civil Liberties Association (referenced at paras. 63 and 64 in *Wakeling*) and were rejected by the majority.

[191] Although not determinative of the constitutionality of s. 8(2) of the federal *Privacy Act*, it is in my view instructive that in respect of record keeping, accountability and transparency with respect to the disclosure of wiretap communications, the majority in *Wakeling* stated at para. 72:

> [72] Contrary to the submissions of Mr. Wakeling and the BCCLA, s. 193(2)(*e*) is not devoid of accountability measures. Rather, accountability has been built into the scheme for the disclosure of wiretap communications. Section 193(1) provides a powerful incentive for Canadian authorities to comply with the dictates of s. 193(2)(*e*). The failure to do so can lead to criminal charges against the disclosing party or result in the exclusion of the improperly disclosed evidence at a subsequent proceeding in Canada. The possibility of criminal sanction or the loss of important evidence creates an incentive to maintain records about what information was disclosed, to whom, and for what purpose. [My emphasis.]

[192] While that statement was made in the context of the disclosure of wiretap communications by the RCMP to a foreign state, in my view, the "powerful incentive" in s. 193(1) of the *Code* to comply with the provisions of the *Code* also applies to and should govern the disclosure of wiretap communications by the police to the CFO.

[193] That is so important because, as I have earlier stated, if issues about disclosure do arise in forfeiture litigation, such issues can, if necessary, be resolved by application and determination in those proceedings with a complete evidentiary record.

CONCLUSION

[194] The petition is dismissed.

"Davies, J."