Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

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CITATION: Re Indalex 2010 ONSC 1114
Court File No. CV-09-8122-00CL
Date: 20100218

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC. (the "Applicants")

Katherine McEachern, Linc Rogers, J.A. Prestage for the Applicants

Ashley Taylor, Lesley Mercer for the Monitor, FTI Consulting

Andrew Hatnay, Demetrios Yiokaris for various employees

Darrell Brown for the United Steelworkers

Mark Bailey for the Superintendent of Financial Services

Fred Myers, Brian Empey for Sun Indalex Finance, LLC

Heard: July 20 and August 28, 2009

C. CAMPBELL J.:

REASONS FOR DECISION

[1] On July 20, 2009, this Court heard a motion for approval of a sale and for a Vesting Order in a joint cross-border hearing with Justice Walsh of the United States Bankruptcy Court for the District of Delaware.

Background

[2] On March 20, 2009, Indalex US commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code before the U.S. Court.

[3] On April 3, 2009, the Applicants commenced parallel proceedings and filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "*CCAA*") pursuant to an order of Morawetz J. (the "Initial Order") Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants.

[4] On April 8, 2009, the Initial Order was amended and restated to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex Limited to borrow funds (the "DIP Borrowings") pursuant to a debtor-in-possession credit agreement among Indalex US, the Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. is administrative agent (the "DIP Agent.")

[5] The Applicants' obligation to repay the DIP Borrowings was guaranteed by Indalex US. The guarantee by Indalex US was a condition to the extension of credit by the DIP Lenders to the Applicants.

[6] On April 22, 2009, this Court granted an Order which, inter alia, extended the stay of proceedings to June 26, 2009, and approved a marketing process.

[7] By Order dated July 20, 2009 (the "Approval and Vesting Order"), this Court approved the sale of the Applicants' assets as a going concern to SAPA Holding AB (including any assignees, "SAPA"), and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor.

[8] Pursuant to the Approval and Vesting Order, the Monitor was ordered and directed to make a distribution to the DIP Lenders, from the Canadian Sale Proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds.")

[9] At the sale approval hearing, both the Former Executives and the United Steel Workers (USW) asserted deemed trust claims over the Canadian Sale Proceeds in respect of underfunded pension liabilities in connection with certain pension plans administered by Indalex Limited, and requested that an amount representing their estimate of the under-funded deficiencies be included in the amount retained by the Monitor as Undistributed Proceeds, pending further order of the Court.

[10] As a result of the Former Executives and USW's reservation of rights, the Monitor has retained the amount of $6.75 million as Undistributed Proceeds, in addition to other amounts reserved by the Monitor.

[11] On July 31, 2009, the sale of Indalex's assets to SAPA closed. A total payment of US$17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent. As this resulted in a deficiency of US$10,751,247.22 in respect of the DIP Borrowings, the DIP Agent called on the guarantee granted to the DIP Lenders by Indalex US for the amount of the deficiency (the "Guarantee Payment") and Indalex US has satisfied the obligation of the Applicants.

[12] The approval motion was either supported or unopposed by all parties except for an issue raised on behalf of certain retirees under pension plans of the Company. Pursuant to paragraph 14 of the Approval and Vesting Order, Indalex US is fully subrogated to the rights of the DIP Lenders under the DIP Lenders' Charge for the amount of the Guarantee Payment.

[13] Counsel for the retirees objected to the sale on the basis that the liquidation values set forth in the 7th Monitor's Report would, it was suggested, provide greater return for unsecured creditors than would the proposed sale. That objection was dismissed on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs of the Applicants' plant employees in Canada.1

[14] The second objection by certain retirees and employees involves a claim based on a statutory deemed trust said to be in respect of certain funds held by the Monitor proposed to be reserved from the funds for distribution on closing to the DIP Lenders.

[15] At the July 20, 2009 hearing, the Court expressed concern that the position of the retirees and employees, which was brought only at the time of the approval motion, if it were to be dealt with at all, without an adjournment of the approval hearing, should be dealt with promptly as part of the overall approval process.

[16] Following the submissions of counsel, it was agreed that an expedited hearing process on the retirees' and employees' positions would be undertaken promptly, and that the funds on hand with the Monitor would be sufficient if required to satisfy retirees' alleged trust claims.

[17] The motion in respect of the deemed trust came on for hearing on August 28, 2009. The position of the retirees was opposed by the Applicants and the purchaser. Submissions were also made by counsel for the Superintendent under the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8 ("*PBA*.") This decision was then reserved pending the November 26, 2009 ruling of the Court of Appeal rendered in *Sproule v. Nortel Networks Corporation*, reported, 2009 ONCA 833.

[18] There are two groups of retired employees at issue in this matter. Those represented by Mr. Hatnay and his colleagues seek a declaration that the amount of $3.2 million, which represents the wind up liability said to be owing by the Applicants to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and which is currently held in reserve by the Monitor, is subject to the deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the *PBA*. The Pensioners further seek an order that such amounts are not distributable to other creditors of the Applicants and are to be paid into the fund of the Executive Plan and that such orders and declarations survive any subsequent bankruptcy of the Applicants.

[19] There were, as of January 1, 2008, eighteen members of the Executive Plan, none of whom are active employees.

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1 Monitor's 7th Report, July 15, 2009, p. 13, paragraphs 34(c)(d)

[20] The second group of pension claimants are members of the United Steel Workers, who seek recovery from the sale proceeds based on deemed trust of a pension plan in wind-up of an amount equal to the deficiency in the Retirement Plan for Salaried Employees of Indalex and Associated Companies ("Salaried Plan.") The deficiency in the Salaried Plan is said to be $1,795,600 as of December 31, 2008.

The Issues

1. Do the deemed trust provisions of s. 57 and s. 75 of the *PBA* apply to the funds currently held in reserve by the Monitor in respect of:

   a. The Executive Plan;

   b.T he Salaried Plan?

2. Should the stay currently in place under the *CCAA* be lifted to permit the Applicants to file for bankruptcy under the *BIA*?

[21] There are several differences between the Executive Plan and the Salaried Plan. The Salaried Plan contains both a defined benefit and defined contribution component. Indalex and members of the Salaried Plan were required to make joint contributions to the Salaried Plan.

[22] The Salaried Plan is in the process of being fully wound up with an effective wind-up date of December 31, 2006. No pensions have accrued since that date. The wind-up deficiency in the Salaried Plan at December 31, 2008 was $1,795,600, has been subject to special payments to deal with that deficiency, of $709,013 in 2007, $875,313 in 2008 and $601,000 in 2009, all of which have been made. The last special payment was scheduled to be made on December 31, 2009.

The Executive Plan

[23] The Executive Plan has not been wound up. The material filed with the Court exhibits an intention on the part of the Applicants to wind up that Plan. The uncontested evidence of Bob Kavanagh on behalf of the Applicants in his affidavit sworn August 12, 2009 is to the following effect:

16. Indalex has made all required contributions to the Executive Plan to date and no amounts are currently due or owing to the Executive Plan, including special payments.
17. As at January 1, 2008, the Executive Plan had an estimated deficiency of $2,996,400 determined on a wind-up basis. In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments are due to be made to the Executive Plan until 2011.
18. If the Executive Plan were to be fully wound up, the funded status of the plan as of the wind-up date could only be determined by an actuarial valuation of the plan performed after the wind-up date once the plan's assets and liabilities have been determined. No actuarial valuation of the Executive Plan has been prepared since the valuation performed with an effective date of January 1, 2008.
19. Sixteen individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Ontario and two individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Alberta.

20. There is currently one member of the Executive Plan who is on long term disability and continues to accrue benefits under the plan.
21. Currently, approximately 80% of the assets of the Executive Plan are invested in fixed income securities and approximately 20% of the assets of the Executive Plan are invested in equities.
22. The market value of the assets of the Executive Plan as at June 30, 2009 was $5,022,940. Attached hereto as Exhibit "C" is a copy of the Statement of Net Assets Available for Benefits as of June 30, 2009.

[24] The affidavit of Keith Carruthers exhibits a letter of July 13, 2009 on behalf of the Monitor confirming the intention of the Applicants to wind up the Executive Plan in accordance with the provisions of the *PBA*. There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up. Given the analysis that follows in respect of the Salaried Plan, I see no basis for a deemed trust of any amount at this time in respect of the Executive Plan.

The Salaried Plan

[25] This motion essentially involves one aspect of the Salaried Plan of Indalex, namely the windup deficiency of the said plan. It is the position of the *CCAA* Applicants that prior to the sale of assets approved on July 20, 2009, all pension payments required under obligation to Indalex employees, both statutory and contractual, were met.

[26] What is at issue here is the requirement for an annual deficiency payment that was established to be made when the Salaried Plan was wound up as at December 31, 2006.

[27] The term "wind up" can be a misnomer unless understood in context. When a pension plan is "wound up," at the effective date it means that no new entrants are permitted. An actuarial calculation is then made of the assets to determine whether, based on certain actuarial assumptions, there will be sufficient monies available at the times required to pay the pension entitlement of employees who have and will retire.

[28] If the assets as of the wind-up date are found to be insufficient, that deficiency will be required to be made up under the *PBA*. As in this case, the Plan may be permitted to have the deficiency rectified in a period of up to five years by annual instalments.

[29] The issue for this Court is whether or not under the *PBA* there is a requirement that the deficiency commencing at the wind up date be paid as at the date of closing of the sale and transfer of assets, namely July 20, 2009.

[30] The issue is to be determined by analysis and application of the provisions of the *PBA*. The sections involved are the following:

57.

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

75

(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
(b) an amount equal to the amount by which,
(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8, s. 75 (2).

[31] Section 75 of the *PBA* is amplified by sections of the regulations under the statute * * (see R.R.O. 1990 Regulation 909.) Section 28 and the following 144 pages of the Regulation deal with wind-up notices. Section 31(1) and (2) are as follows:

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund. O. Reg. 712/92, s. 19.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30 (2) (b) and (c). O. Reg. 712/92, s. 19.

[32] The most pertinent of all of these sections are 57(4) and 75(2), as they apply to this windup situation. The submission on behalf of the Superintendent distinguished between the words "due" and "accruing due." The assertion is that the word "accrue" must be given meaning. The meaning suggested is that by virtue of the inclusion of the word "accrue," the remaining deficiency payments become payable since they fall within the deemed trust provisions.

[33] The distinction to be made between amounts that are accruing and amounts that are due is that, in the case of an amount accruing, it is not yet payable, while generally an amount that is due is payable.

[34] The deemed trust provision of s. 57(4) requires the employer to accrue "to the date of the windup but not yet due." The windup in this case is December 31, 2006. In my view the section contemplates the calculation to be made as of the date of wind-up of the amounts required to make up the deficiency. If, as here, the regulator permits that deficiency to be made up over a

period of years, the amount of the yearly payments does not become due until it is required to be paid. It is "payable annually in advance."

[35] In *Re Ganong Estate; Ganong v Belyea*, [1941] S.C.R. 125, it was held:

> ...the words 'all dividends accrued due' can surely only mean dividends which have become payable by the corporation to the shareholder, as the words "dividends accruing due" during any stated period can only mean dividends as they become payable by the corporation to the shareholder.

The court went on to say:

> How can these dividends possibly be said to have 'accrued due' or to be 'accruing due' when no profits have been earned to provide for their payment and no declaration has been made by the directors fixing any date therefor? The shareholders acquire no right to payment of any dividends until there are net profits, out of which alone they can be paid and until such time as the directors determine they shall be paid.

[36] The use of the word "accrue" connotes the ability to calculate a precise amount of money. The word "due" connotes that it is payable whether or not the time for payment has arrived. See *Black's Law Dictionary*, 6th ed., The West Group at p. 499, where it is noted that with respect to the word "due," "it imports a fixed and settled obligation or liability but with reference to the time for its payment, there is considerable ambiguity in the use of the term."

[37] In *Toronto Dominion Bank v. Usarco Ltd.*, [1991] 42. E.T.R. 235, Ont. C.J. (Gen. Div.), Farley J. dealt with the deemed trust provisions under what is now section 57(4) of the *PBA* in a context in which a declaration was sought prior to a bankruptcy petition. He said at paragraph 26:

> It therefore appears to me that the deemed trust provisions of subs. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation, that would be the regular and special payments that should have been made but were not (as reflected in the report of December 31, 1988), together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1). It is recognized in these circumstances, however, that the bank will have a secured position which will prevail against these additional obligations as to the special payments, which have not yet been required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency.)

[38] The issue was dealt with again in *Ivaco Inc. Re.* [2006] 25 C.B.R. [5th] 176. (Ont. C.A.), J. Laskin J.A. speaking for the Court of Appeal noted at paragraph 38 that "in a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute."

[39] Paragraph 44 of that decision states:

> At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R 235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act,1987* , S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco* is correct, but I do not need to resolve the issue on this appeal.

[40] In the text "Essentials of Canadian Law-Pension Law" (Toronto: IrwinLaw, 2006) author Ari N. Kaplan at page 396 states:

> The *PBA* does not expressly state whether a funding deficiency on the wind up of a pension plan is secured by the deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due and owing to the pension fund on wind up, but which have not been paid."

[41] The author goes on in the next paragraph:

> The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the windup of the pension plan.

The *Usarco* decision referred to above is the foundation for that statement.

[42] In his paper given at an Insight Conference, "Pension Management in Insolvency and Restructuring: What Is At Stake?" September 20, 2005, Gregory J. Winfield at page 29 states:

> Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under that O*PBA* does not extend to the unfunded pension liability upon the windup of the plan, but is limited to the outstanding unremitted contributions that are past due plus those arising in respect of the stub period. Accordingly while the entirety of the pension fund shortfall remains an obligation of the employer, and an obligation exists under the O*PBA* to fund this deficiency over a period not exceeding five years from the date of wind up, at present this is an unsecured claim on the assets of the debtor." [Reference omitted]

[43] The difficulty in reconciling the requirements of the pension statute with the regime of the *CCAA* is that a company such as Indalex is entitled to carry on business and to make payments in the ordinary course of such business including those that may be required under the initial order which may well, as here, include certain ongoing pension obligations while in *CCAA*.

[44] Were it not for the provisions in s. 31 of the Regulations, Indalex would have had under s. 75 of the *PBA* to pay in as of the date of wind-up any Plan deficiency. Section 31 of the Regulation as anticipated in s. 75 of the Act spreads that into five equal annual instalments.

[45] One obvious purpose behind the provision in s. 31 of the Regulation is to ease the burden on the Company to enable it to have the funds to operate its normal business operations while it earns the revenue to make up the deficiency.

[46] The pension issues that have arisen given the nature of the recent recession, as here, are often complex and pit as adversaries creditors of a corporation who most often having advanced funds under security which creditors assert give them priority as to the repayment, as against employees many of whom are long-term or even retired who have seen the assets supporting their pensions decrease in value, risking the payments to which the employees are otherwise entitled by the terms of the plan of which they are members.

[47] In circumstances such as this, the Court does not have the mandate to exercise the discretion to do what it or any group might consider fair and equitable. The federal insolvency legislation in force (the *CCAA* and *BIA*) provide schemes of priority among creditors commencing with those who have security over the assets of the company. Pitted against those with security are those unsecured creditors who must share in whatever is left over after the secured creditors are paid.

[48] Employees or retired employees are entitled to pensions in accordance with the contractual terms of their pension plan. In certain circumstances those contractual terms will be augmented by the provisions of the *PBA* to the extent that they do not conflict with federal insolvency legislation. In some of these circumstances, a "deemed trust" will arise.

[49] In this case I have concluded there is no conflict between the federal and provincial legislation. I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the *CCAA*.

[50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.

[51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

Motion To Lift Stay

[52] The Applicants and Indalex US, in addition to disputing the validity of the deemed trust claim, sought to file a voluntary assignment in bankruptcy to ensure the priority regime they urged as the basis for resisting the deemed trust.

[53] In support of that position, it was urged that since the Applicants no longer carried on business, have no active employees and no tangible assets apart from tax refunds (other than the cash sale proceeds associated with the above motion), and no directors (they having resigned), an assignment in bankruptcy is appropriate. The stay granted under the Initial Order, it is urged, should be lifted for that purpose.

[54] The decision on the voluntary assignment was reserved pending a decision in the main motion above, since to allow the bankruptcy to proceed might have deprived employees of an argument under the *CCAA*.

[55] Given that disposition, the question of bankruptcy assignment might well be moot. In my view, a voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.

[56] I conclude that it is not necessary to deal with the issue of the voluntary assignment, at least on the basis sought by the Applicants at this time. I did not find conflict between the federal and provincial regimes.

[57] Should the Applicants wish to renew the request for bankruptcy relief, the motion can be scheduled through the Commercial List.

C. CAMPBELL J.

Released:

CITATION: Re Indalex 2010 ONSC 1114
Court File No. CV-09-8122-00CL
Date: 20100218

SUPERIOR COURT OF JUSTICE
ONTARIO
(Commercial List)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC. (the "Applicants")

REASONS FOR DECISION

C. CAMPBELL J.

RELEASED: February 18, 2010

CITATION: Indalex Limited (Re), 2011 ONCA 265
DATE: 20110407
DOCKET: C52187 & C52346

COURT OF APPEAL FOR ONTARIO

MacPherson, Gillese and Juriansz JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc.

Applicants/Respondents

Andrew J. Hatnay and Demetrios Yiokaris for the Former Executives, appellants

Darrell L. Brown for the United Steelworkers, appellants

Mark Bailey for the Superintendent of Financial Services

Hugh O'Reilly and Adam Beatty for Morneau Sobeco Limited Partnership, Intervenor

Fred Myers and Brian Empey for Sun Indalex Finance, LLC

Ashley Taylor and Lesley Mercer for the Monitor, FTI Consulting Canada ULC

Harvey Chaiton and George Benchetrit for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Heard: November 23 and 24, 2010

On appeal from the orders of Campbell J., of the Superior Court of Justice, dated

February 18, 2010.

Gillese J.A.:

[1] A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

[2] The company obtains protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the Guarantee).

[3] The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

[4] The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act,* R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

[5] Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

OVERVIEW

[6] Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the Salaried Plan) and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the Executive Plan) (collectively, the Plans).

[7] On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

[8] On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

[9] On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

[10] On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans.

Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

[11] At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

[12] Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

[13] The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies.[1]

[14] The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee.

[1] The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

[15] In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

[16] Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

[17] By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

[18] The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

[19] On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

[20] Morneau was granted intervenor status. It supports the appellants.

[21] The Superintendent also appeared. He, too, supports the appellants.

[22] Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

[23] The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

[24] George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

[25] For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

BACKGROUND

[26] Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

with special contributions that were to have been made but had not been.[8] In *Ivaco*, the major financers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco,* Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.[9] On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

[108] The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

[109] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that

[8] At para. 26.
[9] At para. 11.

deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument – the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

[111] Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

[112] In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust

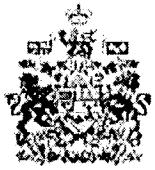
applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

DID INDALEX BREACH ITS FIDUCIARY OBLIGATION?

[113] The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

[114] The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

[115] Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:



SUPREME COURT OF CANADA

CITATION: Sun Indalex Finance, LLC *v.* United Steelworkers, 2013 SCC 6

DATE: 20130201
DOCKET: 34308

BETWEEN:

Sun Indalex Finance, LLC

Appellant

and

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville

Respondents

AND BETWEEN:

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors

Appellant

and

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville

Respondents

AND BETWEEN:

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited

Appellant

and

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville

Respondents

AND BETWEEN:

United Steelworkers

Appellant

and

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services

Respondents

- and -

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association
Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

REASONS FOR JUDGMENT: Deschamps J. (Moldaver J. concurring)
(paras. 1 to 84)

REASONS CONCURRING IN RESULT WITH THOSE OF DESCHAMPS J.: Cromwell J. (McLachlin C.J. and Rothstein J. concurring)
(paras. 85 to 262)

DISSENTING REASONS: LeBel J. (Abella J. concurring)
(paras. 263 to 280)

Sun Indalex Finance, LLC *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

United Steelworkers *Appellant*

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services *Respondents*

and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association *Interveners*

Indexed as: Sun Indalex Finance, LLC *v.* United Steelworkers

2013 SCC 6

File No.: 34308.

2012: June 5; 2013: February 1.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), 57(4), 75(1)(a), 75(1)(b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust —

Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an

amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and a constructive trust arising from Indalex's alleged breaches of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan w ind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per **Deschamps** and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is a ffirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind-up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind-up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind-up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind-up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind-up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind-up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind-up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind-up and with respect to which employees make elections only after wind-up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind-up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. Moreover, the legislative evolution and

history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind-up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind-up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason

to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per **Deschamps** and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust As A Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision

to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be

unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per **Deschamps** and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the

plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

Per **LeBel** and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per **Deschamps** and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir,* for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered by

DESCHAMPS J. —

[1] Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

[2] To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10

members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

[24] The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

[25] The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?

2. If so, does the deemed trust supersede the DIP charge?

3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?

Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

[46] The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

[47] The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of

such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. *Does the Deemed Trust Supersede the DIP Charge?*

[48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

[61] The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

[62] The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

[63] However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. —

I. Introduction

[85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over

to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

[94] Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

[95] The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

[96] The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

[97] The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. *Indalex's CCAA Proceedings*

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

[98] As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the

[116] Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. *First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?*

(1) Introduction

[117] The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

[118] The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree

with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

[119] The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the wind-up".

[120] Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

[121] I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on

[259] I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

[260] With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

[261] I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

[262] I would dismiss the USW costs appeal, but without costs.

The reasons of LeBel and Abella JJ. were delivered by

LEBEL J. —

I. Introduction

[263] The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

[264] I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

[265] Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the

application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

[266] But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

[267] Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It

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Indexed as:

Danyluk v. Ainsworth Technologies Inc.

Mary Danyluk, appellant;
v.
Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson, respondents.

[2001] 2 S.C.R. 460

[2001] S.C.J. No. 46

2001 SCC 44

File No.: 27118.

Supreme Court of Canada

2000: October 31 / 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (82 paras.)

Administrative law -- Issue estoppel -- Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions -- Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions -- Employment standards officer dismissing employee's complaint -- Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel -- Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel -- Whether preconditions to application of issue estoppel satisfied -- If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the Employment Standards Act ("ESA") seeking [page461] unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

[page462]

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or

tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in Harelkin and collateral attack in Maybrun.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a matter [page463] of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

Cases Cited

Considered: Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248; disapproved in part: Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267; referred to: Re Downing and Graydon (1978), 21 O.R. (2d) 292; Farwell v. The Queen (1894), 22 S.C.R. 553; 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; Robinson v. McQuaid (1854), 1 P.E.I.R. 103; Bell v. Miller (1862), 9 Gr. 385; Raison v. Fenwick (1981), 120 D.L.R. (3d) 622; Wong v. Shell Canada Ltd. (1995), 15 C.C.E.L. (2d) 182; Machin v. Tomlinson (2000), 194 D.L.R. (4th) 326; Hamelin v. Davis (1996), 18 B.C.L.R. (3d) 112; Thrasyvoulou v. Environment Secretary, [1990] 2 A.C. 273; R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706; McIntosh v. Parent, [1924] 4 D.L.R. 420; British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1; Schweneke v. Ontario (2000), 47 O.R. (3d) 97; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173; Guay v. Lafleur, [1965] S.C.R. 12; Thoday v. Thoday, [1964] P. 181; Machado [page464] v. Pratt & Whitney Canada Inc. (1995), 12 C.C.E.L. (2d) 132; Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19; Heynen v. Frito-Lay Canada Ltd. (1997), 32 C.C.E.L. (2d) 183; Perez v. GE Capital Technology Management Services Canada Inc. (1999), 47 C.C.E.L. (2d) 145; Munyal v. Sears Canada Inc. (1997), 29 C.C.E.L. (2d) 58; Alderman v. North Shore Studio Management Ltd., [1997] 5 W.W.R. 535; R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128; Harelkin v. University of Regina, [1979] 2 S.C.R. 561; Poucher v. Wilkins (1915), 33 O.L.R. 125; Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321; Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd. (1988), 22 B.C.L.R. (2d) 89; General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72; Arnold v. National Westminster Bank plc, [1991] 3

All E.R. 41; Susan Shoe Industries Ltd. v. Ricciardi (1994), 18 O.R. (3d) 660; Iron v. Saskatchewan (Minister of the Environment & Public Safety), [1993] 6 W.W.R. 1.

Statutes and Regulations Cited

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 23(1).
Employment Standards Act, R.S.O. 1990, c. E.14, ss. 1 "wages", 2(2), 6, 65(1)(a), (b), (c) [rep. & sub. 1991, c. 16 (Supp.), s. 9(1)], (7) [ad. idem, s. 9(2)] 67(1) [am. idem, s. 10(1)], (2) [rep. & sub. idem, s. 10(2)], (3) [ad. idem], (5) [idem], (7) [idem], 68(1) [am. idem, s. 11(1); am. 1991, c. 5, s. 16; am. 1993, c. 27, sch.], (3) [rep. & sub. 1991, c. 16 (Supp.), s. 11(2)], (7).
Employment Standards Improvement Act, 1996, S.O. 1996, c. 23, s. 19(1).
O. Reg. 626/00, s. 1(1).

Authors Cited

American Law Institute. Restatement of the Law, Second: Judgments 2d, vol. 2. St. Paul, Minn.: American Law Institute Publishers, 1982.
Brown, Donald J. M., and John M. Evans. Judicial Review of Administrative Action in Canada, vol. 2. Toronto: Canvasback, 1998 (loose-leaf updated 2001, release 2).
Handley, K. R. "Res Judicata: General Principles and Recent Developments" (1999), 18 Aust. Bar Rev. 214.
Holmested, George Smith, and Garry D. Watson. Ontario Civil Procedure, vol. 3 Supp. Toronto: Carswell, 1984 (loose-leaf updated 2000, release 3).

[page465]

Lange, Donald J. The Doctrine of Res Judicata in Canada. Markham, Ont.: Butterworths, 2000.
Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. The Law of Evidence in Canada, 2nd ed. Toronto: Butterworths, 1999.
Spencer Bower, George, and Sir Alexander Kingcome Turner. The Doctrine of Res Judicata, 3rd ed. by K. R. Handley. London, U.K.: Butterworths, 1996.
Watson, Garry D. "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623.

APPEAL from a judgment of the Ontario Court of Appeal (1998), 42 O.R. (3d) 235, 167 D.L.R. (4th) 385, 116 O.A.C. 225, 12 Admin. L.R. (3d) 1, 41 C.C.E.L. (2d) 19, 27 C.P.C. (4th) 91, [1998] O.J. No. 5047 (QL), dismissing the appellant's appeal from a decision of the Ontario Court (General Division) rendered on June 10, 1996. Appeal allowed.

Howard A. Levitt and J. Michael Mulroy, for the appellant. John E. Brooks and Rita M. Samson, for the respondents.

Solicitors for the appellant: Lang Michener, Toronto. Solicitors for the respondents: Heenan Blaikie, Toronto.

The judgment of the Court was delivered by

1 **BINNIE J.**:-- The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the Employment Standards Act, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice [page466] should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard A. Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

4 An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed [page467] damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

6 On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

7 On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she or-

dered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

8 The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs [page468] from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. Ontario Court (General Division) (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267 (C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. Court of Appeal for Ontario (1998), 42 O.R. (3d) 235

10 After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

> This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision [page469] should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

11 In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

12 In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered Re Downing and Graydon (1978), 21 O.R. (2d) 292 (C.A.), to be "determinative of this issue" (p. 249).

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

> The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to consider [page470] and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

> These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

[page471]

III. Relevant Statutory Provisions

17 Employment Standards Act, R.S.O. 1990, c. E.14

1. In this Act,

...

"wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(a) tips and other gratuities,
(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,
(c) travelling allowances or expenses,
(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

...

6. -- (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

65. -- (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;
(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or
(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the [page472] Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

...

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

...

67. -- (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

...

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

...

[page473]

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

> 68. -- (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.
>
> ...
>
> (3) The Director shall select a referee from the panel of referees to hear the review.
>
> ...
>
> (7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

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 [page474] 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 s. 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.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making [page475] process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in The Doctrine of Res Judicata in Canada (2000), at p. 94 et seq., including Robinson v. McQuaid (1854), 1 P.E.I.R. 103 (S.C.), at pp. 104-5, and Bell v. Miller (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include Raison v. Fenwick (1981), 120 D.L.R. (3d) 622 (B.C.C.A.); Rasanen, supra; Wong v. Shell Canada Ltd. (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.); Machin v. Tomlinson (2000), 194 D.L.R. (4th) 326 (Ont. C.A.); and Hamelin v. Davis (1996), 18 B.C.L.R. (3d) 112 (C.A.). See also Thrasyvoulou v. Environment Secretary, [1990] 2 A.C. 273 (H.L.). Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, inter alia, to their legal nature and the position within the state structure of the institutions that issue them": R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on [page476] the application of issue estoppel and the relevance of the rule against collateral attack.

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 [page477] 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.

26 The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel per rem judicatem in the circumstances of this case, and erred in failing to do so.

A. The Statutory Scheme

1. The Employment Standards Officer

27 The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum [page478] employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rap-

idly than could realistically be expected in the courts. There [page479] are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

30 The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director may appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

31 It seems clear the legislature did not intend to confer an appeal as of right. Where the Director [page480] does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "peut nommer un arbitre de griefs pour tenir une audience" (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim de novo and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

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B. The Applicability of Issue Estoppel

1. Issue Estoppel: A Two-Step Analysis

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; Schweneke v. Ontario (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

34 The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

35 A common element of the preconditions to issue estoppel set out by Dickson J. in Angle, supra, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, The Doctrine [page482] of Res Judicata (3rd ed. 1996), paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner? These are distinct requirements:

> It is of no avail to prove that the alleged res judicata was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.
>
> (Spencer Bower, Turner and Handley, supra, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent ex curia statement of Handley J. (the current editor of The Doctrine of Res Judicata) that:

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to res judicata estoppels.
>
> ("Res Judicata: General Principles and Recent Developments" (1999), 18 Aust. Bar Rev. 214, at p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard capable of supporting an issue [page483] estoppel? In my opinion, the answer to this question is yes.

(a) The Institutional Framework

38 The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: Re Downing and Graydon, supra, per Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important indicia of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) The Nature of ESA Decisions Under Section 65(1)

39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

40 One distinction between administrative and judicial decisions lies in differentiating adjudicative [page484] from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in Guay v. Lafleur, [1965] S.C.R. 12, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in Thoday v. Thoday, [1964] P. 181 (Eng. C.A.), at p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (1998), vol. 2, s. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

(c) Particulars of the Decision in Question

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

44 The appellant contends that it is not enough to say the decision ought to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in Rasanen, supra, per Abella J.A., at p. 280:

[page485]

> 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. [Emphasis added.]

45 Trial level decisions in Ontario subsequently adopted this approach: Machado v. Pratt & Whitney Canada Inc. (1995), 12 C.C.E.L. (2d) 132 (Ont. Ct. (Gen. Div.)); Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19 (Ont. Ct. (Gen. Div.)); Heynen v. Frito-Lay Canada Ltd. (1997), 32 C.C.E.L. (2d) 183 (Ont. Ct. (Gen. Div.)); Perez v. GE Capital Technology Management Services Canada Inc. (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in Munyal v. Sears Canada Inc. (1997), 29 C.C.E.L. (2d) 58 (Ont. Ct. (Gen. Div.)), at p. 60, reflects that position:

> The plaintiff relies on [Rasanen] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

46 In Wong, supra, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also Alderman v. North Shore Studio Management Ltd., [1997] 5 W.W.R. 535 (B.C.S.C.).

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47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. As early as R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128 (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: Harelkin v. University of Regina, [1979] 2 S.C.R. 561, at pp. 584-85. The decision remains a "judicial decision", although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

48 I mentioned at the outset that estoppel per rem judicatem is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in Harelkin, supra. In that case a university student failed in his judicial review application to quash the decision of a [page487] faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the Harelkin barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

49 The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though Maybrun, supra, says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to Maybrun, on which forum [page488] the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA

scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law [page489] governing judicial review in Harelkin, supra, and collateral attack in Maybrun, supra.

52 Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

53 I turn now to the three preconditions to issue estoppel set out by Dickson J. in Angle, supra, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) That the Same Question Has Been Decided

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: Poucher v. Wilkins (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law [page490] that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action, she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) That the Judicial Decision Which Is Said to Create the Estoppel Was Final

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike Harelkin, supra, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA [page491] decision must nevertheless be treated as final for present purposes.

(c) 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

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: Machin, supra; Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321 (C.A.), per Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd. (1988), 22 B.C.L.R. (2d) 89 (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, supra, at 21 s. 24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623.

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in The Law of Evidence in Canada (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

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61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

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:

[page493]

> 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.

64 Courts elsewhere in the Commonwealth apply similar principles. In Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, per Lord Keith of Kinkel, at p. 50:

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

65 In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

66 In my view it was an error of principle not to address the factors for and against the exercise of [page494] the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in Maybrun in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in Minott, supra. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

(a) The Wording of the Statute from which the Power to Issue the Administrative Order Derives

68 In this case the ESA includes s. 6(1) which provides that:

> No civil remedy of an employee against his or her employer is suspended or affected by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: Rasanen, supra, per Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

[page495]

70 While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings -- including any available appeals -- has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) The Purpose of the Legislation

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In Bugbusters, supra, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. Forest Act, R.S.B.C.

1979, c. 140. The expense claim was allowed despite an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, per Finch J.A., at para. 30, was 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 [reimbursement] proceedings [under the Forest Act].

A similar point was made in Rasanen, supra, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery [page496] and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American Restatement of the Law, Second: Judgments 2d (1982), vol. 2 s. 83(2)(e), which refers to

> procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

> As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages... .

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) The Availability of an Appeal

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: Harelkin, supra, at p. 592. Here the employee had no right of appeal, but the existence of a potential administrative review and her failure to take advantage of it [page497] must be counted against her: Susan Shoe Industries Ltd. v. Ricciardi (1994), 18 O.R. (3d) 660 (C.A.), at p. 662.

(d) The Safeguards Available to the Parties in the Administrative Procedure

75 As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

76 Morden A.C.J.O. pointed out in his concurring judgment in Rasanen, supra, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in Minott, supra, at pp. 341-42.

(e) The Expertise of the Administrative Decision Maker

77 In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (Maybrun, supra, at para. 50):

[page498]

> ... where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or raison d'être, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

(f) The Circumstances Giving Rise to the Prior Administrative Proceedings

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in Minott, supra, at pp. 341-42:

> ... employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them ... .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) The Potential Injustice

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the [page499] problem identified by Jackson J.A., dissenting, in Iron v. Saskatchewan (Minister of the Environment & Public Safety), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

81 On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

82 I would therefore allow the appeal with costs throughout.

cp/e/qllls

3

Ethel Annabelle Angle *Appellant*;

and

Minister of National Revenue *Respondent.*

1973: November 7; 1974: May 27.

Present: Martland, Judson, Spence, Laskin and Dickson JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Estoppel—Benefit from construction by a controlled company—Assessment—Alleged debt of taxpayer to the company—Writ of extent against the taxpayer as debtor of the company—Whether principle of "issue estoppel" applicable.

Appellant, president and controlling shareholder of Transworld Explorations Limited, caused the company to construct a pool house, with furniture and fixtures, at the rear of her property. Six months after the foundations were in, appellant purported to lease to the company the whole of her property for five years at one dollar per year. After construction was complete, appellant leased the property to the company by a second lease for one year, at a rental of $6,000 payable in monthly instalments of $500. In order to create the impression that the pool house had been paid for, the husband of appellant arranged a bank loan of $50,000 to appellant. This sum was deposited to the credit of the company, which could not withdraw it until the loan was paid. The husband then gave the appellant a cheque drawn on the company's account and signed by him as agent for the company in order that she could repay the bank loan, which she did.

Appellant was assessed under s. 8(1)(*c*) of the *Income Tax Act*, R.S.C. 1952, c. 148, $52,243.58 for benefits from construction of the pool house, and $5,995.82 for furniture and fixtures. On appeal the Exchequer Court concluded that appellant had received the house as owner of the freehold and that the procedure employed by appellant did not constitute payment for the house, and it affirmed the assessment except for the furniture and fixtures.

Some time after these proceedings the Minister of National Revenue, in an effort to collect arrears of taxes from another company, obtained *ex parte* an order for a writ of extent in the second degree,

Ethel Annabelle Angle *Appelante*;

et

Le Ministre du Revenu National *Intimé.*

1973: le 7 novembre; 1974: le 27 mai.

Présents: Les Juges Martland, Judson, Spence, Laskin et Dickson.

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA.

Fin de non-recevoir—Bénéfice découlant de construction par une compagnie controlée—Cotisation—Prétendue dette de la contribuable envers la compagnie—Bref de saisie «in extent» contre la contribuable en tant que débitrice de la compagnie—Le principe de l'«issue estoppel» est-il applicable.

L'appelante, présidente et actionnaire contrôlant de Transworld Explorations Limited, a fait en sorte que cette compagnie construise à l'arrière de sa propriété un pavillon de bains avec mobilier et accessoires fixes. Six mois après que les fondations furent achevées, l'appelante a censément loué à la compagnie la totalité de sa propriété pour cinq ans, à un dollar par an. Une fois la construction terminée, elle lui a loué la propriété en vertu d'un second bail pour un an, à raison de $6,000 payable par versements mensuels de $500. Pour donner l'impression que le pavillon de bains avait été payé, le mari de l'appelante obtint de la banque qu'un prêt de $50,000 soit fait à l'appelante. Cette somme fut déposée au crédit de la compagnie qui ne pouvait la retirer avant que le prêt ne soit remboursé. Le mari donna ensuite à l'appelante un chèque tiré sur le compte de la compagnie et signé par lui à titre de représentant de la compagnie pour qu'elle puisse rembourser le prêt bancaire, ce qu'elle fit.

L'appelante fut cotisée en vertu de l'art. 8*c*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, pour $52,243.58 pour bénéfices découlant de la construction du pavillon de bains ainsi que $5,995.82 pour mobilier et accessoires fixes. En appel la Cour de l'Échiquier a conclu que l'appelante avait reçu le pavillon à titre de propriétaire de la tenure libre, que le moyen employé par l'appelante ne constituait pas un paiement du pavillon, et elle a confirmé la cotisation sauf à l'égard des meubles et accessoires fixes.

Quelques temps après ces procédures, le ministre du Revenu national, afin de percevoir d'une autre compagnie des arriérés de taxes, a obtenu *ex parte* une ordonnance pour bref de saisi «extent» au second

against Transworld as debtor of the other company; a writ of extent in the third degree was also issued against appellant as debtor of Transworld. Other writs of extent were also issued, but set aside following a motion to set aside; however, the writ issued against appellant was upheld. The latter appealed this decision, on the ground that the judgment of the Exchequer Court rendered the matter of appellant's alleged indebtedness *res judicata*.

Held (Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Dickson JJ.: There is a distinction between the "cause of action estoppel" where another action is brought for the same cause of action as has been the subject of previous adjudication, and "issue estoppel" where, the cause of action being different, some point or issue of fact has already been decided. The requirements of issue estoppel are (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 determination on which it is sought to found the estoppel must be so fundamental to the substantive decision that the latter cannot stand without the former.

The question to be decided in these proceedings was the existence of a debt by Mrs. Angle to Transworld, whereas the question in the earlier proceedings was the amount of Mrs. Angle's income tax assessment. The question not being *eadem questio*, this is not a case of issue estoppel.

The claim that Mrs. Angle is indebted to Transworld is founded upon her sworn statement during examination for discovery in the tax proceedings. The Transworld balance sheet confirmed her evidence. It is not alleged and there is no evidence to suggest that she subsequently paid her debt to the company.

Per Spence and Laskin JJ., *dissenting*: Leave was given to refer to the reasons in the original tax judgment and they showed that the pool house which gave rise to the "benefit" was also the foundation of

degré contre Transworld en tant que débitrice de l'autre compagnie; un bref de saisie «extent» au troisième degré fut aussi émis contre l'appelante en tant que débitrice de Transworld. D'autres brefs de saisie «extent» furent aussi émis, mais annulés à la suite d'une requête en annulation, alors que le bref émis contre l'appelante fut maintenu. Celle-ci en appelle de cette décision, pour le motif que le jugement de la Cour de l'Échiquier donne à la question de l'existence de la dette dont l'appelante serait redevable le caractère de chose jugée.

Arrêt: (les Juges Spence et Laskin étant dissidents): L'appel doit être rejeté.

Les Juges Martland, Judson et Dickson: Il y a une distinction entre le principe de l'autorité de la chose jugée applicable lorsqu'une demande est intentée pour la même cause d'action que celle qui a fait l'objet d'un jugement antérieur, et cette théorie de la fin de non-recevoir qu'on applique lorsqu'il arrive que la cause d'action est différente mais que des points ou questions de fait ont déjà été décidés. Les conditions de l'*issue estoppel* exigent (1) que la même question ait été décidée; (2) que la décision judiciaire invoquée comme créant la fin de non-recevoir soit finale; et, (3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la fin de non-recevoir est soulevée, ou leurs ayants droits. La décision sur laquelle on cherche à fonder la fin de non-recevoir doit avoir été si fondamentale à la décision rendue sur le fond même du litige que celle-ci ne peut valoir sans celle-là.

La question à être décidée en l'espèce, c'est l'existence d'une dette de M^me^ Angle envers Transworld alors que la question à être décidée dans l'affaire antérieure était celle du montant de la cotisation d'impôt de M^me^ Angle. La question n'étant pas *eadem questio*, il n'y a pas lieu d'appliquer le principe de l'*issue estoppel*.

La prétention suivant laquelle M^me^ Angle a une dette envers Transworld est fondée sur sa déclaration sous serment durant l'interrogatoire préalable dans l'affaire relative à l'impôt. Le bilan de Transworld au 31 janvier 1969 confirme son témoignage. Il n'est pas allégué qu'elle aurait par la suite payé sa dette envers la compagnie, et il n'y a pas de preuve qui le donne à penser.

Les Juges Spence et Laskin, *dissidents*: Autorisation a été accordée aux avocats représentant les parties de se référer aux motifs du jugement rendu dans l'affaire d'impôt et ils ont reconnu que la pavil-

the debt allegedly owing by appellant to Transworld. Further, the appellant and the Minister were parties both to the tax appeal and to the present proceedings, into which the appellant was drawn by the Minister through a writ of extent, albeit they had their origin in a tax claim against a third person. Because of the difference in the two proceedings, issue estoppel is what the appellant must stand on.

Issue estoppel, as a principle, has been recognized in Canadian law. The application of this principle is not in any way affected because it is directed against a Minister of the Crown. There is no reason to introduce any anomalies or exceptions to its general application if the facts call for it.

The Minister's contention that the pool house transaction can be both a benefit and a loan or debt at the same time ignores the basis upon which he sought and succeeded in his reassessment of the appellant, namely s. 8(1)(*c*). Any question of a loan, arising from the arrangements for a bank credit to Transworld which was ultimately repaid by a Transworld cheque (leaving Transworld and the appellant where they were before), was negated by the Exchequer Court as having been dependent upon a lease which was ineffective to support it. A device which failed as a defence to a reassessment, and so determined by a final judicial decision, cannot be later reactivated as between the same parties to provide a different basis upon which to attempt to capture the same sum twice.

[*Angle v. Minister of National Revenue*, [1969] C.T.C. 624; *Thoday v. Thoday*, [1964] P. 181; *Hoysted v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537, [1926] A.C. 155; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Duchess of Kingston's Case* (1776), 20 St. Tr. 355, 538n; *R. v. Hutchings* (1881), 6 Q.B.D. 300; *Society of Medical Officers of Health v. Hope*, [1960] A.C. 551; *Spens v. I.R.C.*, [1970] 3 All. E.R. 295; *Curlett v. Minister of National Revenue*, [1961] Ex. C.R. 427, aff. 62 D.T.C. 1320; *R. v. Poynton*, [1972] 3 O.R. 727; *Attorney General for Trinidad and Tobago v. Enriché*, [1893] A.C. 518, referred to.]

lon de bains qui avait constitué le «bénéfice» était aussi le fondement de la dette qu'on allègue être due par l'appelante à Transworld. De plus l'appelante et le Ministre se trouvent à avoir été parties tant à l'appel en matière d'impôt qu'aux procédures en l'espèce, dans lesquelles l'appelante a été plongée par le Ministre au moyen d'un bref de saisie «extent» bien qu'elles aient pris naissance dans une réclamation d'impôt contre une tierce personne. A cause de la différence qui existe entre les deux instances, c'est sur l'*issue estoppel* que l'appelante doit s'appuyer.

L'*issue estoppel*, en tant que principe est reconnu dans le droit canadien. L'application de ce principe n'est pas atteinte parce qu'il est invoqué à l'encontre d'un ministre de la Couronne. Il n'y a aucune raison d'introduire des anomalies ou des exceptions à son application générale si les faits permettent de l'invoquer.

La prétention du Ministre que la transaction relative au pavillon de bains peut être à la fois un bénéfice et un emprunt ou une dette en même temps ne tient pas compte du fondement sur lequel il a voulu et obtenu la nouvelle cotisation qu'il recherchait à l'égard de l'appelante, soit l'art. 8(1)*c*). Toute évocation d'un prêt, résultant des dispositions prises pour que la banque émette en faveur de Transworld un crédit qui en définitive a été remboursé par un chèque de Transworld (laissant Transworld et l'appelante dans la situation où elles étaient auparavant), a été repoussée par la Cour de l'Échiquier comme subordonnée à un bail qui ne pouvait efficacement lui servir de fondement. Un expédient qui a failli comme moyen de défense à l'encontre d'une nouvelle cotisation, et qui est donc réglé par une décision judiciaire finale ne peut être par la suite réactivé entre les mêmes parties de façon à fournir une base différente sur laquelle tenter de capturer la même somme une seconde fois.

[Arrêts mentionnés: *Angle v. Minister of National Revenue*, [1969] C.T.C.624; *Thoday v. Thoday*, [1964] P. 181; *Hoysted v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537, [1926] A.C. 155; *Carl Zeiss Stiftung c. Rayner & Keeler Ltd.* (No. 2), [1967] 1 A.C. 853; *Duchess of Kingston's Case* (1776), 20 St. Tr. 355, 538n; *R. v. Hutchings* (1881), 6 Q.B.D. 300; *Society of Medical Officers of Health v. Hope*, [1960] A.C. 551; *Spens v. I.R.C.*, [1970] 3 All. E.R. 295; *Curlett c. Le ministre du Revenu national*, [1961] R.C.É. 427, conf. 62 D.T.C. 1320; *R. c. Poynton*, [1972] 3 O.R. 727; *Attorney General for Trinidad and Tobago v. Enriché*, [1893] A.C. 518.]

APPEAL from a judgment of the Exchequer Court of Canada ordering that a writ of extent be issued. Appeal dismissed, Spence and Laskin JJ. dissenting.

C. C. Sturrock, for the appellant.

N. A. Chalmers, Q.C., and *G. O. Eggertson*, for the respondent.

The judgment of Martland, Judson and Dickson JJ. was delivered by

DICKSON J.—In early 1966 Mrs. Angle caused Transworld Explorations Limited, a company of which she was president and controlling shareholder, to construct at the expense of the company, an indoor swimming pool, sauna bath, mineral bath, barbecue, bar, fireplace, sitting room and office at the rear of property owned by her on Stevens Drive in West Vancouver, British Columbia. The then s. 8(1) (*c*) of the *Income Tax Act* provided that where a benefit or advantage was conferred on a shareholder by a corporation the amount or value would be included in computing the income of the shareholder and, acting under the section, the taxing authorities added to Mrs. Angle's income for the years 1966 and 1967 a total of $52,243.58 for benefits from construction of the pool house and $5,995.82 for furniture and fixtures. Mrs. Angle appealed the assessment. The appeal was heard by Sheppard D.J. in the Exchequer Court of Canada[1] and judgment was delivered on November 17, 1969. The judge defined what he referred to as the basic issues in these words:

> That the pool house (i) was received by the appellant as lessor not as "shareholder" within Section 8(1)(c), (ii) was paid for by the appellant and therefore was not "a benefit or advantage" (iii) or in any event was a benefit received only on expiration of a lease, therefore not in 1966 or 1967 but in 1968.

The short facts and the manner in which the judge disposed of each of the issues follow:

[1] [1969] C.T.C. 624.

APPEL d'un jugement de la Cour de l'Échiquier du Canada ordonnant l'émission d'un bref de saisie «extent». Appel rejeté, les Juges Spence et Laskin étant dissidents.

C. C. Sturrock, pour l'appelante.

N. A. Chalmers, c.r., et *G. O. Eggertson*, pour l'intimé.

Le jugement des Juges Martland, Judson et Dickson a été rendu par

LE JUGE DICKSON—Au début de 1966, M^me^ Angle a fait en sorte que Transworld Explorations Limited, une compagnie dont elle était présidente et actionnaire contrôlant, construise à l'arrière de la propriété que M^me^ Angle possédait sur Stevens Drive à West Vancouver, Colombie-Britannique, une piscine intérieure, sauna, bain d'eau thermale, barbecue, bar, foyer, vivoir et bureau. A cette époque-là l'al. *c*) du par. (1) de l'art. 8 de la *Loi de l'impôt sur le revenu* prévoyait que lorsqu'un bénéfice ou un avantage était attribué à un actionnaire par une corporation, le montant ou la valeur en l'espèce devait être inclus dans le calcul du revenu de l'actionnaire, et invoquant cet article les fonctionnaires du fisc ajoutèrent au revenu de M^me^ Angle des années 1966 et 1967 un total de $52,243.58 pour bénéfices découlant de la construction du pavillon de bains, ainsi que $5,995.82 pour mobilier et accessoires fixes. M^me^ Angle en appela de la cotisation. L'appel fut entendu par M. le Juge suppléant Sheppard en Cour de l'Échiquier du Canada[1] et jugement fut rendu le 17 novembre 1969. Le juge a défini comme suit ce qu'il a appelé les questions fondamentales:

> Que le pavillon de bains (i) a été reçu par l'appelante en qualité de bailleur et non «d'actionnaire» au sens de l'article 8(1)*c*), (ii) qu'il a été payé par l'appelante, et ne constituait donc pas «un bénéfice ou un avantage», (iii) et que de toute façon, il s'agissait d'un bénéfice reçu seulement à l'expiration du bail, soit en 1968 et non en 1966 et 1967.

Voici maintenant l'exposé sommaire des faits et la façon dont le juge a décidé chacune des questions:

[1] [1969] C.T.C. 624.

(i) On November 1, 1966, six months after the foundations of the pool house were built and after receiving advice that the value of the pool house might be added to her income, Mrs. Angle purported to lease to Transworld the whole of her lot on Stevens Drive for a term of five years at a rental of one dollar per year. A year later, on November 27, 1967, after the pool house had been constructed, a second lease was entered into whereby she purported to lease the property to Transworld for a term of one year at a rental of $6,000 payable $500 per month. The judge held that the pool house was not received by Mrs. Angle as lessor because it was let into the soil: that is, construction was begun before there was any lease; the leases did not operate to divest Mrs. Angle of the pool house vested in her as owner of the freehold and accordingly the benefit was not received by her as lessor but as owner.

(ii) The scheme by which it was sought to create the impression that Mrs. Angle had paid for the pool house took this form. Her husband arranged for the Toronto-Dominion Bank to loan her $50,000 on December 27, 1967. The proceeds of the loan were deposited to the credit of Transworld but, as the money was assigned to the bank as security for the loan, it could not be withdrawn by Transworld until the loan was paid. In February 1968 Mr. Angle gave Mrs. Angle a cheque for $50,000 drawn on the Transworld account and signed by him as agent for the company with which she repaid the bank loan. The judge rightly concluded that this trumpery did not amount to payment for the pool house.

(iii) The judge rejected Mrs. Angle's contention that no benefit would vest in her until the expiration of the lease, holding that the benefit vested not by virtue of an assignment or conveyance by the lessee, but by virtue of Mrs.

(i) Le 1er novembre 1966, six mois après l'achèvement des fondations du pavillon de bains et après qu'on lui eut appris que la valeur du pavillon pourrait être ajoutée à son revenu, Mme Angle a censément loué à Transworld la totalité de son lot sur Stevens Drive, pour une période de cinq ans au loyer d'un dollar par an. Un an plus tard, le 27 novembre 1967, après que la construction de la piscine eut été terminée, un second bail est intervenu en vertu duquel la propriété était censément louée à Transworld par Mme Angle pour une période d'un an, en contrepartie d'un loyer de $6,000 payable par versements mensuels de $500. Le juge a décidé que Mme Angle n'avait pas reçu le pavillon de bains à titre de bailleur parce que le pavillon avait été loué incorporé au sol; c'est-à-dire, la construction avait débuté avant qu'il n'y ait de bail; les baux n'avaient pas eu pour effet de priver Mme Angle du pavillon de bains dévolu à elle en sa qualité de propriétaire de la tenure libre (*freehold*) du fonds et, par conséquent, c'est à titre de propriétaire et non de bailleur qu'elle avait reçu le bénéfice.

(ii) Le plan conçu pour donner l'impression que Mme Angle avait payé le pavillon de bains a été mis à exécution de la façon suivante. Le mari fit les arrangements nécessaires pour que la Banque Toronto-Dominion prête $50,000 à Mme Angle le 27 décembre 1967. La somme provenant de cet emprunt fut déposée au crédit de Transworld mais, comme l'argent avait été cédé à la banque en garantie du prêt, Transworld ne pouvait pas le retirer avant que le prêt soit remboursé. Au mois de février 1968, M. Angle donna à Mme Angle un chèque de $50,000 tiré sur le compte de Transworld et signé par lui à titre de représentant de la compagnie, et Mme Angle remboursa le prêt bancaire au moyen de ce chèque. Le juge a conclu à bon droit que cet artifice ne constituait pas un paiement du coût de la piscine.

(iii) Le juge a rejeté la présention de Mme Angle selon laquelle aucun bénéfice ne devait être dévolu à cette dernière avant l'expiration du bail, décidant que le bénéfice lui avait été dévolu non pas du fait d'une cession ou trans-

Angle being the owner of the freehold on which the building was erected. In the result the judge dismissed the appeal and confirmed the assessment except as to furniture and fixtures.

Some time after the proceedings in the Exchequer Court, the Minister of National Revenue sought to collect arrears of taxes amounting to $40,266.71 from a company, Kansas City Traders Ltd., and obtained a Writ of Extent ordering the sheriff of the County of Vancouver to extend and seize the assets of that company in the amount of the arrears. There being small prospect of collecting directly from Kansas City Traders, the Minister obtained *ex parte* an order for the issuance of a Writ of Extent in the Second Degree against Transworld in the amount of $40,266.71, Transworld being indebted to Kansas City Traders; a Writ in the Third Degree against Mrs. Angle in the amount of $34,612.33, on the allegation that Mrs. Angle was indebted to Transworld in this sum; a Writ of Extent in the Fourth Degree against Mr. and Mrs. Adolf Franz Bauer, purchasers in 1968 of the Stevens Drive property from Mrs. Angle; and a Writ of Extent in the Fifth Degree against the legal firm which acted for Mrs. Angle on the sale. A motion was brought before Sheppard D.J. to set aside the writs issued against Mrs. Angle, against Mr. and Mrs. Bauer and against the legal firm. As a result, the writs against Mr. and Mrs. Bauer and against the legal firm were set aside but the writ against Mrs. Angle allowed to stand. An appeal has now been taken to this Court on behalf of Mrs. Angle, the main ground being that the judgment of the Exchequer Court rendered the matter of Mrs. Angle's alleged indebtedness to Transworld *res judicata*.

In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem*

port par le locataire, mais du fait de sa qualité de propriétaire de la tenure libre du bien-fonds sur lequel le bâtiment avait été érigé. Le juge a rejeté l'appel et confirmé la cotisation sauf à l'égard des meubles et des accessoires fixes.

Quelque temps après les procédures en Cour de l'Échiquier, le ministre du Revenu national a tenté de percevoir d'une compagnie, Kansas City Traders Ltd., des arriérés de taxes s'élevant à $40,266.71, et il a obtenu un bref de saisie «extent» ordonnant au shériff du comté de Vancouver d'évaluer et de saisir les biens de cette compagnie-là pour le montant des arriérés. La possibilité de percevoir le montant directement de Kansas City Traders s'avérant mince, le Ministre a obtenu *ex parte* une ordonnance prévoyant l'émission d'un bref de saisie «extent» au second degré contre Transworld pour le montant de $40,266.71, Transworld étant débitrice de Kansas City Traders; un bref de troisième degré contre M^me^ Angle pour le montant de $34,612.33, sur allégation que cette dernière était débitrice de Transworld pour cette somme; un bref de saisie «extent» au quatrième degré contre M. et M^me^ Adolf Franz Bauer, qui en 1968 avaient acheté de M^me^ Angle la propriété de Stevens Drive; et un bref de saisie «extent» au cinquième degré contre l'étude d'avocats qui avait représenté M^me^ Angle lors de la vente de la propriété. Devant le Juge suppléant Sheppard on présenta une requête en vue de faire annuler les brefs émis contre M^me^ Angle, contre M. et M^me^ Bauer et contre l'étude d'avocats. Les brefs émis contre M. et M^me^ Bauer et contre l'étude d'avocats furent annulés mais le bref émis contre M^me^ Angle fut maintenu en vigueur. Un appel est maintenant interjeté devant cette Cour au nom de M^me^ Angle, le motif principal étant que le jugement de la Cour de l'Échiquier donne à la question de l'existence d'une dette dont serait redevable M^me^ Angle envers Transworld, le caractère de chose jugée.

Anciennement, la chose jugée en tant que fin de non-recevoir (*estoppel*) était appelée *estoppel by record*, c'est-à-dire, une fin de non-recevoir de par l'effet des registres et procès-verbaux d'une cour d'archives, mais maintenant on

judicatam. This form of estoppel, as Diplock L.J. said in *Thoday* v. *Thoday*[2], at p. 198, has two species. The first, "cause of action estoppel", 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. We are not here concerned with cause of action estoppel as the Minister's present claim that Mrs. Angle is indebted to Transworld in the sum of $34,612.33 is obviously not the cause of action which came before the Exchequer Court in the s. 8(1)(*c*) proceedings. The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead* v. *Federal Commissioner of Taxation*[3], at p. 561:

> I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

Lord Guest in *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 2)*[4], at p. 935, defined the requirements of issue estoppel as:

> . . . (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 . . . . .

Is the question to be decided in these proceedings, namely the indebtedness of Mrs. Angle to Transworld Explorations Limited, the same as was contested in the earlier proceedings? If it is

[2] [1964] P. 181.
[3] (1921), 29 C.L.R. 537.
[4] [1967] 1 A.C. 853.

emploie le plus souvent l'expression générique *estoppel per rem judicatam*. Cette forme de fin de non-recevoir, comme le Lord Juge Diplock l'a dit dans l'arrêt *Thoday v. Thoday*[2], est de deux sortes. Le premier, soit le «*cause of action estoppel*», empêche une personne d'intenter une action contre une autre lorsque la même cause d'action a déjà été décidée dans des procédures antérieures par un tribunal compétent. En l'espèce, nous n'avons pas à nous préoccuper du *cause of action estoppel* puisque l'allégation du Ministre selon laquelle M^me^ Angle doit la somme de $34,612.33 à Transworld, n'est évidemment pas la cause d'action dont la Cour de l'Échiquier a été saisie dans les procédures relatives à l'al. *c*) du par. (1) de l'art. 8. La deuxième sorte *d'estoppel per rem judicatam* est connue sous le nom *d'issue estoppel*, expression qui a été créée par le Juge Higgins de la Haute Cour d'Australie dans l'arrêt *Hoysted v. Federal Commissioner of Taxation*[3], à la p. 561:

> [TRADUCTION] Je reconnais pleinement la distinction entre le principe de l'autorité de la chose jugée applicable lorsqu'une demande est intentée pour la même cause d'action que celle qui a fait l'objet d'un jugement antérieur, et cette théorie de la fin de non-recevoir qu'on applique lorsqu'il arrive que la cause d'action est différente mais que des points ou questions de fait on déjà été décidés (laquelle je puis appeler théorie de *l'«issue-estoppel»*).

Lord Guest, dans l'arrêt *Carl Zeiss Stiftung c. Rayner & Keeler Ltd.* (No. 2)[4], à la p. 935, définit les conditions de *l'«issue estoppel»* comme exigeant:

> [TRADUCTION] . . . (1) que la même question ait été décidée; (2) que la décision judiciaire invoquée comme créant la fin de non-recevoir soit finale; et, (3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la fin de non-recevoir est soulevée, ou leurs ayants droit . . .

Est-ce que la question à être décidée en l'espèce, c'est-à-dire l'existence d'une dette de M^me^ Angle envers Transworld Explorations Limited, est la même que celle que l'on a débattue dans

[2] [1964] P. 181.
[3] (1921), 29 C.L.R. 537.
[4] [1967] 1 A.C. 853.

not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the *Duchess of Kingston's case*[5], quoted by Lord Selborne L.J. in *R. v. Hutchings*[6], at p. 304, and by Lord Radcliffe in *Society of Medical Officers of Health* v. *Hope*[7]. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: *per* Lord Shaw in *Hoystead* v. *Commissioner of Taxation*[8]. The authors of Spencer Bower and Turner, *Doctrine of Res Judicata*, 2nd ed. pp. 181, 182, quoted by Megarry J. in *Spens v. I.R.C.*[9], at p. 301, set forth in these words the nature of the enquiry which must be made:

> . . . whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do.

The claim in the present proceedings that Mrs. Angle is indebted to Transworld in the amount of $34,612.33 is founded upon a sworn statement of Mrs. Angle, during her examination for discovery in the tax proceedings, that she owed Transworld a balance of $34,000, being $50,000 less a credit for shares transferred by her to Transworld. The Transworld balance sheet as at January 31, 1969 confirmed her evidence. It showed $34,612.33 to be "Due from shareholder".

In my opinion the question to be decided in these proceedings is not the same question as was decided in the earlier proceedings. The primary question in the earlier proceedings was the amount of Mrs. Angle's income tax assessment

[5] (1776), 20 St. Tr. 355, 538n.
[6] (1881), 6 Q.B.D. 300.
[7] [1960] A.C. 551.
[8] [1926] A.C. 155.
[9] [1970] 3 All. E.R. 295.

l'affaire antérieure? Si elle ne l'est pas, il n'y a pas de fin de non-recevoir. Il ne suffira pas que la question ait été soulevée de façon annexe ou incidente dans l'affaire antérieure ou qu'elle doive être inférée du jugement par raisonnement. Cela ressort clairement des termes employés par le Juge en chef De Grey dans l'arrêt *Duchess of Kingston's*[5], cités par Lord Selborne dans *Reg. v. Hutchings*[6], à la p. 304, et par Lord Radcliffe dans *Society of Medical Officers of Health v. Hope*[7]. La question qui est censée donner lieu à la fin de non-recevoir doit avoir été «fondamentale à la décision à laquelle on est arrivé» dans l'affaire antérieure: d'après Lord Shaw dans l'arrêt *Hoystead v. Commissioner of Taxation*[8]. Les auteurs de l'ouvrage Spencer Bower and Turner, *Doctrine of Res Judicata*, 2e éd. pp. 181, 182, cité par M. le Juge Megarry dans l'arrêt *Spens v. I.R.C.*[9], à la p. 301, décrivent dans les termes suivants la nature de l'examen auquel on doit procéder:

> [TRADUCTION] . . . si la décision sur laquelle on cherche à fonder la fin de non-recevoir a été «si fondamentale» à la décision rendue sur le fond même du litige que celle-ci *ne peut valoir* sans celle-là. Rien de moins ne suffira.

La prétention en l'espèce suivant laquelle M^me^ Angle doit à Transworld la somme de $34,612.33 est fondée sur une déclaration sous serment de M^me^ Angle, durant son interrogatoire préalable dans l'affaire relative à l'impôt, aux termes de laquelle elle devait à Transworld un solde de $34,000, soit $50,000 moins un crédit pour des actions qu'elle avait transférées à Transworld. Le bilan de Transworld au 31 janvier 1969 confirme son témoignage. Y figure un montant de $34,612.33, avec l'inscription «Dû par un actionnaire».

A mon avis la question à être décidée en l'espèce n'est pas la même que celle qui a été décidée dans l'affaire antérieure. Dans l'affaire antérieure, la question principale était celle du montant de la cotisation d'impôt de M^me^ Angle,

[5] (1776), 20 St. Tr. 355, 538n.
[6] (1881), 6 Q.B.D. 300.
[7] [1960] A.C. 551.
[8] [1926] A.C. 155.
[9] [1970] 3 All. E.R. 295.

and in order to determine that issue it was necessary to consider several subsidiary issues raised by Mrs. Angle in support of her appeal. I have quoted the judge's statement of those issues and in effect they were (i) that the pool house was received by her as a lessor and not as a shareholder or (ii) alternatively, that she had paid for the pool house through the $50,000 bank loan. A submission that she was still indebted for the pool house would have been impossible to reconcile with her contention that the pool house had been paid for.

A finding of no liability by Mrs. Angle to Transworld was not legally indispensable to the judgment on the income tax appeal or a necessary finding to support that judgment. A tax assessment in respect of a benefit or advantage received is not inconsistent with an obligation to pay for the benefit or advantage where, for example, there is no apparent intention to honour the obligation. The decision that a taxable benefit has been received can stand in an appropriate case with an alleged obligation to pay for that benefit. See *Curlett* v. *Minister of National Revenue*[10]; and *R.* v. *Poynton*[11]. In these proceedings the Minister is claiming from Mrs. Angle payment of indebtedness to Transworld. If Transworld or its shareholders were suing Mrs. Angle for recovery of corporate funds expended on the construction of the pool house, the s. 8(1)(*c*) proceedings in the Exchequer Court would afford her no defence. It is true that one of the leases contained a clause whereby Transworld purported to surrender to Mrs. Angle all its interest in the improvements for $49,768.51 and when the lease was struck down this clause suffered a similar fate. But that was not, and was not tantamount to, a finding that Mrs. Angle was not indebted to Transworld. Transworld was not a party to the proceedings and the Exchequer Court did not have jurisdiction to make such a finding.

[10] [1961] Ex. C.R. 427, affd. 62 D.T.C. 1320.
[11] [1972] 3 O.R. 727.

et pour décider cette question-là il était nécessaire d'examiner plusieurs questions subsidiaires qu'avait soulevées Mme Angle à l'appui de son appel. J'ai cité l'énoncé que le juge a fait de ces questions, qui étaient en somme (i) que le pavillon de bains avait été reçu à titre de bailleur et non d'actionnaire ou (ii), subsidiairement, qu'elle avait payé le pavillon au moyen d'un prêt bancaire de $50,000. Une allégation suivant laquelle elle était encore endettée à l'égard du pavillon aurait été impossible à réconcilier avec sa prétention selon laquelle elle avait payé pour ce pavillon.

Il n'était pas juridiquement indispensable, pour rendre jugement sur l'appel concernant l'impôt, ni même nécessaire, pour étayer ce jugement, d'en arriver à la conclusion que Mme Angle n'était pas débitrice de Transworld. Une cotisation d'impôt à l'égard d'un bénéfice ou d'un avantage reçu n'est pas incompatible avec une obligation de payer pour ce bénéfice ou avantage lorsque, par exemple, il n'existe pas d'intention apparente d'honorer l'obligation. Une décision qu'un bénéfice imposable a été reçu peut, dans un cas approprié, coexister avec une obligation alléguée de payer pour ce bénéfice. Voir *Curlett c. Le ministre du Revenu national*[10], arrêt confirmé par cette Cour; et *R. c. Poynton*[11]. En l'espèce, le ministre réclame de Mme Angle qu'elle paie le montant de sa dette envers Transworld. Si Transworld ou ses actionnaires poursuivaient Mme Angle pour recouvrer le montant des fonds de la compagnie dépensés pour la construction du pavillon de bains, les procédures mues en Cour d'Échiquier relativement à l'al. *c*) du par. (1) de l'art. 8 ne pourraient donner de moyen de défense à Mme Angle. Il est vrai que l'un des baux incluait une clause par laquelle Transworld était censée céder à Mme Angle tous ses droits dans les améliorations pour la somme de $49,768.51, et que lorsque le bail a été infirmé cette clause a connu le même sort. Mais cela n'était pas une conclusion que Mme Angle n'avait pas de dette envers Transworld, et n'était pas l'équivalent d'une telle con-

[10] [1961] R.C.É 427, conf. 62 D.T.C. 1320.
[11] [1972] 3 O.R. 727.

As long ago as 1893, Lord Hobhouse said in the Privy Council in *Attorney General for Trinidad and Tobago v. Eriché*[12], at p. 522:

> It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of res judicata the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point. In the *Duchess of Kingston's Case*, Sm. L.C. vol. ii. p. 642, which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of res judicata the Court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally into question in the first Court, or were only incidentally cognizable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive.

The question not being *eadem questio*, I am of the opinion that this is not a case for application of the principle of issue estoppel.

Two collateral points were taken on behalf of Mrs. Angle. First, that there was no evidence upon the *ex parte* application for the issuance of the writs of extent as to how the alleged debt from Transworld to Kansas City Traders Ltd. arose or, if there was a debt, that it was payable. No objection was taken in the Court below to the writs of extent issued against Kansas City Traders Ltd. or against Transworld. Transworld has not challenged the writ against it, and it is not open to Mrs. Angle to do so at this time. Second, that even if Mrs. Angle was indebted to Transworld, there was no evidence she was indebted after January 31, 1969 and more particularly at the time of the application for the writs of extent, October 30, 1970. On discovery

[12] [1893] A.C. 518.

clusion. Transworld n'était pas partie aux procédures et la Cour de l'Échiquier n'avait pas compétence pour en arriver à une conclusion semblable.

Dès 1893, Lord Hobhouse, dans une décision du Conseil Privé rendue dans l'affaire *Attorney General for Trinidad and Tobago v. Eriché*[12], disait, à la p. 522:

> [TRADUCTION] Il n'est guère nécessaire de se reporter longuement aux précédents pour reconnaître ce principe élémentaire selon lequel, pour établir le moyen de chose jugée, le jugement sur lequel on se fonde doit avoir été rendu par un tribunal ayant compétence simultanée ou exclusive directement sur le point. Dans l'arrêt *Duchess of Kingston*, Sm. L.C. vol. ii. p. 642, auquel on se réfère constamment pour énoncer le droit à ce sujet, on pose le principe que pour établir le moyen de chose jugée le tribunal dont le jugement est invoqué doit avoir eu compétence et avoir rendu jugement directement sur la question en litige; mais si la question est venue en cause de façon annexe dans le premier tribunal, ou si celui-ci ne pouvait en connaître que de façon incidente, ou si on devait simplement l'inférer du jugement par raisonnement, le jugement n'est pas concluant.

La question n'étant pas *eadem questio*, je suis d'avis qu'en l'espèce il n'y a pas lieu d'appliquer le principe de *l'issue estoppel*.

Deux questions annexes ont été soulevées au nom de M^me^ Angle. Premièrement, on dit que lors de la demande *ex parte* pour la délivrance des brefs de saisie «extent» il n'y avait pas de preuve sur l'origine de la dette de Transworld envers Kansas City Traders Ltd., ou que si dette il y avait il n'y avait pas de preuve que la dette était échue. Devant les cours d'instance inférieure, on ne s'est aucunement opposé aux brefs de saisie «extent» émis contre Kansas City Traders Ltd. ou contre Transworld. Transworld n'a pas attaqué le bref de saisie «extent» émis contre elle et il n'appartient pas à M^me^ Angle de le faire à ce stade-ci. Deuxièmement, on dit, même si M^me^ Angle était débitrice de Transworld, il n'y avait aucune preuve selon laquelle

[12] [1893] A.C. 518.

October 6, 1969 Mrs. Angle said she was indebted to Transworld. The books of account and records of Transworld were taken out of the country by Mrs. Angle and her husband on leaving Canada in 1968 to reside in Las Vegas, Nevada and Mrs. Angle has since refused to produce those books and records. It is not alleged and there is no evidence to suggest that since October 6, 1969 she paid Transworld the amount of her debt to that company. There is an affidavit of a Las Vegas chartered accountant stating that the decision of the Exchequer Court eliminated the character of the indebteness of $34,612.33 as a debt or loan, and a similar affidavit of a Vancouver solicitor, but as I have indicated, I am of the opinion that the decision of the Exchequer Court did not have any such effect.

I would accordingly dismiss the appeal with costs.

The judgment of Spence and Laskin JJ was delivered by

LASKIN J. (*dissenting*)—This appeal concerns the propriety of a writ of extent in the third degree issued against the appellant at the instance of the respondent Minister. On the motion to set aside the writ, the sufficiency of the material upon which the *ex parte* application for the writ was made was challenged. Beyond that, it was contended that the basic foundation for the writ, an alleged debt owing to the second degree debtor who in turn was indebted to the first degree debtor from whom the Minister claimed unpaid income taxes, could not be asserted by the Minister because of the preclusive effect of *res judicata*. I am of the opinion that the more appropriate preclusive principle in this case is issue estoppel and that the appellant is entitled to succeed on that ground. I find it unnecessary therefore to deal with the alleged

elle l'était encore après le 31 janvier 1969, et plus particulièrement lors de la demande d'émission de brefs de saisie «extent» faite le 30 octobre 1970. Lors de son interrogatoire préalable, le 6 octobre 1969, M^me^ Angle a déclaré avoir une dette envers Transworld. Les livres de comptes, dossiers et registres de Transworld ont été transportés hors du pays par M^me^ Angle et son époux lorsqu'ils ont, en 1968, laissé le Canada pour aller demeurer à Las Vegas, Nevada, et M^me^ Angle a depuis refusé de produire ces livres, dossiers et registres. Il n'est pas allégué qu'elle aurait, depuis le 6 octobre 1969, payé à Transworld le montant de sa dette envers la compagnie, et il n'y a pas de preuve qui le donne à penser. Il existe une déclaration écrite faite sous serment par un comptable agréé de Las Vegas qui affirme que le jugement de la Cour de l'Échiquier a supprimé le caractère de dette ou d'emprunt de l'obligation afférente au montant de $34,612.33, de même qu'une déclaration écrite similaire faite sous serment par un avocat de Vancouver, mais comme je l'ai mentionné je suis d'avis que le jugement de la Cour de l'Échiquier n'a pas eu d'effet semblable.

Je suis d'avis, par conséquent, de rejeter l'appel avec dépens.

Le jugement des Juges Spence et Laskin a été rendu par

LE JUGE LASKIN (*dissident*)—Cet appel concerne le droit d'émettre un bref de saisie «extent» de troisième degré délivré contre l'appelante à la demande du Ministre intimé. Lors de la requête en annulation du bref, on a contesté la suffisance des documents sur lesquels la demande faite *ex parte* pour l'émission du bref avait été faite. En plus, on a prétendu que le fondement de base pour l'émission du bref, soit un montant allégué être dû au débiteur du deuxième degré qui lui-même était débiteur du débiteur du premier degré de qui le Ministre réclamait le paiement d'impôts impayés, ne pouvait pas être invoqué par le Ministre, vu l'empêchement découlant de la chose jugée. Je suis d'avis que le principe qui peut le mieux justifier un empêchement en l'espèce est celui de *l'issue estoppel* (fin de non-recevoir à la remise en

deficiency of supporting material for the issue of the writ of extent against the appellant.

On October 3, 1968, a writ of extent was issued against Kansas City Traders Ltd. for the recovery out of its assets of $103,395.03 for unpaid taxes. By October, 1970, the amount of its indebtedness had been reduced to $40,266.71. On October 30, 1970, a successful application was made by the Minister for the issue of writs of extent in the second, third, fourth and fifth degrees against, respectively, Transworld Exploration Ltd., in the amount of $40,266.71 as being indebted to Kansas City in the amount of $44,707.70; the appellant, in the amount of $34,612.33, as being the amount of a debt owing by her to Transworld; and a firm of lawyers who acted for the appellant and were assignees of an agreement of sale of her house and the purchasers of the house under the agreement for sale, also in the amount of $34,612.33. On motion to set aside the writs of extent in the third, fourth and fifth degrees, the motion succeeded as to the firm of lawyers and as to the purchasers of the house, but was dismissed as to the appellant.

The *ex parte* application for the writs of extent herein and the motion to set them aside were heard by Deputy Judge F. A. Sheppard of the Exchequer Court. He had also presided at the appeal of the appellant herein against a tax assessment which involved adding to her taxable income for the years 1966 and 1967 the value of a "benefit", being a pool house constructed at the rear of her residence by Transworld. At that time the appellant was the principal shareholder and president of Transworld; and, despite her central contention that she was indebted to Transworld for the cost of the pool house, she was unable to persuade Sheppard J. that the Minister was wrong in assessing her for it as a benefit under the then s. 8(1)(c) of the

cause d'une question déjà décidée), et que sur ce moyen l'appelante a le droit d'avoir gain de cause. Je considère qu'il ne m'est donc pas nécessaire de traiter de l'insuffisance alléguée des documents justificatifs fournis en vue de l'émission du bref de saisie «extent» contre l'appelante.

Le 3 octobre 1968, un bref de saisie «extent» a été délivré contre Kansas City Traders Ltd. afin de percevoir sur ses biens la somme de $103,395.93 pour des impôts impayés. En octobre 1970, le montant de sa dette était tombé à $40,266.71. Le 30 octobre 1970, le Ministre a obtenu la délivrance de brefs de saisie «extent» aux deuxième, troisième, quatrième et cinquième degrés contre, respectivement, Transworld Exploration Ltd., au montant de $40,266.71, en tant que débitrice envers Kansas City de la somme de $44,707.70; l'appelante, au montant de $34,612.33, censé être le montant d'une dette de celle-ci envers Transworld; et une étude d'avocats autrefois mandataire de l'appelante et devenue cessionnaire du contrat de vente de sa maison ainsi que les acheteurs de la maison en vertu de ce contrat, également au montant de $34,612.33. Une requête en annulation des brefs de saisie «extent» aux troisième, quatrième et cinquième degrés a été accueillie à l'égard de l'étude d'avocats et des acheteurs de la maison mais elle a été rejetée à l'égard de l'appelante.

La demande *ex parte* en vue de l'émission de ces brefs de saisie «extent» et la requête visant à les faire annuler ont été entendues par M. le Juge suppléant Sheppard de la Cour de l'Échiquier. Il avait aussi présidé l'audition d'un appel de l'appelante à l'encontre d'une cotisation d'impôt ajoutant au revenu imposable de l'appelante, pour les années 1966 et 1967, la valeur d'un «bénéfice», soit un pavillon de bains construit à l'arrière de sa résidence par Transworld. A cette époque-là, l'appelante était le principal actionnaire et la présidente de Transworld; et, en dépit de sa prétention principale selon laquelle elle était débitrice de Transworld pour le coût du pavillon de bains, elle n'avait pu convaincre M. le Juge Sheppard que le Ministre avait eu tort de

Income Tax Act, R.S.C. 1952, c. 148, as amended. Judgment against the appellant was given in reasons delivered on November 17, 1969, long before the application for a writ of extent against her: see *Angle v. Minister of National Revenue*[13]. It is under this judgment that issue estoppel arises.

On the motion to set aside the writs of extent, Sheppard J. refused to consider his reasons for judgment in the appellant's tax appeal, speaking on this point as follows:

> There was no proof of the reasons for judgment nor that the alleged benefit or advantage within the reasons was the alleged indebtedness of Mrs. Angle to Transworld. For Mrs. Angle, it was contended that as the same judge was hearing the motion who had determined the judgment . . . therefore judicial notice could be taken of the judgment. The judgment is not a fact of which judicial notice may be taken.

There are occasions when insistence on excessive technicality (especially when the Crown or a Minister of the Crown in his official capacity is involved) gives credence to Mr. Bumble's well-known remonstrance in Dickens' "*Oliver Twist*." In this Court, leave was given to refer to the reasons in the tax judgment and, that done, counsel for the appellant and for the Minister agreed to the obvious, namely, that the pool house which gave rise to the "benefit" was also the foundation of the debt allegedly owing by the appellant to Transworld. I turn, therefore, to consider what was determined in the tax appeal and why it gives rise to issue estoppel in the present proceeding.

In adding $51,482.26 to the appellant's income for 1966 and another $4,912.94 for

[13] [1969] C.T.C. 624.

l'inclure comme bénéfice dans le calcul de son impôt en vertu de ce qui était alors l'al. *c*) du par. (1) de l'art. 8 de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, modifiée. Le jugement rendu contre l'appelante l'a été dans des motifs déposés le 17 novembre 1969, longtemps avant la demande faite en vue de l'émission d'un bref de saisie «extent» contre elle: voir *Angle v. Minister of National Revenue*[13]. C'est de ce jugement que découle *l'issue estoppel*.

Lors de la requête en annulation des brefs de saisie "extent", M. le Juge Sheppard a refusé de considérer les motifs du jugement qu'il avait rendu dans l'appel que l'appelante avait interjeté contre le fisc, et il s'est exprimé sur ce point de la façon suivante:

> La preuve des motifs du jugement n'a pas été faite et il n'a pas été prouvé que le bénéfice ou l'avantage prétendu visé par ces motifs constitue la dette prétendue de M^me^ Angle envers la Transworld. Au nom de M^me^ Angle, on a soutenu que le juge saisi de la requête étant celui-là même qui avait rendu le jugement. . . il s'ensuivait que connaissance judiciaire pouvait être prise de son jugement. Le jugement n'est pas un fait dont il peut être pris connaissance judiciaire.

Il est des occasions où l'insistance sur des exigences exagérées de procédure (particulièrement lorsque la Couronne ou un ministre de la Couronne en sa qualité officielle est concerné) fait ajouter foi à la remontrance bien connue de M. Bumble dans l'*Oliver Twist* de Dicken's. En cette Cour, autorisation a été accordée aux avocats de se référer aux motifs du jugement rendu dans l'affaire d'impôt et, cela ayant été fait, les avocats représentant l'appelante et le Ministre ont convenu de reconnaître ce qui était évident, soit, que le pavillon de bains qui avait constitué le «bénéfice» était aussi le fondement de la dette qu'on allègue être due par l'appelante à Transworld. Par conséquent, je passe à ce qui a été décidé dans l'appel interjeté en matière d'impôt et à la raison pour laquelle cela donne ouverture à *l'issue estoppel* en l'espèce.

En ajoutant $51,482.26 au revenu de l'appelante pour l'année 1966 et un autre montant de

[13] [1969] C.T.C. 624.

1967, as benefits from the construction of the pool house by Transworld, the Minister invoked s. 8(1)(*c*). His position was upheld by Sheppard J., save for the deduction of $4,151.62 from the additional reassessment for 1966, representing the value of some furniture and fixtures. It is desirable to set out s. 8(1) and (2) in whole, and those provisions are as follows:

8. (1) Where, in a taxation year,

(*a*) a payment has been made by a corporation to a shareholder otherwise than pursuant to a bona fide business transaction,

(*b*) funds or property of a corporation having been appropriated in any manner whatsoever to, or for the benefit of, a shareholder, or

(*c*) a benefit or advantage has been conferred on a shareholder by a corporation,

otherwise than

(i) on the reduction of capital, the redemption of shares or the winding-up, discontinuance or reorganization of its business,

(ii) by payment of a stock dividend, or

(iii) by conferring on all holders of common shares in the capital of the corporation a right to buy additional common shares therein

the amount or value thereof shall be included in computing the income of the shareholder for the year.

8. (2) Where a corporation has, in a taxation year, made a loan to a shareholder, the amount thereof shall be deemed to have been received by the shareholder as a dividend in the year unless

(*a*) the loan was made

(i) in the ordinary course of its business and the lending of money was part of its ordinary business,

(ii) to an officer or servant of the corporation to enable or assist him to purchase or erect a dwelling house for his own occupation,

(iii) to an officer or servant of the corporation to enable or assist him to purchase from the corporation fully paid shares of the corporation to be held by him for his own benefit, or

$4,912.94 pour 1967, à titre de bénéfices résultant de la construction du pavillon de bains par Transworld, le Ministre s'était fondé sur l'al. *c*) du par. (1) de l'art. 8. Sa position fut maintenue par M. le Juge Sheppard, sauf pour le retranchement d'une somme de $4,151.62 de la nouvelle cotisation supplémentaire afférente à l'année 1966, représentant la valeur de certains meubles et accessoires fixes. Il convient de reproduire les par. (1) et (2) de l'art. 8 au complet, ces dispositions se lisant comme suit:

8. (1) Lorsque, dans une année d'imposition,

a) un paiement a été fait par une corporation à un actionnaire autrement qu'en vertu d'une opération commerciale authentique,

b) des fonds ou biens d'une corporation ont été affectés de quelque manière que ce soit à un actionnaire ou à son avantage, ou

c) un bénéfice ou un avantage a été attribué à un actionnaire par une corporation,

autrement

(i) Qu'à l'occasion de la réduction de capital, du rachat d'actions, ou de la liquidation, cessation ou réorganisation de son entreprise,

(ii) qu'en payant un dividende sous forme d'actions, ou

(iii) qu'en conférant à tous les détenteurs d'actions ordinaires du capital de la corporation un droit d'y acheter des actions ordinaires additionnelles,

le montant ou valeur en l'espèce est inclus dans le calcul du revenu de l'actionnaire pour l'année.

8. (2) Lorsque, dans une année d'imposition, une corporation a consenti un prêt à un actionnaire, le montant de ce prêt est censé avoir été reçu par l'actionnaire à titre de dividende au cours de l'année, à moins que

a) le prêt n'ait été consenti

(i) dans le cours ordinaire de ses affaires et que les affaires ordinaires ne comprennent le prêt d'argent,

(ii) à un fonctionnaire ou préposé de la corporation pour lui permettre ou lui faciliter l'achat ou la construction d'une maison d'habitation qu'il occupera lui-même,

(iii) à un fonctionnaire ou préposé de la corporation pour lui permettre ou lui faciliter l'achat, de la corporation, d'actions libérées de celle-ci qu'il détiendra pour son propre bénéfice, ou

(iv) to an officer or servant of the corporation to enable or assist him to purchase an automobile to be used by him in the performance of the duties of his office or employment,

and bona fide arrangements were made at the time the loan was made for repayment thereof within a reasonable time, or

(*b*) the loan was repaid within one year from the end of the taxation year of the corporation in which it was made and it is established, by subsequent events or otherwise, that the repayment was not made as part of a series of loans and repayments.

(iv) à un fonctionnaire ou préposé de la corporation pour lui permettre ou lui faciliter l'achat d'une automobile dont il se servira dans l'accomplissement des fonctions de sa charge ou de son emploi,

et que des arrangements de bonne foi n'aient été conclus, lorsque le prêt a été consenti en vue de son remboursement dans un délai raisonnable, ou

b) le prêt n'ait été remboursé dans l'année à compter de la fin de l'année d'imposition de la corporation au cours de laquelle il avait été consenti et qu'il ne soit établi par les événements subséquents ou d'autre façon que le remboursement n'a pas été fait comme partie d'une série de prêts et de remboursements.

Appellant contested the reassessment of her income on the ground that she did not obtain the pool house as a shareholder but as a lessor, that she was genuinely indebted to Transworld for it and that if there was any benefit it was received at the expiry of an alleged lease in 1968. None of these contentions was made out, and appellant's counsel said in this Court that it could be taken that Mrs. Angle did not expect to have to pay for the pool house. Although her attempted evasion of tax liability through a leasing scheme was exposed as a sham this does not make her contention in the present proceeding unsupportable. It is the Minister and not Mrs. Angle who is taking an inconsistent position in the light of what was decided in the tax appeal.

L'appelante avait contesté la nouvelle cotisation de son impôt pour le motif qu'elle n'avait pas obtenu le pavillon de bains à titre d'actionnaire, mais à titre de bailleur, qu'elle était réellement débitrice envers Transworld pour le coût de ce pavillon et que s'il y avait eu quelque bénéfice, celui-ci avait été reçu à l'expiration d'un bail en 1968. Aucune de ces prétentions ne fut prouvée comme fondée et l'avocat de l'appelante nous dit qu'on peut prendre pour acquis que M^me^ Angle ne s'attend pas à devoir payer pour le pavillon de bains. Même si sa tentative d'évasion fiscale au moyen d'un plan de location fut exposée au grand jour comme étant une simulation, cela ne rend pas sans fondement la prétention qu'elle avance en l'espèce présente. C'est le Ministre et non M^me^ Angle qui adopte une position incompatible à la lumière de ce qui a été décidé dans l'appel interjeté en matière d'impôt.

The appellant and the Minister were parties both to the tax appeal and to the present proceedings, into which the appellant was drawn by the Minister through a writ of extent, albeit they had their origin in a tax claim against a third person. Because of the difference in the two proceedings, it is not *res judicata* in its cause of action sense upon which the appellant can rely. Issue estoppel is what she must stand on and, as a principle, it is nothing new either in this Court or in the Courts of sister jurisdictions like the United Kingdom, Australia and the United States: see *Carl Zeiss Stiftung v. Rayner and*

L'appelante et le Ministre se trouvent à avoir été parties tant à l'appel en matière d'impôt qu'aux procédures en l'espèce, dans lesquelles l'appelante a été plongée par le Ministre au moyen d'un bref de saisie «extent», bien qu'elles aient pris naissance dans une réclamation d'impôt contre une tierce personne. A cause de la différence qui existe entre les deux instances, ce n'est pas la chose jugée dans le sens d'une identité de causes d'action (*cause of action sense*) que l'appelante peut invoquer ici. C'est sur l'*issue estoppel* qu'elle doit s'appuyer et, en tant que principe, celui-ci n'est quelque chose

Keeler Ltd. (No. 2)[14]; *Thoday v. Thoday*[15]; *Blair v. Curran*[16]; Note, *Collateral Estoppel by Judgment*, (1952), 52 Col. L. Rev. 647.

There is no mystery as to what was decided in the tax appeal, *Angle v. Minister of National Revenue, supra*. An alleged lease to Transworld of the appellant's residential property (including the pool house) and an associated loan arrangement relating to a release by Transworld of its interest in the pool house for the sum of approximately $50,000 were both held to be ineffective. The associated loan was a circular arrangement which resulted in Transworld paying off the loan to itself; and for good measure Sheppard J. held that there could be no obligation of the appellant to pay the $50,000 because it was conditional upon the surrender by Transworld of its rights in the pool house and it had none because title had already vested in the appellant as owner of the freehold. Thus, it was that the value of the pool house was taxable as a "benefit" under s. 8(1)(*c*).

On what basis then does the Minister contend that there is a debt owing to Transworld by the appellant for the pool house in the sum of $34,612.33? This sum represents the balance after a credit of $15,000 allowed against the total cost as being the value of certain shares in another company transferred by the appellant to Transworld. However, the appellant, in the same tax appeal in which the value of the pool house was assessed against her as a benefit, was also charged with a profit of $12,750 on the transfer of the shares. Transworld's balance sheet as of January 31, 1969 shows $34,612.33 as due from the appellant, with a note that "[it]

[14] [1967] 1 A.C. 853.
[15] [1964] P. 181.
[16] (1939), 62 C.L.R. 464.

de nouveau ni en cette Cour ni dans les cours de ressorts apparentés avec le nôtre comme le Royaume Uni, l'Australie et les États-Unis: voir *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd.* (no. 2)[14]; *Thoday v. Thoday*[15], à la p. 197; *Blair v. Curran*[16]; Note, *Collateral Estoppel by Judgment*, (1952), 52 Col. L. Rev. 647.

Ce qui a été décidé dans l'appel en matière d'impôt, *Angle c. Ministre du Revenu national*, précité, n'est pas un mystère. Un bail qu'on aurait consenti à Transworld sur la propriété résidentielle de l'appelante (pavillon de bains compris) et, à cet égard, un prêt relatif à un abandon par Transworld de ses droits dans le pavillon contre une somme d'environ $50,000, ont tous deux été déclarés inefficaces. Le prêt relié à la location était une opération en circuit fermé dont le résultat était que Transworld remboursait le prêt à elle-même; et par souci d'abondance M. le Juge Sheppard a statué qu'il ne pouvait y avoir d'obligation de l'appelante de payer les 50,000 dollars s étant donné que cette obligation était subordonnée à la cession par Transworld de ses droits dans le pavillon et que Transworld n'en avait pas parce que le droit de propriété afférent au pavillon se trouvait déjà dévolu à l'appelante en sa qualité de propriétaire de la tenure libre. Ainsi, la valeur du pavillon de bains a été déclarée imposable à titre de «bénéfice» en vertu de l'al. *c*) du par. (1) de l'art. 8.

Sur quoi le Ministre se fonde-t-il alors pour prétendre qu'une dette de $34,612.33 est due par l'appelante à Transworld pour le pavillon de bains? Cette somme représente le solde du coût total après déduction d'un crédit de $15,000 autorisé comme valeur d'un certain nombre d'actions d'une autre compagnie, transférées par l'appelante à Transworld. Cependant, l'appelante, qui dans l'appel en matière d'impôt s'est vue cotisée comme bénéficiaire pour la valeur du pavillon de bains, s'est aussi dans la même instance vue cotisée pour un profit de $12,750 sur le transfert de ces actions. Le bilan de Transworld au 31 janvier 1969 indique qu'un

[14] [1967] 1 A.C. 853.
[15] [1964] P. 181.
[16] (1939), 62. C.L.R. 464.

represents a forced debit balance by the Vancouver District Taxation Office, by it escrowing cash on sale of [appellant's] house . . .". Notwithstanding Sheppard J.'s characterization of the value of the pool house on the tax appeal as a s. 8(1)(*c*) benefit, the Minister now says that he can still urge the $34,612.33 to be a debt because (1) the appellant admitted it to be a debt on her examination for discovery in the tax appeal proceedings; and (2) it is still owing as between Transworld and the appellant; and (3), in any event the value of the pool house can be at the same time both a benefit and a debt or a loan.

Appellant's assertion on her examination for discovery that the cost of construction of the pool house was a debt owing by her to Transworld was part of her case against the Minister's reassessment which was based by him on s. 8(1)(*c*). Sheppard J. rejected this construction of the pool house transaction and affirmed the Minister's position. For the Minister now to insist on the existence and validity of the debt, as if the assertion on discovery was a disembodied proposition, is unacceptable reprobation and approbation. Nor is his position any better in alleging that there is an outstanding debt as between the appellant and Transworld and that he is entitled to act on that fact in the writ of extent proceedings despite the determination made by Sheppard J. in the tax appeal. I propose to deal with this contention in the light of the authorities and of principle in respect of issue estoppel.

The Minister's position in law is founded on *res judicata* in its traditional cause of action sense. In tax matters, this was a position which rejected *res judicata* as an answer to tax liability

montant de $34,612.33 est dû par l'appelante, et il s'y trouve une note que [TRADUCTION] «[ceci] représente un solde débiteur forcé de la part du bureau de district de l'impôt de Vancouver, qui a entiercé le comptant provenant de la vente de la maison [de l'appelante] . . .». Malgré que M. le Juge Sheppard ait considéré que la valeur du pavillon de bains dans l'appel en matière d'impôt était un bénéfice selon l'al. *c*) du par. (1) de l'art. 8, le Ministre dit maintenant qu'il peut toujours prétendre que la somme de $34,612.33 est une dette parce que (1) l'appelante a reconnu qu'il s'agissait d'une dette lors de son interrogatoire préalable dans l'appel en matière d'impôt; et (2) que la somme est toujours due pour ce qui concerne l'appelante et Transworld; et (3) que, de toute façon, la valeur du pavillon de bains peut être en même temps un bénéfice et une dette ou un emprunt.

L'assertion de l'appelante lors de son interrogatoire préalable, selon laquelle le coût de construction du pavillon de bains était une dette due par elle à Transworld, était un élément de la cause qu'elle soutenait contre la nouvelle cotisation du Ministre fondée sur l'al. *c*) du par. (1) de l'art. 8. M. le Juge Sheppard a rejeté cette interprétation de l'opération relative au pavillon et il a confirmé la position soutenue par le Ministre. Le fait, pour le Ministre, d'insister maintenant sur l'existence et la validité de la dette, comme si l'assertion faite lors de l'interrogatoire au préalable était une affirmation désincarnée, constitue une réprobation et une approbation inacceptables. Sa position n'est pas plus défendable lorsqu'il allègue qu'il existe une dette échue pour ce qui concerne l'appelante et Transworld et qu'il a le droit de se fonder sur ce fait-là pour obtenir délivrance du bref de saisie «extent» nonobstant la décision rendue par M. le Juge Sheppard dans l'appel interjeté en matière d'impôt. J'entends traiter de cette prétention à la lumière des précédents et des principes relatifs à l'*issue estoppel*.

La position du Ministre en droit est fondée sur la chose jugée dans son sens traditionnel d'identité de causes d'action. En matière fiscale, il s'agit d'une position qui a rejeté le moyen de

for a particular year although the taxpayer had successfully challenged liability on the same ground in a previous year: see *Caffoor v. Income Tax Commissioner*[17]. Long before this case, the High Court of Australia had recognized that there may be issue estoppel where *res judicata* in its cause of action or subject matter sense would not be open: see *Hoysted (or Hoystead) v. Commissioner of Taxation*[18]. Both the majority and dissenting opinions appreciated the distinction, and the reversal of the majority judgment by the Privy Council did not disavow it: see [1926] A.C. 155. Indeed, the Judicial Committee expressly approved the dissenting reasons of Higgins J. who had held that the tax commissioners were estopped by reason of a previous judgment of the High Court of Australia between the same parties relating to an earlier assessment, a judgment which, the Privy Council said (at p. 171) "was not merely incidental or collateral to the question [in issue, but] was fundamental to it". However, the Privy Council, at about the same time, but constituted differently as to the entire Board, took the *res judicata* subject matter approach in *Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council*[19]; and it was this case, and a later one in the House of Lords, *Society of Medical Officers of Health v. Hope*[20], that the Privy Council followed in *Caffoor*.

chose jugée comme moyen de défense à l'encontre d'une cotisation fiscale pour une année particulière bien que le contribuable eût contesté la cotisation d'une année précédente avec succès en se fondant sur des raisons identiques: voir *Caffoor v. Income Tax Commissioner*[17]. Longtemps avant cet arrêt, la Haute Cour d'Australie avait reconnu qu'il peut y avoir *issue estoppel* lorsqu'il n'y a pas ouverture à la chose jugée dans son sens d'identité de causes d'action ou d'objets: voir *Hoysted (ou Hoystead) v. Commissioner of Taxation*[18]. Les opinions majoritaire et dissidente avaient toutes deux reconnu la distinction, et le Conseil privé, en infirmant le jugement de la majorité, ne l'a pas désavouée: voir [1926] A.C. 155. En effet, le Comité judiciaire a expressément approuvé les motifs dissidents du Juge Higgins qui avait décidé que les commissaires à la taxation étaient non recevables en raison d'un jugement antérieur de la Haute Cour d'Australie entre les mêmes parties relatif à une cotisation antérieure, un jugement qui, selon le Conseil privé (à la p. 171) [TRADUCTION] «n'était pas simplement incident ou annexe à la question en litige, mais lui était fondamental.» Cependant, le Conseil privé, vers la même époque, mais constitué différemment quant au Comité dans son ensemble, a adopté l'approche de la chose jugée dans son sens d'identité d'objets dans l'arrêt *Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council*[19]; et c'est cette décision, et une décision subséquente de la Chambre des Lords, *Society of Medical Officers of Healt v. Hope*[20], que le Conseil privé a suivie dans l'arrêt *Caffoor*.

It acknowledged that the *Hoystead* case was not consistent with the authorities relied on in *Caffoor* and explained it as not having been argued on the principle of the *Broken Hill* case, namely, that the determination of an assessment for one year could not set up an estoppel upon an assessment for another year. Rather, said

Il a reconnu que l'arrêt *Hoystead* n'était pas conforme aux précédents retenus dans *Caffoor* et il a donné comme explication qu'on n'avait pas plaidé l'affaire *Hoystead* sur le principe de l'arrêt *Broken Hill*, à savoir, que la décision rendue à l'égard d'une cotisation pour une année quelconque ne peut pas constituer une fin de

[17] [1961] A.C. 584.
[18] (1921), 29 C.L.R. 537.
[19] [1926] A.C. 94.
[20] [1960] A.C. 551.

[17] [1961] A.C. 584.
[18] (1921), 29 C.L.R. 537.
[19] [1926] A.C. 94.
[20] [1960] A.C. 551.

Lord Radcliffe, referring in *Caffoor* at p. 601, to the *Hoystead* case:

> . . .the attention of the Board was wholly occupied with a discussion of what is quite a different issue in connection with estoppel, whether there can in law be estoppel *per rem judicatam* in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Assuming, as is indicated in *Caffoor*, that the principles applied in the tax assessment cases "form a somewhat anomalous branch of the general law of estoppel *per rem judicatam* and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered" (see [1961] A.C. at pp. 599-600), the present case does not involve successive tax assessments against the appellant and hence cannot rest on the indicated anomaly. Moreover, so far as English cases are concerned, it seems to me that what was said on issue estoppel in *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* (No. 2)[21] makes it unlikely that any anomalous rule, such as that upon which *Caffoor* appeared to be based, retains any survival value. At any rate, I would reject the introduction of such an anomaly into the law of Canada.

I cannot fail to note that none of the Law Lords in the *Carl Zeiss* case examined either *Caffoor* or *Broken Hill*, and only Lord Reid mentioned *Hoystead* and then only on the question whether issue estoppel applies equally to a point of assumption or admission as to a point fully litigated. In the present case, there was full litigation, to finality, of the issue and characterization of the value of the pool house, and hence the doubtful point in issue estoppel arising from what was said in the *Hoystead* case does not arise here.

[21] [1967] 1 A.C. 853.

non-recevoir à l'encontre d'une cotisation pour une autre année. Plutôt, selon Lord Radcliffe, qui, à la p. 601 de l'arrêt *Caffoor*, se référait à l'affaire *Hoystead:*

> [TRADUCTION] . . . l'attention du Comité s'était portée entièrement sur l'examen de ce qui est une question bien différente relativement à la fin de non-recevoir (*estoppel*), celle de savoir si en droit il peut y avoir *estoppel per rem judicatam* quant à une question de droit qui, bien que fondamentale à la question en litige, a été concédée et non débattue dans une procédure antérieure.

Supposant, tel qu'indiqué dans *Caffoor*, que les principes appliqués aux affaires de cotisation d'impôt [TRADUCTION] «constituent un secteur quelque peu anormal du droit général relatif à *l'estoppel per rem judicatam*, et ne peuvent facilement tirer origine des autres secteurs du contentieux dans lesquels on doit tenir compte de semblables *estoppels*, ou y être transposés» (voir [1961] A.C. aux pp. 599-600), l'espèce présente ne met pas en cause des cotisations d'impôt successives contre l'appelante et par conséquent ne peut reposer sur l'anomalie dont il est question. De plus, dans la mesure où la jurisprudence anglaise est concernée, il me semble que ce qui a été dit sur *l'issue estoppel* dans l'arrêt *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* (n° 2)[21], rend improbable qu'une règle anormale quelconque, comme celle sur laquelle l'arrêt *Caffoor* a semblé être fondé, puisse garder quelque valeur à l'avenir. De toute façon, je rejetterais l'introduction de semblable anomalie dans le droit canadien.

Je ne puis m'empêcher d'observer qu'aucun des membres juristes de la Chambre des lords dans l'affaire *Carl Zeiss* n'a pris en considération soit *Caffoor* soit *Broken Hill*, et que seul Lord Reid a mentionné *Hoystead* et là seulement sur le point de savoir si *l'issue estoppel* s'applique autant à un point postulé ou concédé qu'à un point qui a été débattu à fond. En l'espèce présente, il y avait eu débat complet, jusqu'à décision finale, sur la question en litige, et qualification de la valeur du pavillon de bains, et, par conséquent, le point douteux qui découle de ce qui a été dit dans l'arrêt *Hoystead* en matière *d'issue estoppel* ne surgit pas ici.

[21] [1967] 1 A.C. 853.

The basis of issue estoppel as well as a cause of action estoppel has been variously explained; for example, that it is "founded on considerations of justice and good sense" (see *New Brunswick Railway Co. v. British and French Trust Corp. Ltd.*[22], at p. 19); that it is "founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause" (*Carl Zeiss* case, per Lord Upjohm at p. 946, per Lord Guest at p. 933); that is founded on "the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and . . . the right of the individual to be protected from vexatious multiplication of suits and prosecutions . . . " (Spencer-Bower and Turner, *Res Judicata*, (2nd ed. 1969), p. 10). Although, as Lord Reid said in the *Carl Zeiss* case, at p. 913, "issue estoppel may be a comparatively new phrase" (and is also known, especially in American decisions and writings, as collateral estoppel or issue proclusion), as a principle it goes back almost two hundred years in English case law to the *Duchess of Kingston's* Case[23]. It has been recognized as well in Canadian case law as the following statement by Middleton J.A. in *McIntosh v. Parent*[24], at p. 555, attests:

When a question is litigated the judgment of the Court is a final determination 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 retried in a subsequent suit between the same parties or their privies though for a different cause of action. The

[22] [1939] A.C. 1.
[23] (1776), 20 St. Tr. 355.
[24] (1924), 55 O.L.R. 552.

Le fondement de *l'issue estoppel* aussi bien que du *cause of action estoppel* a reçu diverses explications; par exemple, qu'il est [TRADUCTION] «fondé sur des considérations de justice et de bon sens» (voir *New Brunswick Railway Co. v. British and French Trust Corp. Ltd*[22]., à la p. 19); qu'il est [TRADUCTION] «fondé sur les principes jumeaux si fréquemment exprimés en latin selon lesquels tout litige doit avoir une fin et la justice exige que la même partie ne soit pas harassée deux fois pour la même cause» (affaire *Carl Zeiss*, d'après Lord Upjohn, p. 946, d'après Lord Guest, p. 933); qu'il est fondé sur [TRADUCTION] «l'intérêt général de la collectivité à ce que les différends prennent fin, et à ce que les décisions judiciaires aient un caractère final et concluant, et . . . sur le droit de l'individu à être protégé d'une multiplicité vexatoire de demandes et de poursuites . . .» (Spencer-Bower et Turner, *Res Judicata*, (2ème éd. 1969), p. 10). Bien que, comme le disait Lord Reid dans l'arrêt *Carl Zeiss*, à la p. 913, [TRADUCTION] «*issue estoppel* puisse être une expression relativement nouvelle» (et soit aussi connue, en particulier dans les décisions et auteurs américains, sous le nom de *collateral estoppel*» (fin de non-recevoir annexe) ou encore de «*issue preclusion*» (empêchement à question)), en tant que principe l'*issue estoppel* remonte à presque deux cents ans en arrière dans le droit jurisprudentiel anglais, jusqu'à l'arrêt *Duchess of Kingston's*[23]. Il a été également reconnu dans le droit jurisprudentiel canadien, comme le démontre l'énoncé suivant du Juge d'appel Middleton dans l'arrêt *McIntosh v. Parent*[24], à la p. 555:

[TRADUCTION] Lorsqu'une question est soumise à un tribunal le jugement de la cour devient une décision finale entre les parties et leurs ayants droit. Les droits, questions ou faits distinctement mis en cause et directement réglés par un tribunal compétent comme motifs de recouvrement ou comme réponses à une prétention qu'on met de l'avant, ne peuvent être jugés de nouveau dans une poursuite subséquente

[22] [1939] A.C. 1.
[23] (1776), 20 St. Tr. 355.
[24] (1924), 55 O.L.R. 552.

right, question or fact once determined must as between them be taken to be conclusively established so long as the judgment remains. . .

Issue estoppel has been recognized in this country and in this Court in criminal cases (see, for example, *Wright, McDermott and Feeley v. The Queen*[25], and it is no less applicable in civil matters. Nor is the application of that principle in any way affected because it is directed against a Minister of the Crown: see *Fonseca v. Attorney General of Canada*[26], at p. 619. I see no reason to introduce any anomalies or exceptions to its general application if the facts call for it. The remaining question here then is whether the facts as between the appellant and the Minister bring issue estoppel into play.

The Minister's contention that the pool house transaction can be both a benefit and a loan or debt at the same time ignores the basis upon which he sought and succeeded in his reassessment of the appellant. There are two related points here which call for comment. First, the Minister founded his claim against the appellant upon s. 8(1)(*c*) and not upon s. 8(1)(*a*) or (*b*) or s. 8(2). Any question of a loan, arising from the arrangements for a bank credit to Transworld which was ultimately repaid by a Transworld cheque (leaving Transworld and the appellant where they were before), was negated by Sheppard J. as having been dependent upon a lease which was ineffective to support it. A device which failed as a defence to a reassessment, and so determined by a final judicial decision, cannot, in my view, be later reactivated as between the same parties to provide a different basis upon which to attempt to capture the same sum twice. There were, arguably, "funds or property" within s. 8(1)(*b*) or "a benefit or advantage" within s. 8(1)(*c*) conferred upon the appellant by Transworld, and the Minister chose to make his case under s. 8(1)(*c*). The logic of his present position would equally warrant him

[25] [1963] S.C.R. 539.
[26] (1889), 17 S.C.R. 612.

entre les mêmes parties ou leurs ayants droit, même si la cause d'action est différente. Le droit, la question ou le fait, une fois qu'on a statué à son égard, doit être considéré entre les parties comme établi de façon concluante aussi longtemps que le jugement demeure . . .

L'issue estoppel a été reconnu en ce pays et en cette Cour dans les affaires criminelles (voir, par exemple, *Wright, McDermott et Feely c. La Reine*[25]), et ne s'applique pas moins en matière civile. L'application de ce principe n'est pas non plus atteinte parce qu'il est invoqué à l'encontre d'un ministre de la Couronne: voir *Fonseca c. Procureur général du Canada*[26], à la p. 619. Je ne vois aucune raison d'introduire des anomalies ou des exceptions à son application générale si les faits permettent de l'invoquer. Ici, la question qui reste à décider est de savoir si les faits tels qu'ils existent entre l'appelante et le Ministre font entrer en jeu *l'issue estoppel*.

La prétention du Ministre que la transaction relative au pavillon de bains peut être à la fois un bénéfice et un emprunt ou une dette en même temps ne tient pas compte du fondement sur lequel il a voulu et obtenu la nouvelle cotisation qu'il recherchait à l'égard de l'appelante. Il y a ici deux points reliés qui appellent des commentaires. D'abord, le Ministre a fondé sa réclamation contre l'appelante sur l'al. *c*) du par. (1) de l'art. 8 et non pas sur les al. *a*) ou *b*) du par. (1) ou sur le par. (2), même article. Toute évocation d'un prêt, résultant des dispositions prises pour que la banque émette en faveur de Transworld un crédit qui en définitive a été remboursé par un chèque de Transworld (laissant Transworld et l'appelante dans la situation où elles étaient auparavant), a été repoussée par M. le Juge Sheppard comme subordonnée à un bail qui ne pouvait efficacement lui servir de fondement. Un expédient qui a failli comme moyen de défense à l'encontre d'une nouvelle cotisation, et qui est donc réglé par une décision judiciaire finale, ne peut, à mon avis, être par la suite réactivé entre les mêmes parties de façon à fournir une base différente sur laquelle tenter de capturer la même somme une seconde fois. On

[25] [1963] R.C.S. 539.
[26] (1889), 17 R.C.S. 612.

in claiming that a debt exists under s. 8(1)(*b*) which could be the subject of a writ of extent. If the Minister had succeeded in making his case in the tax appeal under s. 8(2), it would have been on the basis that there had been a loan which did not come within any of the exceptions to taxability. That, however, was not how the Minister chose to characterize the value of the pool house, and, clearly, on the facts there was no basis for contending that there had been a loan, giving rise in that aspect to a debt.

Even on the assumption that as between Transworld and the appellant a debt had arisen at the time, I do not think that the Minister can urge this against the appellant in the present case. There are two affidavits in the record of this case, by a chartered accountant and by a solicitor respectively, which state and explain why the sum of $34,612.33 was written off as an indebtedness as of January 31, 1970. It is immaterial whether these affidavits, upon which there was no cross-examination, be taken at face value. At worst, they underline the position taken by the Minister against the appellant in the tax appeal. Where issue estoppel is concerned I do not think that there is any warrant for invoking a *jus tertii*. Moreover, to do so in the present case would be to rely, in another form, on the same rejected view of the transaction that the Minister has asserted with respect to the appellant's admission on her examination for discovery in the tax appeal. The matter in issue is one between parties or their privies, and here this means only the Minister and the appellant.

pouvait alléguer qu'il y avait eu attribution à l'appelante par Transworld de «fonds ou biens» selon l'al. *b*) du par. (1) de l'art. 8 ou d' «un bénéfice ou d'un avantage» selon l'al. *c*) du par. (1) de l'art. 8, et le Ministre a choisi de procéder en vertu de l'al. *c*). La logique de sa position actuelle l'autoriserait également à prétendre qu'il existe en vertu de l'al. *b*) du par. (1) de l'art. 8 une dette qui pourrait faire l'objet d'un bref de saisie «extent». Si le Ministre avait eu gain de cause en procédant en vertu du par. (2) de l'art. 8 dans l'appel en matière d'impôt, cela aurait été sur la base de l'existence d'un prêt qui n'était visé par aucune des exceptions à l'imposition. Cela, cependant, n'est pas la façon dont le Ministre a choisi de qualifier la valeur du pavillon de bains, et, de toute évidence, d'après les faits, il n'y avait pas de fondement sur lequel prétendre qu'il y avait eu un prêt, donnant lieu sous cet aspect à une dette.

Même dans l'hypothèse que, pour ce qui concernait Transworld et l'appelante, une dette soit intervenue à l'époque, je ne pense pas que le Ministre puisse invoquer cela contre l'appelante en l'espèce présente. Il y a au dossier de la présente affaire deux déclarations sous serment, souscrites l'une par un comptable agréé et l'autre par un avocat, qui déclarent et expliquent pourquoi la somme de $35,612.33 a été radiée comme créance à compter du 31 janvier 1970. Il est sans conséquence de se demander si ces déclarations sous serment, qui n'ont fait l'objet d'aucun contre-interrogatoire, doivent être acceptées telles quelles. Au pire, elles soulignent la position qu'a prise le Ministre contre l'appelante dans l'appel interjeté en matière d'impôt. Lorsque l'*issue estoppel* est en cause, je ne crois pas que l'on puisse invoquer le droit d'un tiers. De plus, le faire en l'espèce équivaudrait à s'appuyer, sous une autre forme, sur la même conception rejetée de l'opération que le Ministre a mise de l'avant relativement à l'aveu fait par l'appelante lors de l'interrogatoire préalable qu'elle a subi dans l'appel interjeté en matière d'impôt. La question en litige est une question qui concerne les parties ou leurs ayants droit, ce qui veut dire ici le Ministre et l'appelante seulement.

I would, accordingly, allow the appeal and vary the order of Sheppard J. by directing that the writ of extent in the third degree against the appellant be set aside. She is entitled to her costs in this Court and also in the Exchequer Court in respect of the writ of extent against her.

Appeal dismissed with costs, SPENCE *and* LASKIN JJ. *dissenting.*

Solicitor for the appellant: C. C. Sturrock, Vancouver.

Solicitor for the respondent: N. D. Mullins, Vancouver.

Par conséquent, j'accueillerais l'appel et modifierais l'ordonnance de M. le Juge Sheppard en ordonnant que le bref de saisie «extent» au troisième degré contre l'appelante soit annulé. L'appelante a droit à ses dépens en cette Cour et aussi en Cour de l'Échiquier à l'égard du bref de saisie «extent» émis contre elle.

Appel rejeté avec dépens, les Juges SPENCE *et* LASKIN *étant dissidents.*

Procureur de l'appelante: C. C. Sturrock, Vancouver.

Procureur de l'intimé: N. D. Mullins, Vancouver.

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Ontario Supreme Court - Appellate Division

Latchford C.J., Middleton, Masten and Orde JJ.A.

May 16, 1924

Estoppel -- Res Judicata -- Judgment in Former Action between same Parties -- Claim for Damages Denied by Reason of Lack of Jurisdiction -- Right to Recover Damages in Subsequent Action -- Rule 260 -- Damages for Delay in Erection of Building by Landlord for Tenant -- Continuing Cause of Action -- Assessment of Damages.

In a lease of land to the plaintiff, made in November, 1914, the defendant covenanted that he would, on the request of the plaintiff, extend the building on the premises, for which the plaintiff was to pay an increased rent. The defendant made default in the erection of the extension, and the plaintiff in October, 1920, brought an action in the Supreme Court of Ontario against the defendant, in which the claim was for $2,000 damages for breach of the covenant, and in the alternative for specific performance of the agreement and damages for the delay in the erection of the building. In that action judgment was given directing specific performance of the agreement, and the building was thereafter erected. The Judge who pronounced this judgment at the trial considered the question of damages, limited the plaintiff to damage suffered before the date of the commencement of the action, and then found that the plaintiff had not shewn that he suffered any damage prior to that date. By the judgment as issued the plaintiff was awarded specific performance, and nothing more. The plaintiff in May, 1923, brought this action in a County Court, claiming to recover $465 damages for the delay in the erection of the extension of the building from the time of the request until the building was in fact erected:

Held, that the plaintiff was not estopped by the judgment in the earlier action.

There was only one cause of action, and it was the plaintiff's right to have his damages assessed once for all; but the finding in the former action that the plaintiff could not recover anything for damage after the commencement of the action was binding upon both parties, and was not, though erroneous, open to dispute in this action. The determination was that the Court had no jurisdiction to

entertain the plaintiff's claim so far as it related to damages subsequent to the commencement of the earlier action. The judgment was not appealed against, and the determination of the question of law was res judicata as between the parties.

The lack of jurisdiction in the Court deprives the judgment of any effect whether by estoppel or otherwise, even where the party alleged to be estopped himself sought the assistance of the court whose jurisdiction is impugned.

It was not open to the defendant in this action to contend that these damages might have been recovered to the former action, where he took advantage of a judgment declaring that the damages sought were not recoverable in that action.

Discussion and explanation of the doctrine of res judicata and review of the authorities.

Rule 260 considered.

It was permissible to look at the reasons for judgment in the earlier action in order to shew that the dismissal was based upon the ground that the Court had no jurisdiction.

Barber v. McCuaig (1900), 31 O.R. 593, followed.

The plaintiff had a reasonable time after the request and before action to erect the building, and for this period no damages were given in the former action. He had a reasonable time after judgment before he would be punished for contempt, but for this delay he must pay damages.

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1 APPEAL by the plaintiff and cross-appeal by the defendant from the judgment of the County Court of the County of Essex (COUGHLIN, Co.C.J.) in an action wherein the plaintiff sought to recover $465 damages for the defendant's delay in erecting an extension to the building standing on land leased by the defendant to the plaintiff. By the judgment of the County Court the plaintiff was awarded only $45 damages and no costs.

2 April 30. The appeal was heard by LATCHFORD, C.J., MIDDLETON, MASTEN, and ORDE, JJ.A.

W. B. S. Craig, for the plaintiff.

A. C. Heighington, for the defendant.

3 May 16. The judgment of the Court was read by MIDDLETON J.A.:-- By a lease bearing date the 29th November, 1914, Parent demised certain lands to the plaintiff for a term of years. The lease contained a covenant by Parent that he would erect a building on the premises to be completed during January, 1915, and that he would, on the request of McIntosh, extend the building toward the rear of the premises 35 feet, for which McIntosh was to pay an increased rent of $8 per month.

4 The landlord made default in the erection of this extension, and an action was brought in the Supreme Court of Ontario on the 20th October, 1920, in which the tenant claimed $2,000 for damages for breach of the covenants in the lease, and in the alternative specific performance of the agreement and damages for the delay in the erection of the buildings.

5 This action, in due course, came on for hearing before Mr. Justice Rose on the 7th December, 1921, and at the close of the hearing he gave to the plaintiff a judgment for specific performance of the agreement, and the building was thereafter erected.

6 Dealing with the question of damages, he said: "If the plaintiff has suffered damage by reason of the defendant not having extended the building, I hold that he ought to recover the amount of that damage. The plaintiff makes up a bill for $12 a month, the difference between what he has to pay under the lease and what the present tenants agreed to pay him if he got an extension of the building, and he brings that account down to date. I do not think he can have that very well in this present action. I need not say anything about any other means there may be of collecting it. I think the plaintiff must be limited to damage which he suffered before the 20th October, 1920."

7 The learned Judge then points out that, prior to that date, the plaintiff had not shewn that he had suffered any damage, and concludes:

> "So I think the plaintiff has not made out any right to damages in this action, and all he can get is an order for specific performance of the covenant with respect to the extension of the building."

8 The formal judgment as issued awarded specific performance of the agreement to build the extension, and nothing more.

9 The plaintiff then brought this action in the County Court, on the 8th May, 1923, claiming to recover $465 damages, suffered by reason of the delay in the erection of the extension of the building from the time of the request and for 31 months thereafter until the building was in fact erected, at $15 a month. The defendant, in answer to the claim, set up the former action and the judgment pronounced therein, alleging that by it the plaintiff's rights had become res judicata, and the plaintiff, by reason of the action and judgment, was estopped from any recovery.

10 The learned County Court Judge, in a carefully considered judgment, has given effect to this defence, holding that the plaintiff's claim for damages was concluded by the former judgment down to the date of that judgment, but that the plaintiff was entitled to recover damages for three and three-quarter months, at $12 per month, being the difference between the rent payable, $8 per month, and $20 for rent which would have been received, this covering the period between the date of the judgment and the actual erection of the building.

11 Both sides appeal, the plaintiff contending that there is no estoppel by reason of the former judgment, and that at any rate the estoppel can only be effective as to the claim for damages down to the date of the writ in the former action, the 20th October, 1920, and that at any rate he is entitled to recover damages for the period commencing at that date, and concluding at the date of the judgment. This would amount to $172.

12 The defendant, by his cross-appeal, denies liability for the $45 awarded by the trial Judge; the ground taken in the notice of appeal being that he was entitled to a reasonable time after the judgment to erect the building. Upon the argument, the claim was made that the plea of res judicata covered this also.

13 Two totally distinct ideas are often confounded in speaking of res judicata. 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 compe-

tent 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.

14 Some think that this judgment must be specially pleaded (Cooper v. Molsons Bank (1896), 26 Can. S.C.R. 611), and will then be an estoppel, but there is high authority that, even when not pleaded, the judgment may be given in evidence, and will, as evidence, prove the facts quite apart from the doctrine of estoppel: Southern Pacific Railroad Co. v. United States (1897), 168 U.S. 1.

15 The other doctrine is often discussed under the maxim nemo debet bis vexari, or as merger by judgment, or splitting of a cause of action, and makes it obligatory upon a plaintiff asserting a cause of action to claim all his relief in respect thereto, and prevents any second attempt to invoke the aid of the courts for the same cause, for on his first recovery his entire cause of action has become merged in his judgment and is gone for ever. This is clearly stated by Parke, B., in the leading case of King v. Hoare (1844), 13 M. & W. 494, at p. 504: " If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result. Hence the legal maxim, transit in rem judicatam -- the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher." One consequence is that an action against one of several tort-feasors will bar recovery against the others, so absolutely is the original cause of action gone.

16 It follows that on the trial the plaintiff is entitled to recover not only for all damage sustained in the past, but also for damage to be sustained in the future, so far as it can be estimated. If subsequent events reveal a loss or damage not suspected at the time of the assessment, there can be no further recovery. "When there is but one cause of action, damages must be assessed once for all:" Bowen, L.J., in Serrao v. Noel (1885), 15 Q.B.D. 549, 558; City of Montreal v. McGee (1900), 30 Can. S.C.R. 582. This is illustrated by the very old case, Fetter v. Beale (1702), 1 Salk. 11, where the plaintiff sued the defendant for beating him and pounding his head on the ground, and recovered a modest verdict. Afterwards he brought a new action shewing that, "by reason of the same battery, a piece of his skull was come out," and though counsel (Shower) pleaded that this could not have been given in evidence when it had not come to pass and was not suspected, the unfortunate plaintiff failed for "the grievousness or consequences of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial."

17 Though there has been this qualification of the rule, that where the plaintiff alleges that two distinct rights have been infringed, e.g., an injury to his person and an injury to his property, he may bring two actions (Brunsden v. Humphrey (1884), 14 Q.B.D. 141), there is no qualification of the general principle where the cause of action is one and the same: Macdougall v. Knight (1890), 25 Q.B.D. 1.

18 Where, however, the rights are distinct, though arising out of the same state of facts, separate actions may be brought, e.g., an action to rescind a subscription for stock on the ground of misrepresentation and an action for damages against the promoters for fraud and deceit: Goldrei Foucard & Son v. Sinclair and Russian Chamber of Commerce in London, [1918] 1 K.B. 180.

19 Upon this principle, a recovery of damages in certain cases where the damage is of the essence of the action, and damnum as well as injuria must be proved, will not bar a recovery where there is a new damnum. Thus where there is an excavation by the defendant on his own land, there is no cause of action until a subsidence on the plaintiff's land, and there is a new cause of action on every new subsidence: Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127. Clegg v. Dearden (1848), 12 Q.B. 576, is useful by way of contrast.

20 Quite distinct from cases of this class are cases of what is erroneously termed continuing damage. As in the case of nuisances, each time the nuisance is repeated there is a new cause of action, a new injuria or infringement of legal right and a new damnum flowing therefrom, and so, where the nuisance continues, a plaintiff may, theoretically, issue a writ every day for the new damage. To avoid this inconvenience, a provision, now found as Rule 260, was enacted: "Damages in respect of any continuing cause of action shall be assessed down to the time of assessment."

21 The meaning and scope of this Rule is shewn by what is said in Hole v. Chard Union, [1894] 1 Ch. 293, a nuisance case, where the defendants had polluted a stream. The plaintiff sought to assess damages after the writ. Lindley, L.J;, says (pp. 295, 296): "It is contended on behalf of the defendants that it was not right in principle to do this; because any nuisance committed after the injunction came into operation gave rise to a fresh cause of action, and was not a continuing cause of action. ... What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought." A. L. Smith, L.J., says (p. 296): "If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on de die in diem. It seems to me that there was a connection in the present case between the series of acts before and after the action was brought; they were repeated in succession, and became a continuing cause of action."

22 In De Soysa v. De Pless Pol, [1912] A.C. 194, a very difficult question arose. In an agreement for a lease, the lessors agreed to complete buildings on the demised premises in a certain time and in default to pay a certain sum per day for default. An action was brought to recover this sum for the default up to the bringing of the action, and the further daily sum till the completion of the buildings. There was a question whether this sum was a penalty or liquidated damages; the holding being against the contention that the amount was a penalty, it was awarded down to the date of the writ, and damages after the writ were allowed at the same rate. The application of the rule in question was not discussed, their Lordships saying: "It was assumed on both sides that the Judge should award damages down to the date of his judgment ... on the whole they are of opinion that substantial justice has been done." So that the question was not really discussed.

23 The question whether damages in detinue are within this rule seems yet open: Serrao v. Noel, 15 Q.B.D. 549.

24 After this discursive discussion of the rule, I turn to the case presented by Mr. Justice Rose. I think that here it was plainly the plaintiff's right to have his damages assessed once and for all. Down to the date of the hearing, the amount of the damage was easily ascertained. From then on it was uncertain, for no one could tell when the mandatory order would be obeyed. This result is not founded upon Rule 260, for the assessment under that Rule ends at the date of assessment, and after that assessment, if the damage continues, there is a new cause of action and a new action will lie. Here the principle is that there is only one cause of action, and damages must be assessed once for all.

25 The question then remains, what is the effect of the Supreme Court judgment upon the proceedings in the County Court in the subsequent action? Mr. Justice Rose held, I think erroneously, that the plaintiff could not recover anything for damage after the date of the writ; but, having so held, his finding upon this point of law is binding upon both parties and is not open to dispute in the subsequent action. "A court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed:" Malkarjun Bin Shidramappa Pasare v. Narhari Bin Shivappa (1900), L.R. 27 Ind. App. 216, 225.

26 Mr. Justice Rose determined that in the action in the Supreme Court then before him he had no jurisdiction to entertain the plaintiff's claim so far as it related to damages subsequent to the issue of the writ. That judgment was not appealed against, and as between the plaintiff and defendant that determination of law is res judicata and conclusive. The decision, however wrong, cannot be disturbed. As between these parties and on this issue (of subsequent damages) the situation is the same as though he had in truth possessed no jurisdiction to entertain the plaintiff's claim in that respect. It is a well recognised principle that the lack of jurisdiction in the Court deprives the judgment of any effect whether by estoppel or otherwise, even where the party alleged to be estopped himself sought the assistance of the court whose jurisdiction is impugned: Rogers v. Wood (1831), 2 B. & Ad. 245; Dublin (Archbishop) v. Trimleston, (1847), 12 Ir. Eq. R. 251; Toronto Railway Co. v. Toronto Corporation, [1904] A.C. 809, 815.

27 Mr. Justice Rose dismissed the plaintiff's claim, not by judication upon the merits, but by declining jurisdiction to entertain it. It has been well said that the law prevents the parties from taking inconsistent attitudes before the Courts. It is not open to the defendant here to contend in this action that these damages might have been recovered in the former action, where he contended in that former action (or what amounts to the same thing has taken advantage of a judgment so declaring) that the damages could not be recovered in that action as being after the date of the writ. For these reasons, the plaintiff is bound to the conclusion that there was no jurisdiction in the Supreme Court action to award these subsequent damages.

28 In arriving at this conclusion I have gone beyond the formal judgment and looked at the reasons for judgment. I quite admit that the formal judgment, and not the reasons, is the adjudication which determines the issues, but I think it may always be shewn that the dismissal of the action was based upon the ground that the Court had no jurisdiction, or that it was prematurely brought, and in either case was not a determination on the merits, and that for this purpose the reasons of the Judge trying the earlier action may be looked at. Barber v. McCuaig (1900), 31 O.R. 593, establishes this exception to the general rule as laid down in such cases as Kingston v. Salvation Army (1904), 7 O.L.R. 681, and Canadian Pacific Railway Co, v. Blain (1905), 36. Can. S.C.R. 159:

29 In Stewart v. Todd (1846), 9 Q.B. 767, in the Exchequer Chamber, it was assumed that, in answer to a plea setting up a former judgment for a lesser sum than that claimed, the plaintiff might shew "that part of the judgment was not due at that time."

30 For these reasons, the dismissal of the plaintiff's claim for damages subsequent to the issue of the writ in the Supreme Court does not estop his recovery in this action.

31 It follows that the appeal should be allowed, and the cross-appeal should, on this ground, be dismissed.

32 Upon the other ground argued, the defendant had a reasonable time after the request and before action to erect the building; and for this period no damages were given by Mr. Justice Rose. The defendant had a reasonable time after judgment before he would be punished for contempt, but for this delay he must pay damages.

33 There will therefore be judgment for $219 and costs on the County Court scale, and the defendant must pay the costs of the appeal and cross-appeal.

34 Appeal allowed and cross-appeal dismissed.

qp/s/qlkam/qlrpv

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Rex v. Sweetman

[1939] O.R. 131

ONTARIO
COURT OF APPEAL

ROBERTSON C.J.O., MIDDLETON and MASTEN JJ.A.

17TH FEBRUARY 1939

Criminal Law -- Manslaughter -- Criminal negligence -- Two persons killed at same time as result of operation of a motor vehicle -- Accused acquitted on indictment for manslaughter of one person -- Accused subsequently indicted for manslaughter of second person -- Special pleas of autrefois acquit and res judicata.

The accused while operating a motor vehicle struck and killed a man and his wife.

The accused was first tried for manslaughter of the husband and at the first trial the accused was acquitted both of manslaughter and of criminal negligence.

Subsequently the accused was tried for manslaughter of the wife and the accused pleaded autrefois acquit and res judicata, and the trial Judge instructed the jury to acquit the accused on the plea of autrefois acquit combined with the operation of sec. 951(3) of The Criminal Code, R.S.C. 1927, ch. 36, as amended by 1930, 20-21 Geo. V, ch. 11, sec. 25.

On an appeal by the Crown from the instruction of the trial Judge the appeal was allowed and the case remitted for trial for the following reasons:

1. Under section 905 of The Criminal Code a plea of res judicata cannot be raised by special plea in bar of the prosecution of an indictment.

2. The plea of autrefois acquit standing by itself was not valid since the offences against the husband and the wife were separate and distinct, because they were offences against separate and distinct individuals.

3. Section 951(3) of The Criminal Code does not alter, vary or extend the ambit of the plea of autrefois acquit in cases of manslaughter or criminal negligence arising out of the operation of a motor vehicle.

Although the pleas raised by the accused could not be given effect to at this stage, nevertheless if the evidence submitted by the Crown at the trial for the purpose of establishing the guilt of the accused in connection with the death of the wife should be substantially the same evidence as was passed upon by the jury which found the accused not guilty in connection with the death of the

husband, it will then be the duty of the trial Judge to tell the jury that it should not find the accused guilty. It would be manifestly improper and contrary to accepted standards of what is fair and right that another jury should be permitted to pronounce the opposite verdict upon the same evidence.

AN appeal by the Crown from the acquittal of the accused on a charge of manslaughter.

The appeal was heard by ROBERTSON C.J.O., MIDDLETON and MASTEN JJ.A.

W. B. Common, K.C., and C. P. Hope, K.C., for the Crown, appellant.

E. P. Groh, for the accused, respondent.

February 17th, 1939. The judgment of the Court was delivered by **MASTEN J.A.**: This is an appeal pursuant to sec. 1013 (4) of The Criminal Code, R.S.C. 1927, ch. 36, brought by the Attorney-General of Ontario against the judgment or verdict of acquittal pronounced by the Honourable Mr. Justice McTague on the 22nd day of November 1938, following the finding of a jury in favour of the respondent on the special pleas raised by him of autrefois acquit and res judicata.

The facts, so far as necessary for the understanding of the present appeal, may be very briefly stated. At about seven a.m. of Christmas morning 1937, Thomas Beedle, a blind man, was being led by his wife Annie Beedle diagonally across the intersection of Lansdowne Avenue and St. Clair Avenue in the City of Toronto. Both these parties were struck at the same instant by a motor car driven by the accused who was proceeding westerly on the north side of St. Clair Avenue. The accused was indicted separately for the death of each of the Beedles. The indictment covering the death of Thomas Beedle was tried by a jury before the Honourable Mr. Justice Greene and the accused was, on the 18th of May, 1938, acquitted both of the charge of manslaughter and of the charge of criminal negligence. The second indictment covering the charges resulting from the death of Annie Beedle came on for trial on November the 21st, 1938, before the Honourable Mr. Justice McTague and a jury, when leave was granted to the accused to withdraw his plea of not guilty which had theretofore been entered and to enter special pleas of autrefois acquit and res judicata, which accordingly was done in the words following:

"Special Plea of Autrefois Acquit and Res Judicata:

"1. The said James Sweetman said that our said Lord, the King, ought not to further prosecute the indictment against him the said James Sweetman in this Court or elsewhere, because he saith heretofore, to wit on the 18th day of May, A.D. 1938, he was previously acquitted of the charge of manslaughter and criminal negligence in the said indictment contained by a jury presided over by the Honourable Mr. Justice Greene of the Supreme Court of Ontario, in the City of Toronto, in the Province of Ontario.

"2. And the said James Sweetman further saith that our said Lord the King ought not further to prosecute the said indictment against him the said James Sweetman, because he saith that by the hereinbefore recited acquittal, the charge of manslaughter and criminal negligence in the said indictment contained is res judicata.

"Dated at Toronto this 21st day of November, A.D. 1938.

James Sweetman

By his counsel Earl P. Groh."

Issue was joined on these pleas and upon a trial of such issue the jury found for the accused.

The appellant by his notice of appeal submits

"1. That the learned trial Judge misdirected the jury empanelled to try the special pleas of autrefois acquit and res judicata, raised by the respondent herein, as to the meaning of sec. 951(3) of The Criminal Code.

"2. That the learned trial Judge should have instructed the jury as a matter of law that the plea of autrefois acquit could not prevail with respect to the indictment for the killing of Annie Beedle," and asks this Court to direct that the respondent do stand his trial before a petit jury on the indictment for manslaughter and for criminal negligence arising from the killing of Annie Beedle.

Sec. 951(3) of The Criminal Code, R.S.C. 1927, ch. 36, as amended by 1930, 20-21, Geo. V, ch. 11, sec. 25, as it stood at the date of the occurrence here in question reads as follows:

"Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury may find the accused not guilty of manslaughter but guilty of criminal negligence under section two hundred and eighty-four, and such conviction shall be a bar to further prosecution for any offence arising out of the same facts."

Relying upon this provision the learned trial Judge in his charge to the jury on the trial of the above issue summarized his directions to them as follows:

"Now, then, to sum up to you: I am rather inclined to the view that the accused has not made out a good case for his plea to succeed on the bare basis of autrefois acquit in the ordinary sense of the word. I have also expressed the view to you that I do not think the accused can rely a great deal on his plea of res judicata. I am rather inclined to the view, however, that there is a good deal of strength in connection with the plea of autrefois acquit when linked up to this section which I have just read to you: He says: 'I was tried on a former occasion. On that occasion I could have been convicted of criminal negligence, and had I been convicted of criminal negligence it would have been, under section 951, a bar to further prosecution for any offence arising out of the same facts.' Now, it seems to me that that is a position of a good deal of strength as far as this accused is concerned on this plea. If there is difficulty in construing the meaning of the statute as to an offence arising out of the same facts, it seems to me that the ambiguity, if any, should be construed in favour of the accused. And so I suggest to you that on that basis he has made out what seems to me to be a reasonable case for success on the plea which he has filed."

Following this direction the jury found in favour of the accused.

On the hearing of the appeal before this Court, counsel for the appellant referred to sec. 905 of The Criminal Code, which reads as follows:

"The following special pleas and no others may be pleaded, according to the provisions hereinafter contained, that is to say, a plea of autrefois acquit, a plea of autrefois convict, a plea of pardon, and such pleas in cases of defamatory libel as are hereinafter mentioned.

"2. All other grounds of defence may be relied on under the plea of not guilty."

Counsel for the respondent admitted that in pursuance of this section a plea of res judicata could not be raised at this juncture by special plea in bar of the further prosecution of this indictment.

There remain therefore for consideration two questions: First, is the plea of autrefois acquit standing by itself applicable in the circumstances of this case, and, second, if not, then is the effect of subsec. 3 of sec. 951, as quoted above, to vary or implement the provision of sec. 907 so as to make them applicable to the circumstances of this case? The trial Judge directed the jury that in his opinion it ought to be so found, being of the view that the accused had already been put in jeopardy of criminal negligence when he was tried for the death of Thomas Beedle, and it being admitted that the negligence alleged against the accused was identically the same in the case of the killing of Thomas Beedle as it was in the case of the killing of Annie Beedle.

On the present argument the appellant submits that personal bodily injury is the gist of secs. 284 and 285 of The Criminal Code and refers to the cases of Rex v. Stark (1927), 60 O.L.R. 375; Rex v. Robbins, [1934] O.W.N. 67, 62 C.C.C. 273, and Rex v. Canadian Allis-Chalmers Ltd. (1923), 54 O.L.R. 38, at p. 53, 48 C.C.C. 63, at p. 80.

I agree with this view and with the contention of the appellant that the offences against Thomas Beedle and against Annie Beedle were separate and distinct because they were offences against separate and distinct individuals. The fact that the offence against each is alleged to have been occasioned by one and the same negligent act or omission is immaterial when dealing with the issue of autrefois acquit, for the complaint is the injury done to the person and not the means whereby that injury is perpetrated. In other words the gist of the offences here charged are, in essence, two separate complaints of personal injury done to two different persons. The accused is not being tried again for the same act or omission but is being tried for two injuries done to two different persons.

In Reg. v. Bird (1851), 5 Cox C.C. 1, at p. 89, Parke B. is reported to have said:

" ... in order to constitute a good plea of autrefois acquit, the plea must state, and it must be proved that the offence charged in the former indictment was the same indentical offence with that charged in the indictment pleaded to."

In the present case it cannot be said that the killing of Thomas Beedle is the same identical offence as the killing of Annie Beedle.

For these reasons it seems to be entirely plain that the plea of autrefois acquit taken by itself cannot be maintained by the accused in the circumstances here shown.

Dealing then with the second point as to whether the ambit of the defence of autrefois acquit has been extended in the case of manslaughter or criminal negligence occasioned by a motor vehicle (sec. 951(3) quoted above), I am with the utmost respect unable to agree with the view which was suggested by the learned trial Judge as indicated in his charge to the jury.

For the respondent there is pointed out

(1) the indentity of the parties, viz., the King and the accused, being the same in the one killing as in the other;

(2) the identity in time and place of the occurrence complained of;

(3) in the case of Thomas, the accused (respondent) was in peril of conviction for criminal negligence;

(4) the identity of the legal question. For the alleged criminal negligence of the accused was admitted to be the same in the case of Thomas as of Annie, and what the jury found in the first case was that the Crown had failed to establish criminal negligence, for which the accused was in peril of conviction;

(5) subsec. 3 of sec. 951, R.S.C. 1927, ch. 36, as amended by (1930), 20-21 Geo. V, ch. 11, sec. 25, provides that if convicted, such conviction shall be a bar to further prosecution for any offence arising out of the same facts.

This ground of defence (autrefois acquit) goes back in substance at least to as remote a period as 1221, A.D., as I find it was raised in the case of The King v. Engelram as reported of that date in the Seldon's Society's Select Pleas of the Crown, vol. 1, No. 158, p. 101.

In earlier days the form of the plea was more elaborate than now, but as set out in Archbold's Criminal Pleading, Evidence and Practice, 28th ed., at p. 165, it is given as follows:

"The King v. A.B.

"A.B. says that the King ought not further to prosecute an indictment against him, because he has been lawfully acquitted of the offence charged therein."

Our Criminal Code provides by sec. 906(3):

"In any plea of autrefois acquit or autrefois convict it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal, or conviction."

The cases throughout show plainly (as already pointed out in this judgment), that under this plea the offence presently charged must be identical with that formerly charged, as was said by Lord Reading C.J., in the case of The King v. Barron, [1914] 2 K.B. 570, at p. 574:

"The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence."

Having regard to the fact that in the reports the defence of autrefois acquit appears for more than seven hundred years, that throughout all that period its essence has been indentity of offences and that as sec. 905 prescribes that where the statute provides that the defence of autrefois acquit (by that name) may and must be raised by special plea in bar of the indictment and tried by itself as a preliminary issue, our statute must, in sec. 905, be there taken to refer specifically to the old and well known plea described in sec. 906(3), and I am unable to persuade myself that the words of subsec. 3 of sec. 951 suffice to alter, vary or extend the ambit of the plea, autrefois acquit in the case of manslaughter or criminal negligence occasioned by a motor vehicle.

For these reasons I am of the opinion that this appeal must be allowed and that the case must go to trial on a plea of not guilty as asked by the appellant.

The principle is well settled that in civil actions the doctrine of res judicata is applicable not merely when the ultimate adjudications by the Court in successive proceedings are or might be identical, but that it is applicable also in a wider sense to the finality of the determination in the first action of all issues of fact or law which were essential to the earlier conclusion, as is illustrated by such cases as Henderson v. Henderson (1843), 3 Hare 100, at pp. 114-115; Hoystead et al. v. Com-

missioner of Taxation, [1926] A.C. 155, and Southern Pacific Ry. v. United States (1897), 168 U.S.R. 1, at p. 48.

It will remain for the trial Judge to deal with any application by the accused to lead evidence in support of a plea of res judicata in a criminal case such as the present, taking into consideration the provisions of sec. 951(3) coupled with the decision of this Court in Rex v. Quinn (1905), 11 O.L.R. 242. See also the observations of Middleton J.A. in Rex v. Manchuk, [1938] O.R. 385, at pp. 424 and 425.

If the evidence submitted by the Crown to establish the guilt of the accused in connection with the death of Annie Beedle should be substantially the same evidence as was passed upon by the jury which found the accused not guilty in connection with the death of Thomas Beedle, then I think it will be the duty of the trial Judge to tell the jury that it should not find the accused guilty. A jury, having already passed upon the conduct of the accused and having found him not guilty, it would be manifestly improper and contrary to accepted standards of what is fair and right, that another jury should be permitted to pronounce the opposite verdict upon the same evidence. It has been said in a civil action that Courts should abhor inconsistent verdicts: Plant v. Normandy (1905), 10 O.L.R. 16, at p. 17. Much more should this be avoided in criminal cases where the accused is to be found guilty only upon evidence that establishes his guilt beyond a reasonable doubt.

Appeal allowed.

6

Case Name:

Cliffs Over Maple Bay Investments Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF the Business Corporations Act, R.S.B.C. 2002, c. 57
AND IN THE MATTER OF the Cliffs Over Maple Bay Investments Ltd.
Between
Fisgard Capital Corporation and Liberty Holdings Excell Corp., Appellants (Respondents on Cross-Appeal), and
Century Services Inc., Lawson Lundell LLP, Respondents (Appellants on Cross-Appeal)

[2011] B.C.J. No. 677

2011 BCCA 180

304 B.C.A.C. 116

17 B.C.L.R. (5th) 60

18 P.P.S.A.C. (3d) 11

2011 CarswellBC 883

67 E.T.R. (3d) 1

[2011] 8 W.W.R. 266

77 C.B.R. (5th) 1

Docket: CA038042

British Columbia Court of Appeal
Vancouver, British Columbia

J.E. Prowse, M.V. Newbury and E.C. Chiasson JJ.A.

Heard: January 14, 2011.
Judgment: April 14, 2011.

(72 paras.)

Civil litigation -- Civil procedure -- Estoppel -- Estoppel by record (res judicata) -- Finality of judgment or order -- Issue estoppel -- Appeal by Fisgard Capital from decision determining that, as a secured creditor of Cliffs Over, it had no interest in tranche of debtor-in-possession financing paid by Century Services allowed -- Appellant had provided financing to developer Cliffs Over -- Development failed -- On motion to determine priorities, chambers judge held that appellant had priority in tranche over Century -- On Century's subsequent motion questioning whether funds had been advanced, chambers judge found appellant had no interest in funds -- Issue estoppel applied to Century's motion -- Appellant's interest remained attached to residue of funds still held by Cliffs Over's solicitor.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeal by Fisgard Capital from decision determining that, as a secured creditor of Cliffs Over, it had no interest in tranche of debtor-in-possession financing paid by Century Services allowed -- Appellant had provided financing to developer Cliffs Over -- Development failed -- On motion to determine priorities, chambers judge held that appellant had priority in tranche over Century -- On Century's subsequent motion questioning whether funds had been advanced, chambers judge found appellant had no interest in funds -- Issue estoppel applied to Century's motion -- Appellant's interest remained attached to residue of funds still held by Cliffs Over's solicitor.

Appeal by Fisgard Capital from a decision of a chambers judge respecting the appellant's interest in a tranche of debtor-in-possession funds. The debtor's real estate development failed. The debtor had granted the appellant a mortgage and a general security interest over the debtor's property. The court then authorized debtor-in-possession financing in tranches. This order was subsequently set aside. The respondent Century Services was the debtor-in-possession lender and had advanced funds in 2007 to the debtor's solicitor. On a motion to determine the parties' respective entitlements to what remained of one tranche of debtor-in-possession financing that Century Services purported to advance in violation of a term in its letter of commitment, the chambers judge determined that the appellant was entitled to priority in the funds over Century, subject to the claim of a solicitor's lien over all or part of the funds. This order was not appealed. Century subsequently brought another motion questioning whether the funds had in law and in fact been advanced. The chambers judge determined that issue estoppel and cause of action estoppel did not apply to Century's motion, that the advance had never taken place, that the funds remaining in the solicitor's trust account had been subject to a Quistclose trust in Century's favour, and that the debtor had never obtained an interest in the funds to which the appellant's security interest could attach. The appellant argued that the question of priority was res judicata and that issue estoppel or cause of action estoppel should have barred the chambers judge from making the second order. The appellant also argued that the issues concerning advance, trust and attachment raised in the second motion were wrongly decided.

HELD: Appeal allowed. Although the chambers judge correctly found that cause of action estoppel did not apply, he erred in finding that the criteria for issue estoppel were not met and in not exercis-

ing his discretion not to apply issue estoppel. The issues addressed in the Century's motion were a foundational element of the first order respecting priorities. The chambers judge failed to recognize the finality of his first order which finally determined issue of priority as between Century and the appellant. The court did not have jurisdiction to rehear it or to vary or rescind its order. Although the motions dealt with different issues, the issues of advance, attachment and trust raised in the second motion were necessarily bound up with or fundamental to the determination of priority between the appellant and Century. In determining the applicability of issue estoppel, the chambers judge erred in failing to give consideration to the narrowness of the circumstances in which his discretion not to apply issue estoppel could properly be exercised. It could not be said that special circumstances warranting the exercise of such discretion existed in this case. Even if issue estoppel did not apply, the chambers judge erred in finding that the conditions in the debtor-in-possession financing order had not been met. The funds had been advanced by Century, and the appellant's interest in the funds advanced by Century attached to the funds and remained attached to the residue still held by the debtor's solicitor. The Quistclose trust was not intended or created. As between the appellant and Century, the appellant's interest in the funds ranked in priority to any interest of Century.

Statutes, Regulations and Rules Cited:

Business Corporations Act, SBC 2002, CHAPTER 57, Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Appeal From:

On Appeal from the Supreme Court of British Columbia, March 25, 2010 (*Cliffs Over Maple Bay (Re)*, 2010 BCSC 389, Vancouver Registry, Docket No. S083716)

Counsel:

Counsel for the Appellant: G.J. Tucker, Z.J. Ansley.

Counsel for the Respondent, Century Services Inc.:
M.I.A. Buttery, L. Williams.

Counsel for the Respondent, Lawson Lundell LLP: P. Roberts.

Reasons for Judgment

The judgment of the Court was delivered by

1 M.V. NEWBURY J.A.:-- This appeal involves a three-way dispute among creditors of The Cliffs Over Maple Bay Investments Ltd. ("Cliffs" or the "Company"), which was the developer of an ill-fated real estate project near Maple Bay on Vancouver Island. Unfortunately, the Company was unable to secure a reliable water supply for its proposed golf course and residential units, and the project failed. The ensuing proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") were, as it turns out, similarly misconceived: this court ultimately ruled that a Supreme Court order made under the *CCAA* staying creditors' proceedings against the

Company and authorizing debtor-in-possession ("DIP") financing, should not have been granted, no arrangement or compromise with creditors having been intended.

2 In this last phase of the litigation, the court below had to determine the parties' respective entitlements to what remains of one *tranche* of DIP financing that the DIP lender, "Century", purported to advance in violation of a term in its letter of commitment. The letter had been incorporated by reference in the court order. The chambers judge who was seized of this matter below decided the priority issue as between Century and the existing first-ranking creditor, "Fisgard Liberty", with respect to the funds so advanced. He found that "Century's priority for advances made pursuant to the order is lost because ... those advances were not in compliance with the terms of the order." He granted a declaration that Fisgard Liberty was "entitled to priority" in respect of the funds, subject to the claim of a third creditor, "Lawson", to a solicitor's lien over all or part of the funds - a matter to be decided at a separate hearing following the issuance of his reasons. No appeal was taken from the order.

3 However, Century then brought another motion before the chambers judge, questioning whether the funds had in law and in fact been advanced. On this occasion, the judge stated that his previous order had not determined "entitlement" to the funds. He declined to apply *res judicata*. He found that the advance had never taken place, that the funds remaining in Lawson's trust account had been subject to a *Quistclose* trust in Century's favour, and that Cliffs had never obtained an interest in the funds to which Fisgard Liberty's security interest could attach. Lawson was ordered to [re]pay what remained in its trust account to Century, and its motion for a declaration of solicitor's lien over the funds was dismissed.

4 In this court, Fisgard Liberty (with Lawson joining in) argues among other things that the question of priority was *res judicata* and that issue estoppel or cause of action estoppel should have barred the chambers judge from making the second order. These creditors also assert that the "new" issues concerning advance, trust and attachment raised in the second hearing below were wrongly decided. Fisgard Liberty seeks a declaration that its security interest attached to the funds upon their release to Lawson as Cliffs' agent.

5 Following the issuance of these reasons, this court will consider Lawson's claim both to part of the "Administrative Charge" contemplated by the original DIP order and to a solicitor's lien over all the funds it holds in trust. Until that matter has also been disposed of by this court, Lawson holds the funds in trust.

Chronology

6 The following chronology will, I hope, be sufficient to provide an overview of the facts of this case. I will provide additional facts as necessary when analyzing the issues on appeal.

* April 18, 2006 - Cliffs granted to the appellants Fisgard Capital Corp. and Liberty Holdings Excell Corp. (collectively, "Fisgard Liberty") a mortgage of its real property and a General Security Agreement ("GSA"), registered pursuant to the *Personal Property Security Act* ("*PPSA*"), charging all the Company's present and after-acquired property. (The Fisgard Liberty mortgage was a third mortgage, but it appears that the first and second mortgages, which secured fairly small amounts, were assigned at some point to Fisgard Liberty.)

* January 9, 2007 - The Company granted a fourth mortgage to Liberty Holdings Excell Corp. and Canada Trust Company in the amount of $7,650,000.
* June 15, 2008 - By this time, the Company found itself unable to move forward with the project or to draw down funds required for that purpose because of the water supply problem. Approximately $21,160,000 was outstanding under the third mortgage and $8,800,000 under the fourth, and the sum of approximately $7,340,000 was owed to various trade creditors, lessors and others.
* April-May, 2008 - Fisgard Liberty served the Company with notices of intention to enforce its security and on May 23 appointed a receiver.
* May 26, 2008 - Cliffs proceeded *ex parte* to obtain a stay of proceedings under the *CCAA* and the Court appointed The Bowra Group Inc. as Monitor. The order provided detailed terms for an "Administrative Charge", not to exceed $200,000, in favour of the Monitor and Cliffs' counsel, Lawson Lundell LLP ("Lawson") as security for the payment of their respective fees and disbursements. The Charge was to rank in priority over all other interests and charges.
* June 27, 2008 - The stay was extended in a 'comeback order' under which the Court authorized DIP financing not to exceed $2,350,000 and to be advanced in *tranches* not to exceed $500,000 each. The DIP lender was Century Services Inc. ("Century"), one of the respondents herein. The order, referred to by counsel as the "DIP Order", stated:

  > THIS COURT ORDERS that, advances under the DIP Facility shall be made only at the request of the Monitor to the DIP Lender, such advances to be paid to Lawson Lundell LLP "in trust" and to be paid out only on the written request of the Monitor in consultation with the Petitioner, subject to further Order of the Court. [Emphasis added.]

The DIP financing itself was to be on the terms in Century's commitment letter dated June 13, which contained an "appeal provision" as follows:

> The liability and obligation herein and any future obligations of any nature and kind of the Borrower shall be evidenced, governed and secured, as the case may be, by the following documents (collectively, the "Security") completed in a form and manner satisfactory to Century's counsel:
>
> a. Loan Agreement;
> b. Promissory note;
> c. A court[-]approved first and unencumbered charge on the real and personal property of the Borrower and no appeal therefrom being taken within 21 days after the pronouncement of that Order ... [Emphasis added.]

* July 7, 2008 - Cliffs and the Monitor signed an "Order to Pay" authorizing Century to advance the first *tranche* of DIP financing to Lawson as solicitors for the Company.
* July 18, 2008 - Fisgard Liberty obtained leave to appeal the June 27 order under the *CCAA*. (This occurred within the specified 21-day appeal period.)
* Early August 2008 - The following events took place as described by the chambers judge:

> [16] In early August, prior to the hearing of the appeal, Century purported to waive the appeal provision, and provided the $500,000 in DIP financing authorized by the order to pay to Lawson Lundell. Century sought, and was provided, further security from the Cliffs' principals for this payment. When commitment fees, interest charges, and other chargebacks were taken into account, Lawson Lundell held the net amount of $350,500 in trust on account of this payment.
>
> [17] Lawson Lundell was placed on an undertaking not to release any portion of this $350,500 until Century's solicitors provided them with written authority to do so. A further condition imposed was the payment of a $25,000 due diligence fee to Century.
>
> [18] On August 8, 2008, this undertaking and condition were satisfied.
>
> [19] In accordance with paragraph 8 of the DIP Order, the Cliffs and the Monitor requested and proceeded to use some of the DIP funds held in trust by Lawson Lundell. On July 15, 2008, a real estate appraisal was prepared by the Altus Group in respect of the Cliffs' property located at North Cowichan on Vancouver Island at the direction of the Monitor (the "Altus Report"). The parties agree that approximately $98,000 of the DIP monies were used to pay for the Altus Report. Additionally, the parties agree that the amount of $12,958.52 was directed to be paid by the Monitor out of the DIP facility to consultants who provided advice on golf course specific issues. Payments were also made to the principals of the Cliffs on account of wages.
>
> [20] None of the parties dispute the propriety of these expenses, and none advance a claim of entitlement for these amounts. After these expenditures are taken into account, the $162,276.33 which constitutes the subject of this dispute remains in Lawson Lundell's trust account. [Emphasis added.]

* August 15, 2008 - This court allowed Fisgard Liberty's appeal and set aside the June 27 order for reasons indexed as 2008 BCCA 327. Tysoe J.A. for the Court stated at para. 41:

> I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

As mentioned earlier, the resulting order had not been settled or entered at the time of the initial hearing of the present appeal, but has now been entered. It states in material part:

> THIS COURT ORDERS that the appeal is allowed, and the order dated June 27, 2008 is set aside;
>
> AND THIS COURT FURTHER DECLARES that the powers and duties of the Monitor contained in the May 26, 2008 and June 27, 2008 orders herein continued until today's date and that the Administration Charge created by the May 26, 2008 order shall continue in effect so as to ensure payment of all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel;
>
> AND THIS COURT FURTHER ORDERS that any issues relating to DIP financing are remitted to the Supreme Court;

* September 24, 2008 - Rice J. confirmed the appointment of a receiver of the Company's assets pursuant to Fisgard Liberty's GSA and granted Century a charge on the Company's property in the amount of $98,000, ranking in priority to all other security interests, to secure the cost of the "Altus report".
* February 17, 2009 - The chambers judge below approved fees and disbursements of the Monitor and counsel. The order did not state the amount so approved, but referred to invoices attached to the Monitor's report. We are told these amounted to $118,577.28.
* March 31, 2009 - Pitfield J. approved the sale of the Company's real property holdings to another company, subject to the prior changes in favour of Fisgard Liberty, various encumbrances in favour of the District of North Cowichan, and the security interest created by the Administrative Charge "as it may have been affected" by the order of June 27, 2008.
* May 4, 2009 - Century filed a motion in Supreme Court seeking *inter alia*:

1. A declaration that the monies advanced by Century to The Cliffs Over Maple Bay Investments Ltd. ("Cliffs") on August 7, 2008 was made pursuant to and in accordance with the terms of a valid and enforceable court order dated June 17 [*sic*], 2009 (the "DIP Order");
2. A declaration that an appeal setting aside the DIP Order does not affect the priority of the security held by Century for funds advanced prior to the appeal under the terms of the DIP Order. [Emphasis added.]

* May 5, 2009 - Fisgard Liberty filed a motion seeking an order that its mortgage and GSA charged the Company's property in priority to any claims or interests of Century or Lawson, an inquiry as to the amount Century had advanced to Cliffs, and an order for the delivery up to Fisgard Liberty of all amounts of such advance in the possession of Century or Lawson.
* June 30, 2009 - After hearing both motions on May 12, the chambers judge issued reasons, indexed as 2009 BCSC 869, in which he formulated the issues before him as follows:

1. Was Century's advance of funds to Cliffs made in accordance with the terms of the DIP Order?
2. Does the successful appeal of the DIP Order deprive Century of priority for advances already made pursuant to the order? [Emphasis added.]

He concluded that the "appeal term" in Century's commitment letter had been intended to be a condition of the financing, that Century had not been entitled to waive it unilaterally or indeed without further order, and that:

> ... the August 7, 2008 advance of $500,000 was not authorized under the terms of the DIP order. Thus Century is not entitled to priority on the funds claimed. As Fisgard/Liberty are the first and second mortgagees of Cliffs, they are entitled to priority of the funds in question, with the exception of the amount of $98,000 spent on the Altus appraisal report, which is not in dispute by agreement between the parties. [At para. 51; emphasis added.]

Having answered the first issue in the affirmative, the judge found it unnecessary to go on to consider the second question. In his words, "Century's priority for advances made pursuant to the order is lost because I have concluded that those advances are not in compliance with the terms of the order." [Emphasis mine.] The judge's order of June 30, 2009 stated in material part:

> THIS COURT ORDERS that

1. The advance of $500,000 by Century, on or about August 7, 2008, to Cliffs Over Maple Bay Investments Ltd. ("Cliffs") (the "Funds"), was not authorized under the terms of the Order of this Court dated June 27, 2008.
2. Century is not entitled to priority over the Funds except with respect to the amount of $98,000 incurred in connection with the Altus appraisal report.
3. Fisgard and Liberty are entitled to priority over the Funds, except with respect to the amount of $98,000 incurred in connection with the Altus appraisal report.
4. Nothing in this Order affects the entitlement, if any, of Lawson Lundell LLP, to a solicitor's lien over all or part of the Funds in its trust account, which shall be determined on a separate motion.
5. Fisgard/Liberty are entitled to their costs of this application. [Emphasis added.]

* In November 2009, Lawson and Fisgard Liberty filed motions which the chambers judge heard on November 24 and 26. Lawson sought a declaration that it was entitled to "payment of its outstanding accounts from the funds secured by the Administrative Charge granted herein by order of the Court on May 26, 2008", and to a solicitor's lien "over funds held in its trust account to the credit of the Petitioner [Cliffs] in an amount to be determined", and costs. For its part, Fisgard Liberty sought an order that:

1. Century Services Inc. ("Century") pay to Fisgard and Liberty the sum of $239,860.31, together with interest on that sum from the date of making of the Advance by Century to The Cliffs Over Maple Bay Investments Ltd. ("COMB") in or about August 2008.
2. Alternatively, an accounting to determine that portion of the $500,000 Advance which was actually paid into the hands of COMB in or about August 2008, and an order that Century pay to Fisgard and Liberty an amount calculated by deducting from the $500,000 Advance;

    a) the sum of $162,139.69 held in trust by [Lawson];
    b) the sum of $98,000 incurred in connection with the Altus appraisal report; and
    c) that amount determined on an accounting to have been actually paid into the hands of COMB from the Advance.

3. Lawson pay to Fisgard and Liberty the sum of $162,139.69, together with interest on that sum from the date of payment of those funds into Lawson's trust account in or about August 2008.

4. An accounting as to funds received into and/or paid out of Lawson's trust account in connection with the Advance and the *CCAA* proceeding.
5. An order that Lawson pay to Fisgard and Liberty any sum held by Lawson for the benefit of or in connection with COMB other than the sum referred to in paragraph 3. ...

The Chambers Judge's Reasons

7 The chambers judge issued reasons dated March 25, 2010 that are indexed as 2010 BCSC 389. After describing the events I have summarized, he reviewed the amounts relevant to Lawson's claim:

> In addition to its claim of solicitor's lien, Lawson Lundell seeks a declaration that it is entitled to payment of its outstanding accounts from the administrative charge created in the Initial Order.
>
> To date, Lawson Lundell has been paid $15,700.70 by the Cliffs for legal fees and disbursements incurred in this matter. On June 26, 2008, Lawson Lundell rendered a bill in the amount of $7,291.34 for which it was paid in full. On August 18, 2008, Lawsons rendered a bill in the amount of $144,822.94 to the Cliffs for legal services and disbursements incurred up to that date in this matter, of which $8,409.36 has been paid. Thus, Lawson Lundell is owed $136,413.58 on account of that bill. Interest continues to accrue on this sum at 12% per annum.
>
> Since August 18, 2008, Lawsons has continued to perform work for the Cliffs, and as of January 5, 2009, had recorded unbilled work in progress in the amount of $50,516.29 inclusive of disbursements, but not any applicable taxes. [At paras. 30-2.]

8 He described the issues before him as follows:

1. Does *res judicata* bar Century from claiming entitlement to the Funds?
2. Were the Funds "advanced" by Century to the Cliffs? Did the Cliffs ever own or possess the Funds?
3. Alternatively, are the Funds impressed in equity with a trust in Century's favour? If the Funds are subject to a trust, does this defeat Fisgard's claim?
4. Is Lawson Lundell entitled to a solicitor's lien over the Funds?
5. Is Lawson Lundell entitled to access the residue of the administrative charge on account of its fees and disbursements? [At para. 33.]

Items 4 and 5 will be the subject of our second hearing in this proceeding.

Res Judicata

9 The chambers judge's analysis of *res judicata* began at para. 34 of his reasons. Fisgard Liberty contended that any claim by Century to the funds in trust was barred by both issue estoppel and cause of action estoppel in light of the chambers judge's earlier finding that Century's "advance of funds to Cliffs" on August 7, 2008, had violated the DIP Order. That the advance had indeed oc-

curred was also reflected on the face of the order, which stated that "The advance of $500,000 by Century ... to [Cliffs] was not authorized" under the June 30 (DIP) Order, and that "Fisgard and Liberty are entitled to priority over the Funds." No appeal had been taken from that order. As a result, the lenders submitted, it was not open to Century to assert arguments that could and should have been raised at the hearing on May 12, 2009, nor to attack collaterally what was said to be a final order, i.e., the order of June 30, 2009 declaring Fisgard Liberty's priority over the funds.

10 The chambers judge reviewed the law relating to issue estoppel, which he noted (citing *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44, [2001] 2 S.C.R. 460) applies only where the question said to be previously decided was "distinctly put in issue and directly determined by the court" at the previous hearing. (See also *R. v. Van Rassel* [1990] 1 S.C.R. 225 at 238.) After reviewing the motion material filed prior to the hearing on May 12, 2009, his earlier reasons for judgment and the resulting order of June 30, 2009, the judge concluded that what he had considered and decided on the previous occasion was limited to the "construction of a clause in the commitment letter, whether the loan was made in compliance with the required terms and conditions, and the relative priorities Century and Fisgard held in relation to those funds as a result of the advance having been made in a manner contrary to these terms and conditions." He continued:

> It is clear that issue estoppel does not bar what Fisgard itself characterized as Century's "new arguments", based on unjust enrichment and the law of trusts. The beneficial ownership of the funds was not a question decided at the May 12, 2009 hearing, nor was it raised in the parties' arguments or the reasons of this Court. Thus, it cannot be said that this question was "distinctly put in issue and directly determined" at that time. Neither party raised, nor did the Court address, any party's equitable interest in or entitlement to the funds at the previous hearing.
>
> Further, I find that Century is not barred by issue estoppel from arguing that the Funds were never advanced to the Cliffs. The previous hearing only addressed priorities within the context of the DIP charge, not at large.
>
> Finding that Fisgard was entitled to "priority" over the Funds insofar as the terms of the DIP Order were concerned was not a finding on the issue of ownership. A "priority" is distinct from an *in rem* interest in property: *Dinning v. Workmen's Compensation Board*, [1932] 1 D.L.R. 373 at 378 (B.C.C.A.). A priority is not a property right; rather, it is a relative or comparative term, a concept which is legally distinct from that of ownership or title: *Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Ltd.* (1983), 49 Nfld. & P.E.I.R. 181 at 226, *aff'd.* on other grounds (1985), 56 Nfld. & P.E.I.R. 91 (Nfld. C.A.), *aff'd.* [1988] 1 S.C.R. 1085. [At paras. 45-7; emphasis added.]

11 The chambers judge also rejected Fisgard Liberty's submission that his order of June 30 had conclusively established that Century had not retained "title" to the funds. In his analysis, issues of "ownership" and the "impact of legal and equitable principles beyond the narrow scope of the priority granted in the DIP order itself" had not been argued and were simply "not in the contemplation of the Court" at the time of the previous hearing.

12 Alternatively, if he was wrong and issue estoppel was applicable in the circumstances, the chambers judge said he would exercise his discretion to refuse to apply the doctrine where it would work an injustice. Again in his words:

> These proceedings are not the "one shot" trial of an action, and of necessity have required multiple hearings. Great care must be taken in applying *res judicata* to proceedings in the same action, as distinct from separate actions between the same parties: *Talbot v. Pan Ocean Oil Corp.* (1977), 3 Alta. L.R. (2d) 354 at 360 (C.A.).
>
> Further, the key finality rationale which was held in *Danyluk* to underpin *res judicata* is of limited weight in the present circumstances, given that Fisgard knew that issues surrounding Lawson Lundell's entitlement to a solicitor's lien would require a subsequent application relating to the Funds, and that no conclusive finding as to their ultimate disposition had been made in my June 30 reasons.
>
> I do not accept that Century is precluded from advancing its claim. The public interest in ensuring that justice is done on the facts of this case requires entertaining the parties' submissions on the merits. [At paras. 52-4; emphasis added.]

13 The chambers judge then turned to cause of action estoppel. Unlike issue estoppel, he noted, this principle does not require that the issue have been directly raised and decided by the court previously. The classic statement to this effect is found in *Henderson v. Henderson* (1843) 3 Hare 100, [1843-60] All E.R. 378, where Wigram, V.C. stated:

> In trying this question, I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time. [At 381-82; emphasis added.]

14 The chambers judge noted that "some flexibility" had been introduced to cause of action estoppel recently in *Hoque v. Montreal Trust Co. of Canada* (1997) 162 N.S.R. (2d) 321 (C.A.), where it was suggested that the language in *Henderson* was "somewhat too wide" and that the better principle was that "those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred." (At para. 37.) He also referred to *Buschau et al. v. Rogers Communications Inc.* 2003 BCSC 1718 (*rev'd on other grounds*, 2004 BCCA 142), where the Court observed that the rule in *Henderson* is of limited application to interlocutory applications

and that judicial efficiency will often "be well served by allowing interlocutory applications to deal with only small parts of a larger picture." (Para. 36.)

15 The chambers judge was not satisfied that cause of action estoppel had any application in the circumstances before him. This was not an instance, he said, in which Century was seeking any relief against Fisgard Liberty - indeed there was "no cause of action or claim asserted by Century against Fisgard". Instead, the dispute involved three competing creditors in a dispute over a pool of money. Further, the question litigated at the prior hearing had not decided the ultimate disposition of the funds. (Para. 65.) In the circumstances, the chambers judge found that cause of action estoppel had not been established and that in any event, he would again have exercised his residual discretion to refuse to apply the doctrine:

> I reiterate my earlier conclusion that it would be against the interests of justice if Century were precluded from arguing its legal and equitable entitlement to the funds, given that the issue was not considered, and that the fundamental "finality" consideration which underpins *res judicata* is of limited force in the circumstances. [At para. 68.]

Were the Funds Advanced to Cliffs?

16 Being satisfied that neither issue estoppel nor cause of action estoppel applied to bar Century's motion, the chambers judge turned next to consider whether Century had in fact "advanced" the $500,000 *tranche* of DIP financing to the Company or its agents, thus (in Fisgard Liberty's submission) losing any rights to those funds. Even though Century had purported to advance the funds in breach of the appeal provision in the commitment letter, the chambers judge found that they had remained subject to the conditions specified in the DIP Order - that the Monitor authorize or request the release of funds and that the Monitor in consultation with the Company request Lawson to pay the funds out. The chambers judge said there was "no evidence" the Monitor had authorized or requested the funds and that accordingly, they had remained subject to a trust condition that would now never be satisfied. In his analysis:

> Where funds have been released by a lender to a borrower's solicitor with trust conditions governing their use, they do not become the property of the borrower until the trust conditions are satisfied. If the trust conditions are not satisfied, unspent funds must be returned to the lender. [At para. 78.]

This conclusion, the Court said, defeated the claims of both Fisgard Liberty and of Lawson. (Para. 89.)

Alternative Conclusions: Trust and Attachment

17 Century argued in the alternative that Fisgard Liberty and Lawson would be unjustly enriched if they obtained the funds, but the chambers judge found a "clear juristic reason" - the existence of the financing agreement between Cliffs and Century, the foreclosure proceedings taken against Cliffs, and Lawson's "purported statutory entitlement" to a solicitor's lien pursuant to the *Legal Profession Act* - for any deprivation Century might have suffered if the funds had been advanced and Fisgard Liberty or Lawson were to receive them. (Para. 93.)

18 In the further alternative, Century submitted that regardless of whether the funds had been advanced to Cliffs, they had been subject to a *Quistclose* trust in Century's favour: see *Barclay's*

Bank Ltd. v. Quistclose Investments Ltd. [1970] A.C. 567 (H.L.). It was clear that such trusts are subject to the requirement of the three certainties (see *Twinsectra Ltd. v. Yardley* [2002] 2 A.C. 164, [2002] 2 All E.R. 377 (H.L.) at paras. 70-1, 101; *Re Westar Mining Ltd.* 2003 BCCA 11 at para. 12; *Giles v. Westminster Savings Credit Union* 2007 BCCA 411 at para. 31.) With respect to certainty of intention, the Court reviewed Century's commitment letter, which stated that the purpose of the DIP loan was to further the "construction of a golf course and development of the home lots and source an irrigation source for the golf course." This purpose had the effect of restricting the Company's freedom to use the funds. (Para. 105.) The surrounding circumstances and the terms of the DIP order shed additional light on the parties' intention that the funds were not to be used to extinguish the Company's general liabilities or wind up the project. The chambers judge found as a fact that the terms of the commitment letter disclosed a mutual intention on the part of Century and Cliffs to create a *Quistclose* trust. (Para. 110.)

19 Being satisfied that the second certainty - certainty of subject matter - was shown, the chambers judge found that the commitment letter provided adequate clarity for the Court to determine that if the funds had been provided either to Fisgard Liberty or Lawson following the demise of Cliffs' development project, the funds would have been misapplied, i.e., the trust would have been breached. Thus, he said, certainty of objects was also made out.

20 The next question was whether, again assuming the funds had been advanced to Cliffs, a *Quistclose* trust alone could defeat Fisgard Liberty's registered security interest. The chambers judge accepted that a *Quistclose* trust is a form of resulting trust, which comes into existence when money is advanced rather than at the time the trust is judicially declared to exist: see *Twinsectra, supra*, at paras. 100-102. Existing case law suggested that a constructive trust is not defeated by a prior security interest registered under the *PPSA* (see *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.* 2000 BCCA 458 and *Kimwood Enterprises Ltd. v. Roynat Inc.* (1985) 15 D.L.R. (4th) 751 (Man. C.A.)), but it was unclear whether the same was true of resulting trusts.

21 The chambers judge found it unnecessary to decide this point, since in his analysis, the *PPSA* security interest of Fisgard Liberty had never "attached" to the funds and could therefore not defeat or rank ahead of Century's "equitable ownership". (Para. 121.) He cited various authorities for the proposition that before an interest may attach, the debtor must have something more than mere possession of the collateral or an interest that is "trifling" or "completely contingent" in nature. (See paras. 122-29.) Since the advances to be made under the DIP loan facility had been conditional upon the Monitor's making a written request, he concluded that the Company had not had sufficient rights in the collateral for Fisgard Liberty's security interest to have attached, regardless of whether the funds had been "advanced" or not. In his analysis:

> ... The will of a third party (the Monitor) is an external condition upon which the Cliffs' entitlement to the money is entirely dependent, and is therefore a barrier to the Cliffs obtaining "rights in the collateral" beyond a mere expectation or contingent right to future enjoyment.
>
> The Cliffs certainly had a right to receive the collateral; but this right was contingent upon the Monitor making a request in writing which has not and never will be made. Century held the entirety of the beneficial interest in the Funds through the *Quistclose* trust; the Cliffs never had actual possession of the Funds, had no control over their disposition, and could not compel Lawson Lundell to

> disburse them. The agency of the Monitor was required. In these circumstances, I find that the Cliffs did not have sufficient "rights in the collateral" for Fisgard's security interest to attach. [At paras. 131-32; emphasis added.]

22 In the result, the chambers judge's order, dated March 25, 2010, stated in material part:

> 1. The Fisgard and Liberty Motion is dismissed;
> 2. Lawson pay the sum of $162,276.33 held in Lawson's trust account to the credit of The Cliffs Over Maple Bay Investments Ltd. (the "Funds") to Century;
> 3. Lawson is entitled to payment of $81,422.72 on account of its fees and disbursements from the funds secured by the Administrative Charge granted herein by Order of the Court on May 26, 2008, unless an application for further relief in this regard is brought within 30 days of March 25, 2010;
> 4. Lawson's application for a declaration that it is entitled to a solicitor's lien over the Funds is dismissed; and
> 5. the parties each bear their own costs of the Lawson Motion and the Fisgard and Liberty Motion.

On Appeal

23 Fisgard Liberty advanced the following grounds of appeal in its factum:

> 1. The learned Chambers Judge erred in law in determining *res judicata* did not bar Century from claiming entitlement to the Advance at the November 2009 hearing.
> 2. The learned Chambers Judge committed an error of law in determining the Fisgard/Liberty's security interest did not attach to funds in Lawson's trust account and with Century.
> 3. The learned Chambers Judge erred in law in holding that the funds in Lawson's trust account were subject to a *Quistclose* trust.
> 4. The learned Chambers Judge erred in law in finding that the funds in Lawson's trust account were not advanced to Cliffs.
> 5. The learned Chambers Judge erred in law in determining Lawson was entitled to the administration charge and that the charge had not been used up.

I propose to deal with item 1, and then with items 2, 3 and 4 together. Item 5, together with Lawson's grounds of appeal, will be addressed following the later hearing.

Res Judicata

24 The appellant Fisgard Liberty acknowledged that whether *res judicata* should have applied to bar Century's motion is a question of law, reviewable on a standard of correctness. The only exception relates to the chambers judge's exercise of discretion not to apply the principle even if the circumstances of this case fell within its ambit. The appellant notes the well-known formulation of the circumstances in which an appellate court may interfere with such a decision - i.e., if the court below proceeded on a wrong principle or failed to give weight, or sufficient weight, to relevant considerations: see *Friends of the Old Man River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at 76-7; *Stone v. Ellerman* 2009 BCCA 294, (2009) 92 B.C.L.R. (4th) 203 at para. 94. We were also referred to a more recent formulation, which mandates intervention if the court below has

misdirected itself as to the applicable law or made a palpable error in its assessment of the facts: see *British Columbia (Ministry of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R. 371 at para. 43.

25 The policy objectives underlying *res judicata* generally are well-known and have been discussed at length in the jurisprudence and in the academic context: see for example, Donald J. Lange, *Res Judicata in Canada* (3rd ed., 2010), chapter 1; *Henderson v. Henderson*, *supra*; *Hoystead v. Taxation Commissioner* [1926] A.C. 155 (J.C.P.C.); *Angle v. Minister of National Revenue* [1975] 2 S.C.R. 248; and *Danyluk v. Ainsworth Technologies Ltd.* 2001 SCC 44, [2001] 2 S.C.R. 460. The authors of Spencer Bower and Turner, *The Doctrine of Res Judicata* (4th ed., 2009), state:

> Two policies support the doctrine of *res judicata* estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. Maugham L.C. said:
>
> > The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

26 Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be 'twice vexed' (*bis vixari*) for the same cause, must be balanced against the other "fundamental principle" (see *Hoque* at para. 21) that courts are reluctant to deprive litigants of the right to have their cases decided on the merits: see *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 55; *Revane v. Homersham* 2006 BCCA 8, 53 B.C.L.R. (4th) 76 (C.A.) at paras. 16-7; Lange at 7-8.

27 *Res judicata* takes two forms in modern practice, cause of action estoppel (still sometimes called *res judicata*) and issue estoppel. Lange summarizes them as follows:

> In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding. [At 1.]

The distinction was described in more elaborate terms by Lord Denning, M.R. in *Fidelitas Shipping Co., Ltd., v. V/O Exportchleb* [1965] 2 All E.R. 4 (C.A.):

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment 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. Transit in *rem judicatam* ... But within one cause of action, there may be several issues raised which are necessary for the 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, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And within one is-

> sue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. ... But this again is not an inflexible rule. It can be departed from in special circumstances. ... [At 8-9; quoted with apparent approval in *Grandview v. Doering*, *infra*.]

28 Although grounded in the same basic considerations, each form involves, or has traditionally involved, criteria that have been expressed in slightly different terms. The traditional criteria for cause of action estoppel, confirmed in Canada in *Angle, supra*, were summarized by Chief Justice Hewak in *Bjarnarson v. Manitoba* (1987) 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, *aff'd.* (1987) 45 D.L.R. (4th) 766 (Man. C.A.), as taken from *Grandview v. Doering* [1976] 2 S.C.R. 621:

> 1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
> 3. The cause of action and the prior action must not be separate and distinct; and
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [At para. 6; emphasis added.]

It is perhaps unnecessary to state that the doctrine contemplates two "causes" - the first having ended in a final judgment that bars a "second claim for the same cause": see *Mohl v. University of British Columbia*, 2006 BCCA 70 at paras. 23-4. In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy: see also Lange at 147; *Comeau v. Breau* (1994) 145 N.B.R. (2d) 329 (C.A.) at para. 18; and *Letang v. Cooper* [1965] 1 Q.B. 222 (C.A.) at 242-43.

29 Presumably, it is the breadth of the fourth requirement listed above ("could have been argued") that leads Fisgard Liberty to argue that cause of action estoppel can have application in the case at bar. The appellant cites four cases for the proposition that "both issue and cause of action estoppel apply to subsequent motions in the same proceeding on the same questions finally decided in an earlier motion". Three of these authorities - *Air Canada v. British Columbia* (1985) 21 D.L.R. (4th) 685 (B.C.C.A.), *Heather's House of Fashion Inc. (No. 2) (Re)* (1977) 24 C.B.R. (N.S.) 193 (Ont. S.C.J.), and *Las Vegas Strip Ltd. v. Toronto (City)* (1996) 30 O.R. (3d) 286 (Gen. Div.) - do not in my view support this proposition. *Air Canada* was decided on the basis of issue estoppel (see 697), and *Heather's* and *Las Vegas* involved proceedings that resembled separate causes of action (in the substantive, rather than the formal, sense), as opposed to steps taken in the same proceeding. The fourth case, *Re Agil Holdings Ltd.;* (also indexed as *Scherer v. Price Waterhouse* (1985), [1985] O.J. No. 881, 32 A.C.W.S. (2d) 259 (Ont. H.C.J.), does take a broader view than the prevailing one, and illustrates the difficulty in some cases of distinguishing between cause of action and issue estoppel.

30 While it is arguable that the other conditions associated with cause of action estoppel exist in this case, I am not persuaded the chambers judge erred in concluding that because of the procedural context of the two orders - in particular, the fact this is a "dispute over a pool of money between three competing creditors" in one proceeding - the doctrine does not apply. At the very least, one would have to bend it considerably out of shape to fit the facts with which we are concerned. Given my view that issue estoppel applies, it is not necessary to go to these lengths.

31 Turning then to issue estoppel, I note the three traditional "tests" adopted by the Supreme Court of Canada in *Angle*, namely:

> (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. ... [At 254; emphasis added.]

There is also the well-known formulation of issue estoppel given by Middleton J.A. in *McIntosh v. Parent* [1924] 4 D.L.R. 420 (Ont. C.A.):

> 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. [At 422; emphasis added.]

32 The narrow wording ("directly determined") adopted in these and other authorities, however, has not been construed as strictly as one might expect. In *Danyluk,* Binnie J. for the Court stated at para. 54 that issue estoppel applies "to the issues of fact, law, and mixed fact and law that are necessarily bound up [my emphasis] with the determination of that 'issue' in the prior proceeding". This would seem to echo the formulation provided by Lord Shaw in *Hoystead*:

> ... Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.
>
> Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been

> taken. The same principle of setting parties' rights to rest applies and estoppel occurs. [At 165-66; emphasis added.]

The wording used in *Hoystead* (where it was held that issue estoppel applied not only to the admission of a fact fundamental to the first decision, but also to "an erroneous assumption as to the legal quality of that fact") which I have underlined above was approved in *Angle, supra*, at 255, and by this court in *Morgan Power Apparatus v. Flanders Installations Ltd.* (1972) 27 D.L.R. (3d) 249, at 252. (See also *Hill v. Hill* (1966) 57 D.L.R. (2d) 760 (B.C.C.A.) at 764; *Insurance Co. of the State of Pennsylvania v. Global Aerospace Inc.* 2010 SKCA 96 at para. 78; *Foster v. Reaume* [1927] 1 D.L.R. 1024 (Ont. S.C., App. Div.) at 1033; *Prince v. T. Eaton Co.* (1992) 91 D.L.R. (4th) 509 (B.C.C.A.) at 522.)

33 Lange (see 58-65 and the cases cited therein) suggests that an "extended form" of issue estoppel has been adopted in some provinces such that any question that could have been decided or could have been raised at the first proceeding, will be barred in the second. However, this approach has not received appellate approval in this province, and when it has been used, seems not to have led to a different result than the traditional approach. (See the discussion in *Re Agil Holdings, supra*, and in Lange at 62-3.) Neither party relied on the extended form of issue estoppel in the case at bar.

34 Century submits that both the requirement of finality and that of the "same question" are not met in the case at bar. Regarding finality, it contends at para. 59 of its factum:

> ... to the extent [the chambers judge's] Order addressed entitlement to the Trust Funds, Century submits that it was not final. Cause of action (and issue estoppel) only apply when the court has no further jurisdiction to hear the issues or to vary or rescind its decision. In this case [the chambers judge] retained jurisdiction to consider entitlement to the Trust Funds. To the extent [his] later decision contradicted his earlier one, the later decision is to be taken as the final one on the basis that it is the most informed expression of the Court's opinion. [Emphasis added.]

With respect, if by this Century is suggesting that having made a final order, a court may subsequently adopt a "more informed opinion" of the matter and proceed to contradict its earlier order, I must disagree. Obviously, this proposition flies in the face of the principle of finality which is the essence of *res judicata.* Nor did the court below "retain jurisdiction" to vary or rescind its decision: only Lawson's claim, which had the potential of trumping that of Fisgard Liberty, was left for another day. The issue of priority as between Century and Fisgard Liberty was finally determined and the Court did not have jurisdiction to rehear it or to vary or rescind its order.

35 In connection with the "same question" criterion, Century naturally relies on the chambers judge's observation that the issue of the "ultimate disposition of the funds" was not decided in the first proceeding. It says that since "issues of ownership" were not in the Court's contemplation, Century's position in the second hearing did not amount to a collateral attack on the first order; that the two applications concerned "different facts altogether"; that evidence advanced at the second hearing was not known to Century (although Mr. Roberts on behalf of Lawson suggested it was available) until Lawson's affidavit evidence was filed; and that:

> The two hearings related to separate and distinct causes of action, as the First Hearing sought a declaration in respect of the parties' priorities in respect of

> Cliffs' estate generally, whereas the Second Hearing concerned the parties' potential entitlement to the Trust Funds in particular.

36 It is certainly true that the two hearings dealt with different issues. The question is whether the issues of advance, attachment and trust were "necessarily bound up" with or "fundamental to" the determination of priority as between Fisgard Liberty and Century. In my opinion, it is clear that to the extent the earlier order addressed priority, it assumed "entitlement". As a matter of logic, the question of whether the advance had been validly made to Cliffs (through its agent Lawson) should have been raised and determined before or as part of the determination of priority over the advance as between Century and Fisgard Liberty. A finding that Fisgard Liberty was entitled to priority in respect of the funds would seem to be "bound up with" or indeed to rest on the 'foundation' that the funds had indeed been advanced to Cliffs. (Indeed, it was precisely because Century had made an advance in violation of the 21-day period that it had lost its priority in the first hearing.) In the wording used by Lange, entitlement or ownership was part of the "latent structure supporting the express question [of priority] by virtue of an ... assumed recognition of that structure." (*Supra*, at 47.) If the funds had not been advanced, the question of priority would have been moot. Priority was not a "threshold issue", as counsel for Century suggests; it was the ultimate issue.

37 In this respect, the case at bar resembles *Zimbel Estate v. Pascoe* (1992) 80 Man.R. (2d) 142 (Q.B.), where a party who had participated in a proceeding to interpret a will was barred from challenging the validity of the same will in a subsequent proceeding. The Court noted that "there is an underlying assumption that parties participating in an action for interpretation of the will have inferentially conceded its validity. Courts do not construct invalid wills. If there is some issue as to validity, that issue must first be determined." The Court also quoted the following passage from the 1969 edition of Spencer Bower and Turner, *Res Judicata*:

> Whenever it is shown that the party against whom a judicial decision is ultimately pronounced omitted to raise by pleading, argument, evidence, or otherwise some question, or issue, or point which he could have raised in his favour by way of defence or support to his case without detriment to his position or interests in the pending, or in future, proceedings, and which, therefore, it was his duty (in a sense) to have then raised, the adverse general decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question, issue, or point so omitted to be raised, just [as] much as if it had been expressly raised by the party, and expressly determined against him. And this is so whether the question or issue is simply passed over through inadvertence, or is made the subject of express or implied assumption or admission. [At 160.]

38 Similarly, in *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 2006 ABCA 337, the Alberta Court of Appeal held that the defendant's apparent acceptance of the validity of certain trusts in a receivership proceeding barred it from challenging the validity of the trusts in a subsequent action. (See also *Hill v. Hill* (1966), 57 D.L.R. (2d) 760 (C.A.) at 769; *R. v. Duhamel* (1982) 33 A.R. 271 (C.A.) at 277-8 (*aff'd.* [1984] 2 S.C.R. 555.); Spencer Bower and Turner (2009), *supra*, at s. 8.09, 8.10 and 8.12, and cases cited therein.)

39 Ms. Buttery contends on behalf of Century that at the time of the first hearing in May 2009, her client was not aware of the amount of funds Lawson was holding in trust - a fact she says was

important because Century needed to know whether the question of "entitlement" was "worth fighting about". Since it was clear, and the first order contemplated, that Lawson would be asserting entitlement to a solicitor's lien at a later date, she says it would be "incongruous" if other parties (i.e., Century) would not have been able to assert claims at a later date as well. In her submission, there was nothing in the record to suggest that the "super-priority" question (i.e., priority as between Fisgard Liberty and Century as the DIP lender) decided at the first proceeding was intended to be the only issue, or that its determination was to bar any of the parties from raising questions as to whether an advance had taken place and whether Cliffs' interest had attached. Although the parties' notices of motion and the first order itself had all referred to "advances" as though they were an accepted fact, Ms. Buttery emphasized that counsel were dealing with an unusual situation (i.e., the reversal of a stay granted under the *CCAA* and the finding that the Supreme Court's authorization of DIP financing was invalid). This situation gave rise to many uncertainties in the course of the 'unwinding' of the restructuring, and counsel found themselves having to adapt to facts as they unfolded. Thus, it is implied, the requirements of due diligence should not be applied too stringently in this instance.

40 These arguments may bear on the issue of the chambers judge's discretion, but I do not find them persuasive on the prior question of whether issue estoppel is technically applicable to this case. If counsel at the first hearing intended the Court to deal with only one of many issues, they should have made that clear to the other parties and to the Court, which may have had an opinion on the subject. They should have begun with what logically was the first issue - were the funds advanced? - and left the ultimate issue - which creditor has priority? - for later if that course was acceptable to the Court, and if it became necessary. They should have reserved not only the question of Lawson's entitlement in the order but Century's - a course that would have placed the problem of "conflict" front and centre. They should have been much more restrictive in the wording of the first order, ensuring that the Court would not be embarrassed by what appears to be a contradiction of its first order by the second order. If nothing else, this case is a cautionary tale for practitioners in the insolvency area about the importance of clearly informing the Court as to the issues being raised, and properly stating in the Court's order exactly what was determined and what was not.

41 In my respectful view, the question of Cliffs' "entitlement" to the funds advanced by Century was, to paraphrase the reasoning in *Hoystead*, a "point fundamental to the [first] decision ... assumed by [Fisgard Liberty] and traversable by [Century] which was not traversed." I conclude that the chambers judge erred in permitting Century to re-open the question, and in ruling that its arguments were not barred by issue estoppel.

42 This brings us to the exercise of the chambers judge's discretion not to apply issue estoppel, a question that is also dependant on case law that is not completely consistent and in which subtleties abound. In *Danyluk*, the Court ruled that it was an error of principle not to address the factors for and against the exercise of the discretion not to apply issue estoppel and that "The list of factors is open ... The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." (Para. 67.) The most important of these, the Court said, was the potential for injustice since, as noted by Jackson J.A. in dissent in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* [1993] 6 W.W.R. 1 (Sask. C.A.):

> The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard. [At 21.]

43 Binnie J. was referring, however, to the tribunal-to-court context rather than the court-to-court context. He noted the Court's earlier decision in *G.M. (Canada) v. Naken* [1983] 1 S.C.R. 72, where it was said that the discretion not to apply issue estoppel is "very limited in its application'". A broader discretion, Binnie J. stated, was warranted in relation to the decisions of administrative tribunals. This distinction was made in *Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46, where the Court emphasized that *Danyluk* had not modified *Naken, supra,* and that potential injustice becomes relevant only where, having exercised due diligence, a party has not received a "full and fair hearing". (At paras. 41-2; my emphasis.)

44 In *Proctor & Gamble Pharmaceuticals Canada, Inc. v. Canada (Minister of Health)* [2004] 2 F.C.R. 85, Rothstein J., then of the Federal Court of Appeal, suggested for the majority that the discretion is limited to "special circumstances" (citing *Henderson v. Henderson, supra*, at 115), which would include fraud, misconduct or the discovery of decisive fresh evidence that could not have been adduced at the earlier proceeding by the exercise of reasonable diligence, although "fairness considerations could cancel the exercise of discretion." (Para. 29.) In *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988) 47 D.L.R. (4th) 431 (B.C.S.C.), Chief Justice McEachern described the exception as requiring "some overriding question of fairness" necessitating a rehearing. (At 438.)

45 Fisgard Liberty contends that Century made no argument and led no evidence at the second hearing as to any "special circumstances" that would justify the chambers judge's decision declining to apply *res judicata* in this case. Whilst acknowledging that considerations of fairness are relevant, the appellant emphasizes that the first hearing occupied an entire day, that the parties filed extensive written submissions, and that both are "sophisticated commercial entities". Not surprisingly, Century responds that if the chambers judge "did not decide the ultimate disposition of the funds" and if the issues raised in the second hearing were "simply not in the contemplation of the court" in the first hearing (as the chambers judge himself suggested), it would be unfair if Century were held to be bound by the earlier order.

46 It will be recalled that the chambers judge enunciated two reasons for finding that it would be contrary to justice to apply issue estoppel in this case. The first was that these proceedings are not the "one-shot" trial of an action and that "great care" should be taken in applying *res judicata* to proceedings in the same action. On this point, he cited *Talbot v. Pan Ocean Corp.* (1977) 3 Alta.L.R. (2d) 354 (C.A.) at 360, where the Court was discussing the fact that in many interlocutory applications - e.g., an application for an interim injunction - the court proceeds on assumed or incomplete facts. Obviously, such applications do not give rise to final decisions, and *res judicata* has no place. (For this reason, it seems to me that the comment quoted by the chambers judge from *Buschau v. Rogers* (see para. 14 above) cannot be correct.) The Court in *Talbot* did not suggest that estoppel is to be applied with "great care" in subsequent motions once a final determination has been made on an issue; nor did it make any mention of the residual discretion not to apply issue estoppel.

47 The second reason given by the chambers judge was that the principle of "finality" underlying *res judicata* was of "limited weight" in this instance, given that Fisgard Liberty knew a subsequent application would be necessary to decide Lawson's claim to the funds, and that no "conclusive

finding as to their ultimate disposition" had been made in the order of June 30, 2009. As has been seen, however, Fisgard Liberty's status was squarely raised at the first hearing and Fisgard Liberty had no reason to think that the Court's declaration of priority over Century was anything less than a "conclusive finding" on that question.

48 We are of course not exercising our discretion as a matter of first instance. The question for us is whether the chambers judge proceeded on a wrong principle or failed to give weight or sufficient weight to valid considerations in exercising his discretion as he did. In my view, he did err in failing to recognize the finality of his earlier order as between Century and Fisgard Liberty and in failing to give consideration to the narrowness of the circumstances in which his discretion could properly be exercised. It cannot be said "special circumstances" existed here: this was a monetary dispute between sophisticated lenders that had been decided in favour of one of them, and it was not open to the Court to change its mind in favour of a party that had thought of additional arguments that it could and should have mounted at the previous hearing. No overriding question of fairness was engaged. Indeed, in my view, it would be unfair to permit Century's arguments to prevail. I would allow the appeal on this ground.

"Advance" and "Attachment" Issues

49 In the event I am wrong on the applicability of issue estoppel to this case, however, I turn to the alternative grounds of appeal advanced by Fisgard Liberty, namely that the chambers judge erred in determining that the funds in Lawson's trust account had not been advanced to Cliffs and in finding that the appellant's security interest did not attach to the funds. In my view, these two issues are essentially the same: if the funds were indeed "advanced" to the Company (through its agent Lawson), then, subject to the remaining issue concerning the existence of a *Quistclose* trust, Cliffs would have been entitled to the funds and thus would have had a sufficient interest to which Fisgard Liberty's security could attach.

50 It will be recalled that the chambers judge's order of June 27, 2008 authorized the Company to borrow an amount not exceeding $2,350,000 from Century, "provided that such advances under the DIP Facility will be made in *tranches* not to exceed $500,000, unless permitted by further Order of this Court". The conditions under which such advances would be made were specified:

> ... advances under the DIP Facility shall be made only at the request of the Monitor to the DIP Lender, such advances to be paid to Lawson Lundell LLP "in trust" and to be paid out only on the written request of the Monitor in consultation with the Petitioner [the Company], subject to further Order of the Court.

51 The order also stated that the "DIP Facility" would be on the terms and conditions in the commitment letter, which in turn said the purpose of the loan was to "facilitate further construction of the golf course and development of the home lots and source an irrigation solution for the golf course." A commitment fee of 3% was to be deducted from each advance, "representing the Commitment Fee for the entire Facility and six months' interest for each draw."

52 On or before July 17, 2008, Cliffs and the Monitor signed an "Order to Pay" addressed to Century and its solicitors, Boughton Law Corporation ("Boughton"). The material part of this document stated:

Please accept this as your irrevocable authority and direction to payout [*sic*] of the first advance under the above referenced mortgage loan all taxes, assessments and utilities charged against the Property given as security; property valuation fee, solicitor's charges, accrued interest to interest adjustment date, and other expenses payable, and to pay all prior encumbrances on the Property as follows:

Mortgage Advance Amount	$500,000
Less:	
The Lender's Commitment Fee	70,500
The Lender's Six Month Interest Reserve	54,000
Boughton Law Corporation	
Holdback for estimated legal fees, disbursements and taxes to complete the transaction**	25,000
Net mortgage proceeds under the 1st advance payable to Lawson Lundell LLP "In Trust"	$350,500

Dated this 17th day of July, 2008. [Emphasis added.]

53 On August 7, Boughton remitted its trust cheque to Lawson. Referring to Cliffs as "Borrower" and Century as "Lender", Boughton advised:

> Further to your recent correspondence with ... our office, we enclose our trust cheque payable to Lawson Lundell LLP In Trust in the sum of $350,000.00 representing the advance under the above loan, in accordance with the approved Order to Pay.
>
> The enclosed funds are sent to you on your undertaking not to release any portion of the funds to your client until we have provided you with our written authority that it is in order for you to do so.

The written authority referred to in the second paragraph was given later the same day by an email from Boughton to Lawson, confirming that:

> It is now appropriate pursuant to my instructions to release the monies you have in trust to your client. The only undertaking I impose upon your firm is to pay the due diligence fee of $25000 to Century Services Inc., care of Boughton Law Corporation.
>
> I also confirm that my client has waived the condition requiring no appeals to be filed. [Emphasis added.]

54 The following day, Lawson forwarded its trust cheque in the amount of $25,000 payable to Century. According to the affidavit of Ms. Ferris of Lawson, her firm also disbursed $100,000 to the Monitor, $4,400 to 648962 B.C. Ltd., and $36,000 to Mr. and Ms. Paulin, the principals of Cliffs. (The $100,000 payable to The Bowra Group Inc. represented the costs of preparing the Altus Report, which had been the subject of a specific priority order mentioned earlier.) On August 15, further funds were disbursed by Lawson, leaving the sum of $162,276.33 in its trust account as at November 1, 2009.

55 The chambers judge stated at para. 21 of his reasons that there was "no evidence that the Monitor requested the release of the Funds, as required by the DIP Order and they were never used by the Monitor or the Cliffs." With respect, the Company and the Monitor did sign the Order to Pay and surely an "order" goes even farther than a "request". In my view, it simply cannot be said that the conditions for the advance set forth in the order of June 27, 2008 were not met. I conclude, with respect, that the chambers judge fell into clear error at para. 89 of his reasons in finding that the funds remained held by Lawson on a trust condition "that has not and now never will be satisfied" and that therefore Century was entitled to their return.

Quistclose Trust

56 This leads us to the final alternative argument, acceded to by the chambers judge, that the funds were impressed with a *Quistclose* trust in Century's favour, based on the terms of the commitment letter which were incorporated by reference into the DIP Order of June 27, 2008. The letter described the purpose of the DIP Facility thus:

> 3. PURPOSE: To facilitate further construction of the golf course and development of the home lots and source an irrigation solution for the golf course.
> 8. CONDITIONS: The obligation of Century to make the facility available is subject to and conditional upon each of the following:
>
> a. Court [-] authorized DIP borrowing, with the funds to be used for development purposes as disclosed by the borrower. [Emphasis added.]

57 A *Quistclose* trust is a purpose trust of a very special kind. Waters, Gillen and Smith in *Waters' Law of Trusts in Canada* (3rd ed., 2005) write that such trusts arise "when moneys are loaned by a lending institution expressly for the purpose for which the borrower intends to use the loan." (At 565.) The authors continue:

> These trusts occur when moneys are loaned by a lending institution expressly for the purpose for which the borrower intends to use the loan. The lender advances the moneys on the condition that they are to be held "on trust" by the borrower until the time for expenditure upon the purpose takes place. At that point in time, having the authority of the loan agreement, the borrower applies the moneys to the purpose and becomes a debtor *vis-à-vis* the lender. If the contemplated expenditure upon the purpose does not occur, the moneys are held in trust by the borrower for the lender - that is, ahead of all the unsecured creditors of the borrower. [At 565.]

58 A somewhat narrower description was given in a Canadian case, *Niedner Ltd. v. Lloyds Bank of Canada* (1990) 72 D.L.R. (4th) 147 (Ont. H.C.J.):

> A Quistclose trust is created when A lends money to B for the specific purpose of enabling B to pay its creditors or a specific class of them ["C"]. The money is then impressed with a trust and may not be reached by third parties other than the beneficiaries of the trust. Assuming the purpose of the trust should fail, the money reverts back to the settlor of the trust. ... [At 151; emphasis added.]

59 In fact, *Quistclose* trusts have had a broader application, at least in the U.K. In *The Quistclose Trust in a World of Secured Transactions* (1992) 12 Oxf. U. Leg. Stud. 333, Professor M. Bridge observes that they have arisen in three main situations:

> These cases are, for the most part, centred on three fact patterns, though the authorities relied upon in the *Quistclose* decision itself are confined to the first of these categories. First, A puts in funds B, a debtor, for the purpose of paying C, one of B's creditors. The practical issue here is whether the funds may be retained or recovered by B's trustee-in-bankruptcy. Secondly, A consigns goods to C in response to an order placed by B and A draws on B for payment of the price. The question here is whether the cargo has been appropriated to secure the due payment of the bill of exchange. This transaction can also occur in a two-party form, where A consigns goods to B and then, after so advising B, discounts a bill drawn upon B. Thirdly, A transfers to B, a bank, bills of exchange payable to A in payment for other bills drawn earlier by A upon B. B becomes insolvent before paying the bills drawn upon it. Is B merely indebted to A in respect of the bills transferred to it? Another bank insolvency problem occasionally presents itself where one bank is put in funds to be remitted to another bank and becomes insolvent before the remittance is made. [At 347.]

The author also notes certain characteristics common to the decided cases:

> A characteristic of these cases is the immediacy of the debtor's need for outside sources of funding. The debtor may already be faced with a bankruptcy petition by one of his creditors, who may be a judgment creditor, or he may be poised to abscond to evade his creditors, or already by lying in a debtors' prison. In one case, the money is paid over to the debtor to obtain the release of the payer's property from a sheriff executing on behalf of a judgment creditor of the debtor.

> It does no harm to the payer's case if the money advanced is still capable of being returned *in specie*. This was so in one case where it was a surety who was seeking the return of the money to the payer, who unlike the surety was unaware that the money was being advanced conditionally to save a bank from bankruptcy. In all of these cases, the party paying the money does so on an emergency, rescue basis and the debtor is merely a conduit through whom money is channelled to the outside creditor. In the circumstances, the debtor's possession of the money is far removed from misleading anyone entering into further dealings with him and any benefit accruing to the unsecured general creditors would be of a windfall nature. Nor is the payer, it seems, receiving anything in the nature of a premium or reward for the very high degree of risk attendant upon the transaction being a mere loan. It is therefore difficult to see that the payer receives an unfair advantage over the payee's other creditors, in the period leading up to the bankruptcy, making it unfair to allow him to retain or recover the money as the case may be. [At 348.]

60 Such trusts are the subject of much controversy and academic comment in the United Kingdom, and it appears that they are used mainly there to overcome the vagaries of what Bridge describes as its "antiquated" property security laws (see 345.) Many questions about them remain unanswered, despite the important role played by Lord Millett in explaining them in the academic and judicial contexts: see *The Quistclose Trust: Who can Enforce it?* (1985) 101 LQR 269; *The Quistclose Trust - a Reply* (2011) 17:1 Trusts & Trustees 7. (See also Dennis R. Klinck, *Re-Characterizing the Quistclose Trust: Lord Millett's Obiter Dicta in Twinsectra* (2005) 42 Can. Bus. L.J. 427 at 428-31, and Michael Smolyansky, *Reining In the Quistclose Trust: A Response to Twinsectra v. Yardley* (2010) 16 Trusts & Trustees 558.)

61 The first situation described by Professor Bridge existed in the *Quistclose* case itself, *Barclays Bank Ltd. v. Quistclose Investments Ltd., supra.* It involved a company, Rolls Razor Ltd., that had declared a dividend but was unable to pay it. The company negotiated a loan from Quistclose Investments Ltd. for the purpose of paying it, and the lender paid the money into a specific account at Barclay's Bank for this purpose. Before the dividend could be paid, however, Rolls Razor went into bankruptcy and the bank purported to apply the funds against the bankrupt's outstanding indebtedness to the bank. The House of Lords held that a (resulting) trust had been created for the purpose of paying the dividend, which trust had "failed", entitling the original settler, the lender, to the return of the funds, and ensuring the bank did not enjoy what would have been a windfall.

62 The chambers judge in the instant case began his discussion by noting the most recent leading case in this context, the decision of the House of Lords in *Twinsectra, supra.* Its facts were somewhat closer to those in the case at bar: a lender agreed to advance funds to "Y" for the specific purpose of enabling him to purchase certain property. The lender forwarded the loan proceeds in trust to a firm of solicitors on their undertaking to hold the funds until they were applied to the acquisition of the property by Y. The firm instead paid the funds to another solicitor, who simply paid them out on Y's instructions, utilizing some GBP 358,000 for purposes unrelated to the acquisition. The second solicitor then went bankrupt, and the loan was not repaid.

63 The House of Lords applied *Quistclose*, ruling that the money had been subject to a trust in the firm's hands, that the trust met the three certainties, that the firm was liable for breach of the

trust, and that the second solicitor held the remaining funds in trust for the lender, subject to a power to apply it by way of loan to Y in accordance with the undertaking.

64 The chambers judge quoted by way of overview a passage from the reasons of Lord Millett in *Twinsectra*, part of which I will also reproduce:

> Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases. [At para. 68.]

At the same time, his Lordship observed:

> A *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower. Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cashflow. Commercial life would be impossible if this were not the case.
>
> The question in every case is whether the parties intended the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 100 *per* Lord Mustill. ... [Paras. 73-4.]

65 As we have seen, in considering whether the three certainties were met in the case at bar, the chambers judge noted the statement of purposes for which the loan was to be used, finding that these were "intended to, and had the effect of, restricting the Cliffs' freedom to utilize the funds for purposes other than those set out in the commitment letter." (Para. 105.) Further, since the commitment letter had been executed after the Company had sought *CCAA* protection, Century was obviously aware that Cliffs' continued existence was "in doubt". He continued:

> ... In light of the danger that Century's funds would simply be used to satisfy other creditors and wind up the project instead of constructing and completing the development, it makes sense that Century set out the permitted purposes for which the Funds could be used in clauses 3 and 8(a) of the commitment letter. The purpose of Century's credit facility was not to pay secured creditors and wind up the project; rather, it was to provide funds which were required for the project's continued existence and completion. [At para. 107.]

66 It will be recalled that the Order to Pay which was signed by Cliffs and the Monitor and then forwarded to Century and its solicitors, was somewhat more specific than the commitment letter about the purposes for which the first advance was to be used. (See above at para. 52.) It referred to the payment of prior encumbrances, taxes, assessments, utility charges, a property valuation fee, and solicitor's charges. The chambers judge seemed to assume that this "direction" from the Monitor to Century was in conflict with the commitment letter: he said it could not "negate or vary the terms of the purpose trust in the commitment letter." Having said this, he concluded without more that the language of the commitment letter disclosed a mutual intention between Century and the Company to create a *Quistclose* trust.

67 With respect, I find myself in disagreement with much of the chambers judge's analysis. First, I doubt that a *Quistclose* trust was created. This is not a case in which A put B in funds in order to pay C, a creditor of B. (See *Niedner, supra.*) Rather, A (Century) put B (Lawson, not a debtor) in funds to disburse to B's client, C (Cliffs), on B's undertaking to hold the money until it received A's written authority to release to C. The undertaking was a type of trust, certainly, but did not, as in *Twinsectra,* impose a duty on B to supervise how its client C used the money. The trust was almost completely executed - Lawson disbursed most of the advance, including the $25,000 paid to A - and did not "fail" in the *Quistclose* sense.

68 Nor is this a case like *Twinsectra*, in which the bankruptcy or insolvency of C made the purposes of the loan impossible, such that a resulting trust was necessary to ensure the monies reverted to A and did not fall into the hands of C's creditors. Indeed, A was fully aware of C's financial condition and believed at the time of the advance that it was entitled to the super-priority given by the DIP Order. Once it had obtained additional covenants from the borrower's principals, Century directed that the funds be disbursed. Upon all the conditions being met, the funds were *ipso facto* "advanced" to C. The Company would have been bound by contract to use the funds for the general purposes it had agreed on in the letter, but the monies were then its own, and but for this litigation, would presumably have been paid into its general bank account. As Lord Wilberforce observed in *Quistclose*, "in the absence of some special arrangement creating a trust ..., payments of this kind are made upon the basis that they are to be included in a company's assets." There was no obligation on Cliffs to hold what it received from the loan proceeds in any separate account; rather, as stated by Lord Millett in *Twinsectra*, "the money [was] intended to be at the free disposal of the [borrower]" and could be used as part of its cash flow.

69 In short, although it is obvious that Cliffs agreed as a matter of contract that the funds would be used for the general purpose stated, I disagree that this restriction gives rise to any inference of an intention on the part of both parties (Century and Cliffs) to create the specialized vehicle that is a *Quistclose* trust. The only trust in existence here was the usual type created by the undertaking given to the lender by Lawson as Cliffs' solicitors. The terms of that trust were met, as were the terms of the DIP Order.

70 Nor do I agree that the terms of the Order to Pay, under which the Monitor directed Century to pay the first *tranche* into Lawson's trust account and gave its "irrevocable authority" to pay out taxes, assessments, utilities, solicitor's charges and prior encumbrances, would have constituted a breach or "negation" of any trust or of the June 27 order incorporating the commitment letter. Century chose to make the advance it did in July 2008, fully aware of the circumstances that had led to the receivership and to the *CCAA* order, pronounced on May 26, 2008. We may assume Century had fully discussed the risk of lending to Cliffs and had decided that advancing funds for the speci-

fied purposes in the conditions prevailing in August was necessary or conducive to the Company's efforts to revive the project (which efforts were referred to by Tysoe J.A. in his reasons, *supra*, at paras. 14-5). And, by signing the Order to Pay, the Monitor must be taken to have indicated its satisfaction that the expenditures were appropriate. Both decisions were judgements that in my opinion were not unreasonable, and ones that a court should not second-guess.

71 In summary, I conclude that:

* the chambers judge did not err in finding that cause of action estoppel did not apply;
* the chambers judge did err in finding that the criteria for issue estoppel were not met. Although different questions were addressed and different evidence was adduced in the two hearings, the issues addressed in the second proceeding were a foundational element of the first order;
* the chambers judge erred in the exercise of his discretion not to apply issue estoppel in that he failed to recognize the finality of his first order, and the requirement for "special circumstances" such as fraud or the discovery of fresh evidence that due diligence could not have brought forward. No such circumstances were present in this case;
* the chambers judge erred in finding that the conditions in the DIP Order for the advances by Century were not met;
* contrary to the finding below, the *tranche* which Century purported to advance on August 7, 2008 was advanced in fact and in law, and Fisgard Liberty's interest thereupon attached to the funds and remains attached to the residue still held by Lawson, subject to the outstanding issue of Lawson's claim;
* the chambers judge erred in finding that a *Quistclose* trust was intended or created; and
* the chambers judge erred in ruling that the use by Cliffs of the funds for the purposes stated in the Order to Pay would have been a violation of the commitment letter or the order that incorporated it.

72 I would therefore allow Fisgard Liberty's appeal and declare that as between it and Century, its interest in the funds ranks in priority to any interest of Century, but that pending this court's determination of Lawson's claim to the funds (or settlement of that issue by the relevant parties) the funds shall continue to be held by Lawson in trust.

M.V. NEWBURY J.A.
R.E. PROWSE J.A.:-- I agree.
E.C. CHIASSON J.A.:-- I agree.

cp/e/qlrds/qlvxw/qlced/qlcas/qlana/qlcas/qlgpr

7

Case Name:

JOHANESSON v. CANADIAN PACIFIC R. Co.

[1922] M.J. No. 31

66 D.L.R. 599

Manitoba King's Bench

Dysart, J.

Judgment: April 12, 1922

(30 paras.)

Counsel:

F. Heap, for plaintiff.

L. J. Reycraft, K.C., for defendant.

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1 **DYSART, J.**:--This is an application made in pursuance of an order of the referee for the purpose of determining how far issues raised by the pleadings in this action are *res judicata.*

2 The action itself is brought to recover the value of 253 boxes of frozen fish which were accepted by the defendant on stated terms for transportation from the plaintiff in Winnipeg to the Raney Fish Co. at Cleveland, Ohio, and which through the alleged negligence of the defendant and its agents were allowed to spoil *in transitu.*

3 The loss of the fish has already given rise to litigation. An action was commenced by the plaintiff on July 17, 1918, but by the time the case had reached the trial stage the plaintiff had discontinued his statement of claim and the trial resolved itself into a contest over the question of whether or not the defendant was entitled to collect freight charges for the transportation of the fish. The pleadings had by this time dwindled to a counterclaim for the freight and a defence thereto.

4 Omitting what is not pertinent to this inquiry, the said counterclaim alleged that:--"the plaintiff is indebted to the railway company in the sum of $679.41, being charges for the said shipment of fish over the railway lines of the defendant railway company and connecting lines:" and the defence to the counterclaim set up that:--"the Canadian Pacific Railway received the fish in question in this action from the plaintiff consigned to the Raney Pish Co., and the said delivery was made to

and accepted by the railway company upon terms requiring them (amongst other things) to properly salt and otherwise care for the fish during transit; but the said railway company wrongfully neglected to do so. In consequence of said negligence and breach of contract the said fish became bad and unsalable during transit . . . . and the plaintiff has suffered loss and damage to the extent of $4,000, being the value of said fish, and other incidental losses in connection therewith."

5 The case was tried before the Chief Justice of the Court of King's Bench who delivered a written judgment in which, after setting out at length his findings and reasons, he concluded that:--"the company's contract was to carry the goods safely and not having done so, it has not fulfilled the contract on its part and has, therefore, no right to recover the carrying charges."

6 The specific question submitted by the referee's order to this Court for determination is:--"Which, if any, of the matters of fact and law decided and adjudicated in said former action are by virtue of the judgment and reasons therefor in the said former action, binding, as *res judicata* upon the parties hereto so as to dispense with proof or adjudication thereof in this present action and so as to estop the parties from denying or controverting the said matters in this action by evidence or otherwise?"

7 Although in the ordinary case of ascertaining what is *res judicata* it is usual to look to the grounds of the earlier decision and, if necessary, to extrinsic evidence, still, in this case, we are restricted by the terms of the submission to the "judgment and the reasons therefor." Nevertheless as the judgment and reasons set forth with sufficient amplitude all the facts and circumstances that seem necessary for the full and complete inquiry, neither party would seem to be prejudiced by the limitation.

8 The judgment of the Chief Justice recites the issue of the original statement of claim, the filing of defence and counterclaim for freight, the discontinuance of statement of claim by the plaintiff, the signing of judgment by default on counterclaim, the subsequent setting aside of said default judgment on terms, the entry of defence to the counterclaim, the trial of the case on the counterclaim and defence thereto. These recitals conclusively settle what proceedings were taken in the earlier action, and for our purposes they especially make it clear that the earlier action went to trial not in the statement of claim and statement of defence, but upon the counterclaim and defence thereto. The conclusiveness of these recitals is shown in many authorities but in none more definitely than in 23 Cyc., p. 1292, which lays down that:--

> "The recitals of a judgment are conclusive evidence in regard to the form of action, the time of bringing the suit, the various proceedings taken in it, and the disposition finally made of it; but not in regard to facts affecting the substantial rights of the parties except in so far as they were at issue and adjudicated."

9 Before proceeding to any close inquiry as to exactly what matters were adjudicated in the former action, let us first set forth the principles that must guide us in such inquiry. The question of *res judicata* is dealt with generally in the leading text-books and specifically in a large number of cases. In 13 Hals. see. 463, it is stated that:--

> "A party is precluded from contending the contrary of any precise point which, having been once definitely put in issue, has been solemnly found against him. Though the objects of the first and second actions are different the finding on a matter which came directly (not collaterally or incidentally) in issue in the first

> action is conclusive in a second action between the same parties. And this principle has been applied when the point involved in the earlier decision, and as to which the parties were estopped was one rather of law than of fact."

10 And again, sec. 464:--

> "The parties are estopped by the findings of fact involved in the judgment; as to the determination of questions of law, the true view seems to be that the legal rights of the parties are such as they have been determined to be by the judgment of a competent court. But the conclusiveness of the determination rests upon the same principles in each case. The doctrine of *res judicata* is not a technical doctrine applicable only to records: it is a fundamental doctrine of all courts that there must be an end of litigation."

11 And further sec. 465:--

> "A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties ... actually was so put in issue or claimed."

12 In Broom's Legal Maxims, 7th ed., at p. 263 [8th ed., at p. 270] Lord Ellenborough is quoted with approval as laying down in *Outram v. Morewood* (1803), 3 East 346, that:--

> "it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel . . . . the estoppel precludes parties, and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them . . . . has been, on such issue joined, solemnly found against them." "According to the practice of every Court, after a matter has once been put in issue and tried, and there has been a finding or verdict upon that issue, and thereupon a judgment, such finding and judgment are conclusive between the same parties on that issue. In all Courts it would be treated as an estoppel," [quoting from *Finney v. Finney* (1868), L.R. 1 P. & D. 483, 37 L.J. (P) 43.]

13 So also in 23 Cyc., p. 1288-9:--

> "A judgment rendered by a court having jurisdiction of the parties and subject matter, whether correct or not, is conclusive and indisputable evidence as to all the points or questions in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies in proceedings upon the same or a different cause of action, in so far as it settles and determines questions of fact as distinguished from abstract propositions of law."

14 And at p. 1290:--

> "The estoppel of a judgment cannot be extended beyond the particular facts on which it was based; it determines only such points or questions as are sufficient to sustain the legal conclusion that judgment must be given for one or other of the parties in the particular form and amount in which it was rendered not addi-

> tional matters, unnecessary to the decision of the case, al though they may come within the scope of the pleadings, unless they were actually litigated and passed upon."

15 Also at p. 1300:--

> "The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not."

16 In Taylor on Evidence, 11th ed., sec. 1684, it is laid down that:--"Though a judgment *inter partes* is ... admissible for or against parties or privies, where the same subject-matter is a second time in contrary between the same parties ... In no case will it be regarded as quite conclusive of the rights in dispute, unless it be pleaded as a matter of estoppel."

17 From the foregoing authorities and from numberless decisions, it is clear that the principle of *res judicata* has its roots stuck deep in the necessity of having some end and finality to litigation over the same matters between the same parties; that the principle has its sanction not in superficial or technical considerations, but in the inherent jurisdiction of Courts of law; that it is of wide and general application, and that it applies, notwithstanding, that the second action is different in form from the first, or that the plaintiff in the second action is virtually or actually a defendant in the first. So long as any point of fact or law was put in issue--whether pleaded or not--and was tried in the former action in which the present parties were on opposing sides, it matters not that the decision on those points may not be sound or was reached on insufficient or false evidence, or on erroneous views of the law, or because of some matter omitted which might have been supplied or has since been discovered-- so long as that decision or judgment stands on the records un-attacked or unappealed from, it stands with all that is necessarily involved and included in it--as *res judicata*--as matter finally and conclusively settled between these parties and their privies.

18 Applying the foregoing principles to the case in hand, we come irresistibly to the conclusion that the earlier action between these parties settled not only the question of the freight charges but that it also settled every point of fact or law which necessarily entered into consideration of the Court in determining exactly what were the terms of the contract, what were the particulars of the breach, and how that contract and breach affected the defendant's rights to recover freight charges. The freight was the main issue but in attempting to establish a right to freight, the defendant necessarily had to show the terms of a contract entitling it to freight. The plaintiff in resisting the claim brought out other terms which imposed on the defendant a special duty of taking care of the fish and then produced evidence to show that the defendant and its agent had negligently violated that duty. All the points then of the contract and of the breach, together with necessary inference of fact and conclusions of law, that are involved in that earlier judgment must be *res judicata.*

19 For the purpose of making a careful comparison between the issues raised in this action, and "the matters of fact and matters of law decided and adjudicated in the said former action." I have analyzed and summarized those "matters" as I find them in said "judgment and reasons therefor." In doing so I have applied in every instance the tests of identity and of necessity, and am of the opinion that the summary which follows sets forth those and only those "matters" which were necessarily decided in the earlier action, and are among those raised by the pleadings in this:--

(1) On April 29, 1918, the plaintiff loaded into a refrigerator car in Manitoba, 253 boxes of fish consigned to the Raney Fish Co. at Cleveland, Ohio, and on the same day the defendant accepted said car and agreed to carry the fish to their destination;

(2) At the time of the delivery and acceptance, the fish were frozen and in good order and condition, and the bunkers in the ends of the said car were properly filled with crushed ice and 15% salt;

(3) The terms and conditions on which the fish were to be carried were specified in a bill of lading or shipping order issued at the time to the plaintiff; those included an order imposed by the plaintiff on the defendant to "re-charge with ice and 15% salt in transit when necessary";

(4) It was found that the recharging in transit became necessary every twenty-four hours;

(5) The car was transported over the defendant company's railway lines to Chicago, thence over the Nickle Plate line to Cleveland, Ohio, reaching there on May 7, 1918;

(6) Notice of the arrival of the fish was on the day of their arrival given to the consignee, as contemplated by the terms of the bill of lading. The effect of the giving of this notice was to terminate at the end of 48 hours thereafter the defendant's liability as insurer, that is, it set a time, 48 hours thereafter for the termination of the period of transit. That termination would occur some time on May 9;

(7) The fish were inspected on the date of arrival and were found to be "in the same condition as when shipped";

(8) The bunkers on the car were not recharged either on May 7, 8, or 9, nor were any other steps taken to insure the preservation of the fish;

(9) On May 11 the fish were found on inspection to be soft and slimy. This process of deterioration had on that day so far advanced that it must have begun before May 9, that is before the period of transit and the defendant's liability as insurer had ceased;

(10) The omission to recharge the car with ice and 15% salt was negligence, and was the cause of the loss of the fish, and constituted a breach of duty for which the defendant or its agent was responsible to the plaintiff;

(11) The Nickle Plate Railway was by the terms of the bill of lading or shipping order the agent of the defendant and for its negligent breach of duty the defendant was responsible to the plaintiff.

20 In the foregoing summary there is not, in my opinion, a single finding of fact or conclusion of law, but what is necessary to support the judgment of the Chief Justice, not one that may be withdrawn without removing a necessary pillar on which that judgment rests. The terms of the contract; the performance of it; the negligent breach of those terms in that performance, constituting the performance an imperfect one, the legal responsibility of the defendant to the plaintiff for the consequences of that negligent breach so far as consequences extended to the freight charges--these were all necessarily passed upon as a premise for the final conclusion of the Court that:--

> "... the defendant's contract was to carry the goods safely, and not having done so, it has not fulfilled the contract on its part ... "

21 What now are the issues raised in this action, and how far do they coincide with "matters" set forth in our summary? The first 6 paragraphs of the statement of claim show the delivery of the same shipment of fish, by the same plaintiff to the same defendant, for transportation to the same consignee, on the same terms, including the special order for recharging the bunkers with ice when necessary; the same necessity of recharging once in every 24 hours; the same proper packing and good frozen condition of the fish, the same condition for terminating by notice the period of transit, and liability as insurer; the same failure to recharge; the same negligent breach of contract; and the same loss of destruction of the fish attributed to the same cause. These allegations of fact are all framed with an eye to keep them within the language of the judgment, and, in fact, they are nothing but a summary--in language different from mine--but still a summary of the findings and conclusions embraced in that judgment. Paragraph 7 pleads that the matters and facts alleged in the first 6 paragraphs were all adjudicated in the said earlier action, it distinctly pleads *res judicata*, which, by its reply to the statement of defence, it supplements by setting forth in full the particulars of the said judgment. By para. 8 the plaintiff introduces an alternative cause of action based upon the defendant's liability as warehouseman. Paragraph 9 gives details of the quantity and value of the said fish, and their containers, while paragraph 10 asks for damages $3,762.57, the "value of said fish and boxes."

22 The statement of defence ignores completely the plaintiff's allegations of *res judicata*. It devotes much attention to the alleged facts set out in said paras. 2 to 6, not by either denying that they were decided in the earlier action, or if decided not directly decided, or not necessarily decided. No, it passes this phase over in silence, and directs its attack at the existence of the facts themselves, and to this purpose it levels a veritable broadside of denial --general, specific and contingent. By failing to deny the allegations of para. 7 the defendant must be taken to admit them, and by reference paras. 2 to 6 also. Having silently admitted plaintiff's statement that the allegations in said paras. 2 to 6 are *res judicata*, what effect can it hope to secure by its boundless denials of those facts? This self-contradiction, however, I will not further consider, as I prefer to rest the case on grounds of substantive merit, rather than on nice technical effect of pleadings.

23 On the arguments before me, defendant's counsel took the position; (1) That none of the issues raised in this action are *res judicata*; and (2) That if any of them are, then all are. In support of his first point he urged that in the former action the issues that were brought up by the plaintiff and decided in his favour were for the purpose of defeating the defendant in its attack on plaintiff, in other words, that they were used by plaintiff as a shield, that, in this case, the same issues cannot be brought in by the plaintiff for the purpose of establishing his claim in his attack on defendant, in other words, they cannot be used as a sword. On the best consideration I can give this argument, I cannot see its force. There is no magic in the terms "shield" and "sword." If there is merit in this

argument, it must stand scrutiny. Measured by the principles of *res judicata* above laid down, the plaintiff in this action must rely on many facts and matters that are common to this action and the former. It is true that in defeating defendant in the former action, plaintiff had to raise certain issues that are raised here, had to adduce evidence in support of them, and finally got a decision in his favour on them. But what of that? Facts are facts. If he has established them, they are established. For what purpose they were originally established seems to me of no importance whatever when we come to consider the question of whether or not they are established. I dismiss this argument as ineffective.

24 The second position taken by the defendant is--all or none, if any of the issues raised here are *res judicata* then all are, including the plaintiff's claim for the value of the fish. In other words he argues that the entire cause of action is *res judicata*. It is to be remarked here that in the earlier action the plaintiff in reply to the counterclaim, claimed damages of:--"$4,000, being the value of the said fish and other incidental losses in connection therewith."

25 This plea, however, was never put in issue, at least it was not decided, and its decision would have been extraneous to the big issue before the Court. The plaintiff's claim for the value of the fish is, therefore, not *res judicata*.

26 In this argument, defendant's counsel assumes that plaintiff may not bring more than one action in respect of one cause of action, or that he may not make use of the same cause of action to defend one suit and establish another. This assumption is not sound. A litigant is not bound to try all his rights in one action unless, at least, he can establish all his rights by the selfsame evidence. The test is, will the same evidence completely support both actions? It is not enough that the larger part of the evidence is common to both actions--it is necessary to show that each action will rest on the evidence offered in the other. The principle is well illustrated in the frequently cited case of *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141, 53 L.J. (Q.B.) 476, 32 W.R. 944, where the defendant had by the same act of negligence both damaged the plaintiff's cab and also caused personal injuries to him. Having sued for and recovered damages in respect of the cab, the plaintiff sued again for the personal injuries. The majority of the Court of Appeal, applying the above test, held that the second action was not barred, and while fully recognizing the rule that where there is but one cause of action damages must be assessed once for all, they considered that since two distinct rights of the plaintiff had been infringed he had a separate cause of action in respect of each of these rights; and that although the cause of action was the same, yet to constitute the former recovery a bar to the later action "the circumstances must be such that the plaintiff might have recovered in the former suit that which he seeks to recover in the second;"and that "Where the test is whether the same sort of evidence proves the plaintiff's claim in the two actions, two actions may be brought in respect of the same facts where those facts give rise to distinct cause of action."

27 On the authority of this case, this second position of the defendant must clearly appear untenable.

28 In answer to the matters submitted to me for determination, I, therefore, declare that the matters of fact and matters of law brought into issue in this action by para. 2 to 6, both inclusive, of the plaintiff's statement of claim, were all adjudicated in the former action between these parties and are therefore *res judicata*--binding upon:--"the parties hereto, so as to dispense with proof or adjudication thereof in this present action, and so as to estop the parties from denying or controverting the said matters in this action by evidence or otherwise."

29 Consequently para. 8 of the statement of claim, in attempting to set up an issue which has been otherwise determined, is inconsistent with this determination and ought to be eliminated. Paragraphs 9 and 10 of the statement of claim allege and claim matters which were not adjudicated in the former action, and are open to litigation in this. It follows that all those portions of the defendant's statement of defence which are denials of the matters herein declared to have been adjudicated in the former action ought to be stricken from the records.

30 The costs of this application will go to the plaintiff in any event.

Case Name:

JOHANESSON v. CANADIAN PACIFIC R. Co.

[1922] M.J. No. 35

67 D.L.R. 636

Manitoba Court of Appeal

Perdue, C.J.M., Cameron, Fullerton, Dennistoun, JJ.A.

Judgment: June 12, 1922

(69 paras.)

Counsel:

H. A. V. Green, for appellant.

F. Heap, for respondent.

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1 **PERDUE, C.J.M.**:--The question involved in this appeal is whether the issues in the case have become *res judicatae* by virtue of a judgment of the Court of King's Bench, 66 D.L.R. 599, in a former suit between the same parties and concerning, as it is claimed, the same subjects of litigation.

2 The plaintiff, on April 29, 1918, delivered to the Canadian Pacific Co., a carload of frozen whitefish for transportation to the Raney Fish Co., at Cleveland, Ohio. The fish was loaded in a refrigerator car with the bunkers filled with crushed ice and 15% of salt. An order was given the railway company to recharge the bunkers with ice and salt in transit when necessary. The car was carried over defendant's Soo Line to Chicago and thence over the Nickle Plate Line to Cleveland, where it arrived on May 7, and the consignees were notified. It is claimed that the fish arrived at destination in good order, but the consignees, after making several inspections, refused to accept the shipment. It was claimed by the plaintiff that the defendants and their agents, while the carload was still in their hands and the transit had not terminated, neglected to ice and salt the car as required by the contract, with the result that the fish became rotten and lost to the plaintiff.

3 On July 17, 1918, the plaintiff commenced an action against the Canadian Pacific R. Co. and the Raney Fish Co., claiming against the first defendant damages for neglect in failing to properly

ice and salt the fish, and against the second defendant, damages for non-acceptance. The railway company filed a statement of defence and a counterclaim against the plaintiff for freight charges on the carload amounting to $679.41. On April 7, 1919, the plaintiff, by notice, discontinued his action against the railway company. No defence to the counterclaim having been filed, the railway company signed judgment upon it against the plaintiff. Subsequently, by an order of the referee, the judgment was set aside and leave given to the plaintiff to file a defence which he did on August 20, 1919. The railway company's claim was for freight. The defence was failure by the company to observe the terms of the contract with the plaintiff inasmuch as it neglected to salt and otherwise care for the fish during transit, whereby the fish became bad and unsalable during the transit and while in the company's hands; that in consequence of the promises the plaintiff suffered loss to the extent of $4,000. Plaintiff also, by clause 6 of his defence, claimed against the company for his loss, but this paragraph "was struck out by the referee. The issue came on for trial before Mathers, C.J.K.B., on May 31, 1921. Although the issue between the parties was the right of the railway company to recover freight charges, the whole question of the alleged negligence of the company in failing to take proper care of the fish during the period of transit became involved and was gone into and adjudicated upon. The Chief Justice held that the railway company had not fulfilled its contract to carry the goods safely and, therefore, it had no right to recover the carrying charges. Accordingly, he dismissed the company's counterclaim with costs.

4 Shortly after the above judgment was rendered the plaintiff commenced the present action against the C.P.R. Co. He alleges the delivery of the carload of fish to the company for shipment to the Raney Fish Co., at Cleveland, Ohio, defendant's acceptance of same for carriage and the term of the contract as to recharging the car with ice and salt when necessary, and that such recharging was necessary every 24 hours. It is also alleged that one of the terms appearing on the bill of lading was that defendant's liability as carrier should continue until the expiration of 48 hours after written notice of the arrival of the car to the consignees thereof, and that defendant would be responsible for its agents to whom the shipment might be entrusted for any portion of the distance. The plaintiff charges neglect of duty on the part of the defendant and its agents in failing to recharge the car with ice and salt, so that at the end of the transit the fish had become decomposed and worthless. There were further general charges of negligence against defendant and its agents in failing to protect the fish. The plaintiff claims $3,762.57 damages for breach of contract.

5 The defendant, in its statement of defence, denies the allegations in the statement of claim. It alleges that the goods were in bad condition when delivered to it for carriage, and it sets up the condition in the contract that the carrier should not be liable where the loss of the goods was caused by inherent vice in the goods, or the act or default of the owner. It avers that it completed the contract and is not liable for loss occurring after the transit was at an end. It claims that it and its agents exercised due care and denies all negligence or breach of duty.

6 In his reply to the statement of defence the plaintiff alleged that all matters and things alleged, denied and set up in the statement of defence (except the denial in par. 13, as to the weight and value of the fish and the value of the fish boxes) were, in a certain action of that Court, specifying it, "tried, determined and adjudicated in the words following, that is to say:" Then there was set out a copy of the reasons for judgment of Mathers, C.J.K.B., delivered in the first action, followed by the allegation:

> "The foregoing being written reasons given by this Honourable Court for its judgment in the said former action; wherefore all the said matters became and are

> *res judicata* and the defendant ought not to be heard or allowed to say or plead any of the matters or things or allegations or denials pleaded and set forth in its statement of defence (except the aforesaid allegation in para. 13 of the statement of claim.)."

7 On September 27, 1921, the referee, on the application of the plaintiff, and after hearing both parties, made an order, "that before the issues of fact herein are tried, the following question of law, raised herein, be argued and disposed of at a Wednesday sittings of this Court.

8 Which, if any, of the matters of fact and matters of law decided and adjudicated in said former action are, by virtue of the judgment and reasons therefor, in the said former action, binding as *res judicata* upon the parties hereto, so as to dispense with proof, or adjudication thereof in this present action and so as to estop the parties hereto from denying or controverting the said matters in this action by evidence or otherwise."

9 The above question came on for hearing before Dysart, J., 66 D.L.R. 599, who allowed the defendant to amend the statement of defence by adding a new paragraph as follows:--

> "13 (a) In the alternative, the defendant says that the claim of the plaintiff against the defendant has already been adjudicated upon and the plaintiff is now estopped from bringing this action or claiming further damages in respect of the said shipment from the defendant."

10 After hearing the argument on the question of law directed by the referee's order, the Judge declared and adjudged that the allegations set forth in pars. 2, 3, 4, 5 and 6 of the statement of claim were duly proven, adjudicated and decided to be true in the former action and that said matters and allegations (whether of law or fact or otherwise) thereby became and are *res judicatae* between the parties hereto, and that they are thereby estopped, etc. He declared that the allegations in paras. 9 and 10 (relating to the value of the fish and boxes and damages suffered by the plaintiff) had not been adjudicated upon the former action and are open to litigation in this. He also declared that the claim of the plaintiff against the defendant had not been adjudicated upon already and the plaintiff was not estopped from bringing this action.

11 The present appeal is brought by defendant from the above order of Dysart, J.

12 Counsel for defendant contended that the plaintiff's claim against defendant had been adjudicated upon in the first action; that the plaintiff's claim had been set off against defendant's claim for freight; and that plaintiff could not split his claim for damages by setting off part of it against defendant's claim for freight and bringing a new action for the remainder. It is plain, however, that plaintiff's claim for damages was not considered in the first suit. Plaintiff attempted to set it up in his defence to the defendant's counterclaim, but this part (para. 6) was struck out by the referee. The true ground upon which Mathers, C.J.K.B., decided the first action was as stated at the conclusion of his reasons for judgment:

> "The company's contract was to carry the goods safely and not having done so it has not fulfilled the contract on its part and has, therefore, no right to recover the carrying charges."

13 The judgment was that defendant's counterclaim was dismissed.

14 The performance of the contract to carry the goods safely to their destination is a condition precedent to the carrier's right to recover the charges for carrying them: *Cook v. Jennings* (1797), 7 Term. Rep. 381, 101 E.R. 1032; *Metcalfe v. Britannia Ironworks Co.* (1877), 2 Q.B.D. 423, 46 L.J. (Q.B.) 443; see also Pollock on Contracts, 9th ed. 278 *et seq.* The counterclaim of the C.P.R. Co. in the first case, was for carrying charges simply. The defence of the plaintiff to this claim was that the railway company had not performed a term of the contract of carriage, whereby they undertook to do certain necessary acts to preserve the fish during transit, by which breach the fish became bad and unsalable and were refused by the consignee. The only issue in the first suit was whether the plaintiff was or was not liable to pay the freight. The decision of Mathers, C.J.K.B., is binding upon the parties to that issue. Now, what is the issue in the present case?

15 The referee's order directing the inquiry as to what matters of fact and law have by virtue of the first judgment become *res judicata*, recites an admission by the defendant that the fish and shipment thereof and the contract for such shipment in the statement of claim in the present suit are the identical fish, shipment and contract referred to in the prior action in this Court between the same parties and that the reasons for the judgment in the prior action (whereby the defendant's counterclaim for freight charges was dismissed) are as is set forth in the plaintiff's reply in this action. This admission definitely settles that the goods, the shipment of them and the contract for shipment are the same in each case. The reasons for judgment in the former case are before us, forming part of the pleadings in the present suit, so that we can identify the questions before the Court and the disposition made of them on the trial of the first suit. The difficulty that was experienced in *Re Ontario Sugar Co., McKinnon's case* (1910), 22 O.L.R. 621 (in appeal (1911), 24 O.L.R. 332), in ascertaining the actual ground upon which the former suit was decided, does not arise in the present case. Dysart, J., 66 D.L.R. 599, has made a summary of "the matters which were necessarily decided in the earlier action and are among those raised by the pleadings in this." I agree with his finding and need not repeat it. These matters so decided support the allegations in paras. 2 and 6, inclusive of the statement of claim.

16 I would refer to the case of *Dunham v. Bower* (1879), 77 N.Y. Rep. 76, as dealing with questions similar to those which have arisen in the present case. In that ease, defendant agreed with plaintiff to load a number of barrels of apples belonging to the plaintiff on a boat and carry them from Watkins to New York City. Plaintiff's evidence was that defendant agreed to load and start the apples on their journey on or before November 8, but that he did not start until November 12. The boat was stopped by ice at Ilion and could proceed no further. The apples were frozen and destroyed. The plaintiff sued for damages and defendant pleaded in Bar and proved on trial a judgment rendered in Justices Court in his favour in an action to recover freight on the apples from Watkins to Ilion. It was held by the Court of Appeal that the judgment was a bar and that plaintiff was properly nonsuited.

17 Church, C.J., said, 77 N.Y. Rep. at p. 80.:--

> "It is sometimes difficult to draw the line between a judgment which will operate as a bar to an action for a specified claim, and one which leaves the claim outstanding to be enforced by a cross-action. It depends in a great measure upon the nature of the demand litigated, the relation which the claim sought to be enforced bears to it, and the circumstances attending it. Any fact or allegation which is expressly or impliedly involved in a judgment, is merged in it, and cannot again be litigated."

18 He pointed out that if the allegations in the case were true, JOHANESSON the defendant was not only not entitled to any freight, but the plaintiff was entitled to a judgment for the whole amount of his damages; that the right to freight and the right to damages for the destruction of the whole property caused by violation of the shipping contract could not co-exist. But the recovery for freight adjudicated either that the defendant never made the alleged agreement or that he had performed it, these qustions were necessarily involved in that action, and were merged in the judgment. In the case at Bar the carriers were defeated in their action for freight on the facts proved by the owner and this involved an adjudication that the carriers had not performed their contract to protect the goods during the transit and are, therefore, liable for the loss of them.

19 I would dismiss the appeal with costs.

20 CAMERON, J.A.:--On July 17, 1918, an action was commenced by the plaintiff against the defendant, the railway company, and the Raney Fish Co., for the recovery of $3,762.37 claimed as damages for the loss of whitefish accepted for shipment by the railway company and consigned to the Raney Co. The railway company entered a counter-claim to this statement of claim asking for $679.41, being the freight charges for the said shipment of fish. The plaintiff discontinued his action for damages but entered to the defendant railway company's counterclaim a defence in which were alleged facts substantially the same as those set out in the statement of claim, viz., that the railway company agreed properly to salt and otherwise care for the fish during transit but neglected to do so; that in consequence of such neglect the fish became bad and unsalable and were refused acceptance by the consignees and, thereupon, the railway company sold them for the transportation charges. It was further alleged that the sum so realized was $92.75, and that the plaintiff in consequence of the premises "suffered loss and damage to the extent of $4,000, being the value of the said fish and other incidental losses in connection therewith." Originally, this defence contained as para. 6 the words "and the plaintiff hereby agree accordingly against the defendant." This last paragraph was struck out by an order made on the application of the railway company. On these pleadings the case went to trial before Mathers, C.J., with the result that the railway company's counterclaim was dismissed with costs.

21 On June 27, 1921, this present action against the railway company alone was brought on the same grounds as the previous action. The defence filed on July 19, 1921, sets up various defences and in one para. 13, added by amendment, it is pleaded, "that the claim of the plaintiff against the defendant has already been adjudicated upon and the plaintiff is now estopped from bringing this action or claiming further damages in respect of the said shipment from the defendant."

22 In his reply to this defence, the plaintiff sets up that all matters alleged, denied and set up in this defence were tried, determined and adjudicated upon in the following words, and there is then embodied in the pleading the full text of Mathers. C.J.K.B.'s reasons for judgment in the previous action.

23 I think this last pleading must be unique, but it was not questioned and is on the record as it comes before us. The next step in the action was the order of the referee of October 14, 1920, made on the application of the plaintiff. In this order, it is admitted by the defendant's counsel that the fish, the shipment and the contract in the two actions are identical and that the reasons for judgment in the said prior action are as is set forth in the plaintiff's reply in this action.

24 The question of law so submitted was, "which, if any, of the matters of fact and matters of law decided and adjudicated in said former action are, by virtue of the judgment and reasons there-

for, in the said former action, binding as *res judicata* upon the parties hereto, so as to dispense with proof, or adjudication thereof in this present action and so as to estop the parties hereto from denying or controverting the said matters in this action by evidence or otherwise."

25 The question submitted came before Dysart, J., 66 D.L.R. 599, who declared and adjudged that the allegations set forth in the plaintiff's statement of claim in para. 2, 3, 4, 5 and 6 were duly proven, adjudicated and decided to be true in a former action and that the matters of fact and law therein set forth were and became *res judicata* and that the parties hereto are estopped from denying or controverting any of the same and that all such allegations are to be taken as conclusively proved or established. He further declared that matters set out in para. 9 and 10 of the statement of claim were and are not *res judicata.*

26 In the result, the action goes now to trial merely on an assessment of damages. The history of the case, the pleadings and decisions on the questions involved are fully referred to and discussed in Dysart, J.'s, reasons for judgment 66 D.L.R. 599.

27 On this appeal it was contended that in the first action the freight charges were earned, that the defence of the plaintiff to the railway company's counterclaim was itself a counterclaim to that counterclaim, that, in substance, the defence sought to pay for those charges by way of damages and that, therefore, the whole matter raised by paras. 2 to 6 of the plaintiff's statement of claim in the second action was in issue and adjudicated upon in the first action. It was urged that Mathers, C.J.K.B., decided the first case upon an issue not presented in the pleadings, viz., that the company's contract was to carry the goods safely and not having done so it had not fulfilled its contract and was, there-fore, not entitled to recover. The real issue, it is claimed, was that the defence set up to the defendant's counterclaim raised the whole question of damages sustained by the plaintiff by reason of the breach of contract and that the judgment of the Chief Justice must be held to have determined that question and not the mere issue as to the non-performance of the contract. *Outram v. Morewood* (1803), 3 East 346, 102 E.R. 630 and *Robinson v. Duleep Sing* (1879), 11 Ch. D. 798, 48 L.J. (Ch.) 758, were cited as supporting this view.

28 It was contended that the defence to the counterclaim was a counterclaim as it arose under the same contract as that on which the defendant company based its claim in its counterclaim in the first action and that all matters in question in this action were finally disposed of in the former. Reference was made to *Renton Gibbs and Co. v. Neville and Co.*, [1900] 2 Q.B. 181, 69 L.J. (Q.B.) 514; *Snyder v. Minnedosa Power Co.* (1913), 23 Man. L.R. 750. [See also 13 D.L.R. 804; 14 D.L.R. 332.]

29 It was also argued that the cause of action so set up in the defence to the counterclaim in the first action cannot be split and an action now taken for the balance of damages. Reference was made to Black on Judgments, pp. 731 *et seq.*

> "A party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one." 13 Hals. p. 333, para. 467, citing *Re Hilton; Ex parte March* (1892), 67 L.T. 594, 9 Morr. 286.

30 It is necessary to consider the effect of the defence to the counterclaim in the first action. As that part of it which origin-ally claimed damages was struck out, our consideration of it is simplified. At the trial it was evidently considered as stating facts which afforded a defence to the coun-

terclaim. The decision in substance was that the facts shown defeated the railway company's right to recover.

31 I must say that I was at first under the impression that the plaintiff's remedy against the railway company was to be had only in an action (or counterclaim) for damages in contract or tort. But, on further consideration, it appears that this is not the case. The defence to the counterclaim in the first action can properly be regarded as setting forth facts intended to raise the plea that the destruction of the goods by the negligence of the railway company destroyed its claim for the transportation charges. Such was the view taken of it at the trial and justifiably so, especially considering the amendment which had been made in striking out the claim for damages.

32 Whatever may have been the rule in the past "the Court looks to the purpose and effect of the contract as a whole, as a guide to the probable intentions of the parties and the presumption, if any there be, is that breach or default in any material term of a contract between men of business amounts to default in the whole:" Pollock on Contracts, 9th ed., p. 279.

33 I refer to the further discussion of this subject at pp. 282 *et seq.* A test often applied is whether the term of the contract in which default has been made "goes to the whole of the consideration" or only to part. "Can it be said that the promisee gets what he bargained for, with some shortcoming for which damages will compensate him? or is the point of failure so vital that his expectation is in substance defeated?"

34 Pollock quotes from the judgment of Blackburn, J., in *Bettini v. Gye* (1876), 1 Q.B.D. 183, 45 L.J.(Q.B.) 209, approving the rule laid down by Parke, B. in *Graves v. Legg* (1854), 9 Ex. 709, 23 L.J. (Ex.) 228, 156 E.R. 304, and says, at p. 284: "If, however, there be any presumption either way in the modern view of such cases, it is that, in mercantile contracts at any rate, all express terms are material."

35 From this point of view the proof of the allegations in the defence to the defendant company's counterclaim was properly regarded by the Chief Justice as showing that the company had committed a breach of a most material term of the contract, a term that went to the whole of the consideration, and in holding that such breach amounted to a default in the whole contract.

36 What was set up by this plaintiff in the former action was set up as a defence and not as a cause of action. The claim for damages having been struck out, the pleading to the counterclaim was obviously treated at the trial as a defence which, when established, excused the payment of freight and had no other effect.

37 This is a case, therefore, where the matters pleaded in the statement of claim in the present action, although they might have been used as a defence in the first suit, constitute a substantive and distinct cause of action which the present plaintiff was not in the former suit bound to plead or set up. 23 Cyc. p. 1163. The case of *Dunham v. Bower*, 77 N.Y. Rep. 76, which was cited to us is in point. There, it was held that where goods are destroyed by a failure on the part of the carrier to perform his contract of transportation, the failure to perform is a defence, going to the whole cause of action for freight and that the shipper, having thus defeated the action for freight, is at liberty to sue for damages. Church, Ch. J., says at p. 81:--

> "The defendant was not only not entitled to any freight, but the plaintiff was entitled to a judgment for the whole amount of his damages," and:

> "This was clearly a case where the owner was 'excused freight' not merely because the goods were damaged, but because they were destroyed by the violation of the contract of shipment."

38 The Chief Justice of the King's Bench held that there was such a destruction, though the fish in their damaged condition realized a trifling amount, and his finding stands and cannot be disputed.

39 In my opinion, it is clear that in the former suit, in which the claim for freight Avas disposed of, the claim of the present plaintiff for damages, an entirely distinct matter, was not in issue or actually determined therein, and that his right of action, therefore, is still outstanding. It follows that there is nothing in the objection that the plaintiff in this action is splitting his cause of action.

40 It is now established in cases where the defence of *res judicata* is raised that we are entitled to look at the reasons for judgment as well as the pleadings and formal judgment to ascertain with precision the issues decided in the former action. Those reasons are on file as part of the record in the present case and are made part of the referee's order under which the question of law was submitted. Apart from these considerations, there is ample authority for so doing.

41 The former rule that to constitute an estoppel by a former judgment, the precise point which is to create it must have been put in issue and decided and that it was so put in issue and decided can appear by the record alone is now generally repudiated.

> "It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of indentifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial." See Black on Judgments, Vol. 2, para. 624, a statement of the law that is supported by overwhelming authority.

42 In support of this view *Barber v. McCuaig* (1900), 31 O.R. 593, was cited. There it was held by Meredith, C.J., that, where the defence of *res judicata* is set up, the Court may properly examine the pleadings, evidence and proceedings at the trial of the former action as well as the reasons given for the judgments thereon for the purpose of showing what was decided. In *Re Ontario Sugar Co.*, 22 O.L.R. 621, Meredith, C.J., held in an instructive judgment that, in order to ascertain whether the judgment in the former suit is a bar, the Court may look outside the judgment and the pleadings. He points out, that the difficulty of applying the rule that the Court shall not try a suit or issue in which the matter has been directly in issue in a former suit is greater under the existing system of pleading than it was under the system prevailing before the Judicature Act, in which case, as pointed out by Williams, L.J., in *Ripley v. Arthur* (1902), 86 L.T. 735 at p. 736, you, necessarily, have to go to the evidence to identify what was in truth and in fact the subject-matter in respect of which the plaintiff succeeded. Meredith, C.J.'s decision was affirmed on appeal, 24 O.L.R. 332, and leave to appeal from the Court of Appeal to the Supreme Court was refused (1911), 44 Can. S.C.R. 659. Anglin, J., says at p. 661:--

> "The proposition that the Court may look beyond the judgment and pleadings to ascertain what issue was actually determined in an action is well established by the authorities which the learned Chief Justices cite."

43 In *Sorensen v. Smart* (1884), 5 O.R. 678, it was decided that the defence of *res judicata* goes not only to the points actually decided but to every point that properly belonged to the subject of litigation and which with reasonable diligence might have been brought forward at the time, citing *Henderson v. Henderson* (1843), 3 Hare 100, at p. 115 (67 E.R. 312), and the evidence in the first case was examined to determine this point.

> "Parol evidence is admissible to identify the points or issues adjudicated in a former action, when the record thereof is silent or ambiguous on this point." 23 Cyc. p. 1539.

44 These considerations are apart from those of the statements in the referee's order which cannot now be disputed, and of the pleadings in which the reasons for the judgment in the former case are set up. So that we are entitled to examine these reasons to discover what was actually decided in that action.

45 I can add nothing useful to the remarks of Dysart, J., 66 D.L.R. 599, on the doctrine of *res judicata* and its application to the present case. I agree with him that the plaintiff here is at liberty to rely on the many facts and matters that are common to this action and the former, and that the plaintiff's claim for damages is not *res judicata*.

46 The case is not wholly free from difficulty and in its development a novel situation has been created, but after consideration, it is my opinion that the order appealed from must be affirmed.

47 FULLERTON, J.A.:--This appeal is from an order of Dysart, J., 66 D.L.R. 599, adjudging and declaring that all allegations set forth in paras. 2, 3, 4, 5 and 6 of the statement of claim were duly proven, adjudicated and decided to be true in a former action between the parties hereto and that all the said matters and allegations (whether of fact or law or otherwise) thereby became and were *res judicata*; and further adjudging and declaring that the claim of the plaintiff has not been adjudicated upon.

48 In the prior action, the respondent sought to recover damages for the loss of a quantity of fish shipped by the respondent over the appellant's railway and alleged to have become worthless through the negligence of the appellant in failing to ice in accordance with the terms of the contract of carriage. In that action the appellant counterclaimed for freight on such shipment. The action was discontinued, but the counterclaim was proceeded with and was tried before the Chief Justice of the Court of King's Bench, who dismissed the action.

49 Counsel for the appellant contends that the claim of the plaintiff in the present action has been adjudicated upon in the prior action for freight. The defence to the prior action alleged a contract to carry the fish and to care for them properly in transit and failure to exercise care whereby they became a total loss. The contention is that these facts, even if established, would not be a defence to the action, but only a ground of counterclaim, that the relief given must have been damages for breach of contract sufficient to meet the claim of the appellant and that the respondent having recovered in the former action damages cannot now maintain an action for the same cause.

50 I cannot agree with this contention. The defence did not claim damages for breach of contract nor was the right of the respondent to recover damages ever considered. The Chief Justice states in his judgment that:--"he only ground of defence relied upon at the trial was that the company received the fish upon terms requiring them to properly salt and otherwise care for them during transit and neglected to do so, in consequence of which the fish became bad and unsaleable."

51 Whether the Chief Justice was right as a matter of law in holding these facts, an answer to the action is not in question here. He decided the case on that ground and did not treat the facts alleged in the defence as raising any question of counterclaim.

52 As to the appeal from the declaration that paras. 2 to 6 inclusive are *res judicata* it cannot be questioned that the facts alleged in these paragraphs were considered and decided in the former action. Counsel for the appellant did not argue that this was not so. His sole contention, as I understood it, was that, inasmuch as these facts were established in the former action with a view of defeating the appellant's claim for freight they cannot be treated as *res judicata* for the purpose of establishing the respondent's claim in this action. The authority cited for this proposition was *Renton, Gibbs & Co. v. Neville & Co.*, [1900] 2 Q.B. 181, 69 L.J. (Q.B.) 514. This case turned on a question of pleading and raised no question of estoppel.

53 It would be curious indeed if authority could be found in support of such a proposition. If, in any action between parties, findings of fact are made upon which a judgment is based, these facts are *res judicata* in a subsequent action between the same parties, and it can make no difference whether the party in whose favour the judgment is, was plaintiff or defendant in the first action.

54 In my view the order appealed against was properly made.

55 The appeal should be dismissed with costs to the plaintiff in any event of the cause.

56 DENNISTOUN, J.A.:--This is an appeal from Dysart, J., in the Court of King's Bench, 66 D.L.R. 599, holding certain allegations of fact set up in the pleadings in this action to be *res judicata* in a former action between the same parties.

57 The trial Judge has carefully, and in my humble view, correctly set forth the law and the facts upon which this case depends and it is not necessary to add anything to his reasons.

58 One point, however, needs a word of explanation and that is the trial Judge's finding that the railway company has, by silence, admitted the plaintiff's allegation in para. 7 of the statement of claim that the facts in issue in paras. 2 to 6 are *res judicata*, the fact being that para. 7 had been stricken out by order of the referee before the railway company were called upon to plead, their silence, therefore, was justified and no admission made thereby.

59 On the appeal to this Court, it was urged by counsel for the railway company that if anything was *res judicata*, everything was *res judicata*, and that the plaintiff's claim for damages had been disposed of in the former action.

60 The first action was to recover freight charges. The present plaintiff alleged by way of defence that the goods were not carried safely and he counterclaimed for damages. The counter claim was stricken out and the freight issue alone tried. This is abundantly clear when the reasons for judgment of Mathers, C.J.K.B., are looked at and it also appears from an examination of the pleadings and formal judgment. The claim of the railway company was dismissed on the ground that they did not carry the goods safely, inasmuch as they negligently permitted them to decay for lack of ice, the plaintiff's claim for damages was not dealt with and is not *res judicata*.

61 Alternatively, the appellants' second point was that the facts established negligence sufficient to impose liability in the present action were not *res judicata* in the first action. This point has been fully dealt with by the trial Judge, who holds that the parties are bound by what was decided in that case, in so far as it directly concerns the issue both in that case and in this one.

62 In 13 Hals., p. 331, sec. 463, it is stated that:

> "A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him. Though the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties. And this principle has been applied when the point involved in the earlier decision, and as to which the parties were estopped, was one rather of law than of fact."

63 This proposition stated by Dysart, J., 66 D.L.R. 599, is supported by quotations from 23 Cyc., pp. 1288, 1290 and 1300, to the effect that the estoppel of a judgment is effective only so far as questions in issue have been actually adjudicated upon. Such estoppel does not extend so as to include additional matters unnecessary to the decision of the case, although they may come within the scope of the pleadings, unless they were actually litigated and passed upon.

64 The true test is identity of issue. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that point or question was in issue and adjudicated in the first suit, otherwise not.

65 I will endeavour to illustrate by example. A plaintiff sues to recover possession of a chattel. The defendant denies title and claims the chattel as his own. The issue is simple and clear. During the course of the trial it appears in evidence that the chattel has been damaged by the defendant, and the trial Judge, when giving judgment for possession, finds as a fact that the ownership is in the plaintiff and that damages have been done by the defendant.

66 In a second action to recover such damages the only question which is *res judicata* is that of ownership. The references in the evidence and in the reasons of the trial Judge to damages were unnecessary to the decision of the case, and were but incidental or collateral to the real issue.

67 In the case at Bar, the situation is quite different. Here, the first claim was to recover freight charges and the answer was-- you did not carry my goods safely, you negligently allowed them to become worthless and you are not entitled to carrier's charges by reason of that negligence. The facts are found against the carrier on that issue, and his claim for freight charges is disallowed. In the second claim, the facts which were directly in issue as necessary to the determination of the first case are the foundation of the plaintiff's claim for damages. They have already been solemnly determined in an action so framed as to make them vital. Had the claim now pressed been tried in the first case by way of counterclaim, judgment could have been given upon it, and would have been given upon it, had not the railway company procured an order from the Referee in Chambers striking out the plaintiff's present claim for damages. Why the claim in the present action was severed from the issue tried in the first action I am unable to say, for it would have been convenient and expeditious to have tried them in the same action as claim and counterclaim, but the parties went to trial on the freight issue alone with full knowledge that the claim for damages for negligence was pending and would come up for trial at a subsequent hearing in due course.

68 I refer to *Lockyer v. Ferryman* (1877), 2 App. Cas. 519, 4 Rettie 32 (Sess. Cas. 4th series); *Re Ontario Sugar Co.*, 22 O.L.R. 621; 24 O.L.R. 332; and 44 Can. S.C.R. 659; *Barber v. McCuaig*,

31 O.R. 593; *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141, 53 L.J. (Q.B.) 476; 23 Cyc. pp. 1539, 1163, 1172, 1204 and 1312.

69 In conclusion I agree with the trial Judge that the matter is *res judicata* to the extent indicated in his judgment and would dismiss the appeal with costs.

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elapse, can bring his action claiming (1) that the breach is incapable of remedy, or (2) if it is capable of remedy that it has not been remedied, and (3) in any event asking that the court should not permit the lease to continue.

After some hesitation, in my judgment in this case the breach is capable of remedy and indeed was remedied within a reasonable time. It is true that the user for prostitution took place either during two periods or for one lengthy period, but there was no fault on the part of the tenant and no general publicity—only publicity to those who chose to follow up the advertisements which did not give the address. Again, had the prostitutes refused to leave, the length of time before the defendants issued their writ against Dean would have been unreasonably long, but the premises were empty and were seen to be empty by anyone coming to the premises, not only by their appearance but also by reason of a "Notice of Sale" exhibited on the premises. It follows that this action fails. I think I should add that had I held in favour of the plaintiff I should have granted relief, but only on the terms that the defendants paid to the plaintiff not only the costs of the action between the solicitor and own client, but also any reasonably necessary expenses incurred by the plaintiff in connection with the breach before the costs of the action started to run.

There must be judgment for the defendants.

Judgment in the first action for the defendants, Kencakes Ltd. and West Layton Ltd.; judgment in the second action for West Layton Ltd.

Solicitors: *Kenneth Brown, Baker, Baker; Malcolm Davis & Co.*

[COURT OF APPEAL.]

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Feb. 2, 3, 25.

Lord Denning M.R., Danckwerts and Diplock L.JJ.

FIDELITAS SHIPPING CO. LTD. *v.* V/O EXPORTCHLEB.

Arbitration—Special case—Form—Interim award—Effect of award—Subsequent consultative case—Whether claim for demurrage excluded by cesser clause—Estoppel.

Estoppel—Per rem judicatam—Issue estoppel—Arbitration—Interim award—Whether claim for demurrage excluded by cesser clause.

Nemo debet bis vexari—Arbitration—Interim award—Issue estoppel.

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The loading of a ship, chartered to carry grain from the Black Sea to Avonmouth, was delayed for three weeks. On arrival at Avonmouth, the owners released the cargo to the consignees without insisting on any lien for demurrage. Later some £760 was paid on account of demurrage. The owners' claim to the balance of demurrage of some £4,881 was referred to arbitration. The principal issues before the umpire were (1) whether the ship was fit for the carriage of grain, (2) whether by reason of a "cesser clause" the owners ought to have recovered the demurrage by insisting on their lien and, not having done so, could not recover against the charterers, and (3) whether, as the owners contended, the charterers by paying the £760 had "waived" the "cesser clause." The umpire stated his award in the form of a special case, finding that the vessel was fit to load and that the claim for demurrage was not excluded by the "cesser clause." Megaw J. decided that the claim for demurrage was excluded by the "cesser clause" and his decision was affirmed by the Court of Appeal, the House of Lords refusing the owners leave to appeal. When the award went back to the umpire, the owners sought again to raise the point about waiver of the "cesser clause." Mocatta J. held, on the umpire's consultative case stated, that the owners could raise the point.

On appeal by the charterers:—

Held, allowing the appeal, that if the owners had desired to raise the point of waiver of the "cesser clause" they should have had the relevant facts stated and a specific question asked about it in the special case. The owners had not done this. Accordingly, as the first award was an interim award for the opinion of the court, which had held that the claim for demurrage was excluded by the "cesser clause," it was a case of issue estoppel and the owners were estopped from reopening the issue in the arbitration.

Dicta of Wigram V.-C. in *Henderson* v. *Henderson* (1843) 3 Hare 100, 114; Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin* [1909] A.C. 615, 623 and Diplock L.J. in *Thoday* v. *Thoday* [1964] P. 181, 198; [1964] 2 W.L.R. 371, 385; [1964] 1 All E.R. 341, 352, C.A. applied.

Cogstad (C. T.) & Co. v. *Newsum (H.), Sons & Co.* [1921] 2 A.C. 528; 37 T.L.R. 995 distinguished.

Per Lord Denning M.R. and Danckwerts L.J. Within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour) he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances.

Per Diplock L.J. This appeal raises an important and difficult

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question as to the application of the principle nemo debet bis vexari pro una et eadem causa. Issue estoppel applies to arbitration as it does to litigation.

Decision of Mocatta J. reversed.

APPEAL from Mocatta J.

By a charterparty dated September 21, 1960, shipowners, in the Fidelitas Shipping Co. Ltd., chartered their vessel *Sophia* to charterers, V/O Exportchleb, for a voyage with a cargo of wheat in bulk from one or two safe ports in the Black Sea, including Zhdanov, to Basrah. On October 6, 1960, the parties agreed to cancel that charterparty and entered into a second charterparty for a voyage from the Black Sea including Zhdanov to Avonmouth. By clause 38 of the charterparty of October 6, 1960, any disputes arising thereunder were to be settled by arbitration in London. A dispute arose between the owners and the charterers with regard to a claim by the owners for, inter alia, demurrage; the owners contending that the vessel was ready to load at Zhdanov on October 1, 1960, whereas the charterers maintained that the vessel was infested by weevils at the time of arrival at Zhdanov and that laytime did not begin to run until after the vessel had been fumigated. Mr. R. A. H. Clyde and Mr. V. Kutuzov were appointed arbitrators by the owners and charterers, respectively. The arbitrators disagreed and Mr. John Chesterman, of 3 Lloyds Avenue, London, E.C.3, was appointed as umpire on October 11, 1961. The charterers requested that the umpire's award be stated in the form of a special case pursuant to section 21 of the Arbitration Act, 1950.

In March, 1963, Megaw J. heard the special case, his decision [1] being affirmed by the Court of Appeal [2] in July, 1963. The owners' petition to the appeal committee of the House of Lords for leave to appeal to the House of Lords was rejected. When the award went back to the umpire, a dispute arose between the parties as to the effect which should be given to the decision of Megaw J.[3] and the Court of Appeal.[4]

The umpire accordingly sought the opinion of the court by consultative case on the question whether, on the true construction of the documents and the orders of Megaw J. and the Court of Appeal, he was precluded from further considering the question whether the charterers had waived the right to rely on clause 27 (the " cesser clause ") of the second charterparty. On November

[1] [1963] 1 Lloyd's Rep. 246.
[2] [1963] 2 Lloyd's Rep. 113.
[3] [1963] 1 Lloyd's Rep. 246.
[4] [1963] 2 Lloyd's Rep. 113.

A 24, 1964, Mocatta J. answered the question of law asked in the consultative case in the negative. The charterers appealed.

The facts are fully stated in the judgments.

M. J. Mustill for the charterers. The question is whether the issue of waiver is now open to the court. It is a most difficult B question. The decision in *Rederi Aktiebolaget Transatlantic* v. *The Board of Trade*,[5] in which the material facts are not known, has dominated the current proceedings. It is very difficult to reconcile this decision[5] with the post-war cases on promissory estoppel.

The correct approach is to look at the question posed in the C special case and to look at the answers of Megaw J.[6] and the Court of Appeal[7] and see if they leave any room at all for the argument of waiver. The answer is, No. The issue of waiver did not arise directly before Megaw J.[8] but it was implicit in the question posed in the special case. When the question and answer in the case stated are looked at, they do cover waiver. D The question and answer are unambiguous. The arbitrator cannot make an award which is inconsistent with the answer; for this would be to decide contrary to an order of the court. Neither Megaw J.[8] nor the Court of Appeal[9] qualified their answers. *In re Knight & Tabernacle Permanent Benefit Building Society*[10] was a decision on a different Act, in a different form.

E It was for the owners to ensure that the question which they wished to argue was properly raised by the case, and that all the necessary facts were found.

As to convenience, if the owners are right, when the case goes back to the umpire he will be asked to state a case on waiver, and the matter will then come before the High Court a third time. F [Reference was made to *Universal Cargo Carriers Corpn.* v. *Citati*.[11]]

Robert Goff and *Mark Saville* for the owners. The umpire's first award was a consultative case and not a final award: *Cogstad (C. T.) & Co.* v. *Newsum (H.), Sons & Co.*[12] There is only one kind of consultative case where section 21 (1) of the Arbitra- G tion Act, 1950, applies. The question in issue here is one of law,

[5] (1924) 30 Com.Cas. 117.
[6] [1963] 1 Lloyd's Rep. 246.
[7] [1963] 2 Lloyd's Rep. 113.
[8] [1963] 1 Lloyd's Rep. 246.
[9] [1963] 2 Lloyd's Rep. 113.
[10] [1892] 2 Q.B. 613; 8 T.L.R. 763.
[11] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70; [1957] 1 W.L.R. 979; [1957] 3 All E.R. 234, C.A.
[12] [1921] 2 A.C. 528; 37 T.L.R. 995.

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arising in the course of the reference. When an arbitrator or umpire does state a consultative case, he is not functus officio. The reference continues after the case stated. The arbitrator, not being functus officio, still remains the judge of the case, although he must not disregard the guidance given by the court: *In re Knight & Tabernacle Permanent Benefit Building Society.*[13] Cases can go up to the courts after findings on a consultative case. The question is whether the arbitrator is precluded from hearing further argument.

[DIPLOCK L.J. The principle of issue estoppel may arise here. Whatever the position of an arbitrator, the parties are estopped.]

Reliance is placed on section 21 (1) (*a*) of the Arbitration Act, 1950. There is no award here. As to issue estoppel, see *Thoday* v. *Thoday*,[14] *per* Diplock L.J.[15] Three things are necessary for issue estoppel; past litigation, determination of the issue by a court of competent jurisdiction and subsequent litigation in a different cause of action. An interim award is an example of issue estoppel. This is not an appropriate case for estoppel inter partes. The authorities show that for a determination, there must be a final adjudication by the court: *Langmead* v. *Maple.*[16] There must be a final and not an interlocutory order: *Huntly (Marchioness)* v. *Gaskell* [17] and see too *Bozson* v. *Altrincham Urban District Council.*[18] The true test of an issue estoppel is: has there been a final determination of that issue? The owner's linchpin is the judgment of Bowen L.J. in *In re Knight & Tabernacle Permanent Benefit Building Society* [19] where a distinction is drawn between an effective determination and a consultative case, where there is no appeal. A consultative case raises no issue estoppel, but an interim award or a final award does raise such an estoppel. It is crucial to estoppel that there should be a final determination. The substance of the matter and not the words used must be looked at: the crucial thing is to determine whether there has been a final determination. A consultative case is only interlocutory. The arbitrator is judex, the sole judge of law and fact.

What is in issue here is not whether or not the umpire should exercise any discretion, but whether he is shut out from considering the question of waiver. In arbitration proceedings, the

[13] [1892] 2 Q.B. 613.
[14] [1964] P. 781; [1964] 2 W.L.R. 371; [1964] 1 All E.R. 341.
[15] [1964] P. 181, 198.
[16] (1865) 18 C.B.N.S. 255.
[17] [1905] 2 Ch. 656; 22 T.L.R. 20, C.A.
[18] [1903] 1 K.B. 547, C.A.
[19] [1892] 2 Q.B. 613, 619.

A parties have chosen their own judge and the whole essence of the Arbitration Act, 1950, is that that judge is to be trusted. This is not an interim award; which is an award, a decision by the arbitrator: *Cogstad (C. T.) & Co.* v. *Newsum (H.), Sons & Co.*[20] Here the umpire is reserving his jurisdiction.

Mustill in reply. An arbitrator's authority is limited by B stating a consultative case. Once he has stated a case, he is functus officio as regards the issues covered by the case. *In re Knight & Tabernacle Permanent Benefit Building Society*[21] is discussed and explained in *Lloyds Bank Ltd.* v. *Jones.*[22] The words of Bowen L.J.[23] that the arbitrator "remains the final judge "of law and fact" cannot be read in their literal sense; see, for C example, the power of the court to intervene in cases of misconduct.

Here there is the stating of a factual consultative case beginning with the words "I find that." An issue was joined on waiver. It is not a case where the arbitrator will be asked to find facts that have not been found before. The more facts that D are found in a consultative case, the less power is left to the arbitrator. The words "I find" mean "I find" and not "I "propose as a hypothesis for the consideration of the court." *Hoystead* v. *Commissioner of Taxation*[24] is a leading case on issue on estoppel. The parties having brought this matter before the court, it is not for the owners to say that the machinery has E gone wrong. There was the mechanism for them to put the matter right. If they were not satisfied with the findings of fact or the question of law, they should have applied for remissions. The question of waiver were inferentially before the court and the question in issue is whether the owners are now shut out from raising it. If the court should be in doubt, the question of policy F should be considered, whether this case should go again to the House of Lords.

Cur. adv. vult.

February 23. The following judgments were read.

G LORD DENNING M.R. In October, 1960, the motor vessel *Sophia* was chartered to carry grain from the Black Sea to Avonmouth. She arrived at the loading port on October 1, 1960,

[20] [1921] 2 A.C. 528.
[21] [1892] 2 Q.B. 613.
[22] [1955] 2 Q.B. 298; [1955] 3 W.L.R. 5; [1955] 2 All E.R. 409, C.A.
[23] [1892] 2 Q.B. 613, 619.
[24] [1926] A.C. 155, 170; 42 T.L.R. 207, P.C.

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but loading did not commence for three weeks. The owners blamed the charterers for the delay because they had no cargo ready to load. The charterers blamed the owners because the vessel, they said, had weevils and other pests in the holds and was unfit to carry grain. After three weeks a cargo of grain was loaded and carried to Avonmouth. The owners say that, on account of the delay, demurrage was incurred in the sum of £5,642 5s. 7d. The shipowners released the cargo to the consignees without insisting on any lien for demurrage. Later on the charterers paid £760 18s. 6d. on account of demurrage. The owners claimed the balance of demurrage, £4,881 7s. 1d. The matter went to arbitration. The principal issues argued before the umpire were: (1) Whether the vessel was fit for the carriage of grain; for if she was, the charterers ought to have loaded a cargo at once; and having failed to do so, were prima facie liable for the demurrage claimed. (2) Whether the owners' claim was excluded by clause 27, the "cesser clause," which said that: ". . . 27. "The charterers' liability on this charter to cease when the "cargo is shipped (provided the same is worth the freight, dead "freight and demurrage, on arrival at port of discharge), the "owner or his agent having a lien on the cargo for freight, dead "freight, demurrage, lighterage at port of discharge and average." If that clause applied, the owners ought to have recovered the demurrage by insisting on their lien; and, not having done so, they could not recover against the charterers. (3) The owners argued, however, at the arbitration that the charterers, by paying £760 18s. 6d. on account of demurrage, had *waived* the "cesser "clause" and could not rely on it. In support of waiver they cited in a letter *Rederi Aktiebolaget Transatlantic* v. *The Board of Trade*.[1]

The charterers asked the umpire to state his award in the form of a special case. He did so. In his award he found that the vessel was fit to load and that the claim for demurrage was *not* excluded by the cesser clause. He said: "Subject to the answer "of the court to the questions hereinafter stated, I award and "adjudge that the charterers do pay to the owners a balance of "demurrage in the sum of £4,881 7s. 1d."

There were two questions for the court. I need not trouble about question 1 for that dealt only with laytime. But question 2 was: "Whether the claimants' claim against the respondent is "excluded by clause 27 of the said charterparty." The umpire

[1] (1924) 30 Com.Cas. 117, 125–127.

A added: "If the opinion of the court is different from the above, "I respectfully request that the opinion of the court be made "known to me and that this award be remitted to me to enable "me to reconsider my award."

It is to be noted that the special case did not distinctly raise any point about waiver of the cesser clause. There is perhaps a B hint of it in the facts in the one sentence: "The charterers paid "£760 18s. 6d. on account of demurrage": and in the contention of the owners "that clause 27 of the charterparty did not, "*in the circumstances of this case*, relieve the charterers from "liability for loading port demurrage." But these hints are so slight that, if the owners wished to raise the point of waiver for C the opinion of the court, they ought to have got the special case remitted (by consent or by order) for the relevant facts to be stated and a specific question asked about it. They did none of these things. And when the award came before Megaw J.[2] they did not take the point of waiver.

Megaw J. decided [2] that the claim for demurrage was excluded D by the cesser clause, and his decision was affirmed by the Court of Appeal.[3] The owners asked the House of Lords for leave to appeal but it was refused. The result was that, in the opinion of the courts (contrary to that of the umpire) the claim for demurrage was excluded by the cesser clause. So the award went back to the umpire in accordance with his request that "this award E "be remitted to me to enable me to reconsider my award."

At the hearing before Megaw J.,[4] the owners asked that, when the award was remitted to the umpire, the owners should be permitted to maintain their submissions about waiver. Megaw J. expressed the opinion [5] obiter that it was not open to the umpire to consider the question of waiver. The Court of Appeal expressed F no opinion on it,[6] so the matter went back to the umpire without any ruling on the point of waiver.

At the new hearing before the umpire the owners sought again to raise the point about waiver of the cesser clause. The charterers said that the owners ought not to be allowed to raise it. Faced with these rival contentions, the umpire has stated a G consultative case so as to see whether the owners should be allowed to raise it or not. Mocatta J. has held that the owners can raise it. The charterers appeal to this court.

If the first award had been truly a consultative case (as

[2] [1963] 1 Lloyd's Rep. 246.
[3] [1963] 2 Lloyd's Rep. 113.
[4] [1963] 1 Lloyd's Rep. 246.
[5] Ibid. 254, 255.
[6] [1963] 2 Lloyd's Rep. 113, 126.

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Mocatta J. thought it was) I would have agreed with him that the point of waiver could be raised again before the umpire. But I do not think the first award was a consultative case. I think it was an interim award. And this makes all the difference, as I will show. Before the year 1934 our law of arbitrations recognised only two ways in which an arbitrator or umpire could state a special case for the "opinion" (or "decision," I care not which word is used) of the High Court. One was a final award under section 7 (*b*) of the Arbitration Act, 1889. The other was a consultative case under section 19. On a final award there was a right of appeal from the decision of the High Court to the Court of Appeal and thence to the House of Lords. On a consultative case there was no appeal from the decision of the High Court. In order to distinguish between these two alternatives, the test was whether the arbitrator or umpire had in his award exhausted his duties so that there was nothing left for him to do. If he had bid farewell to his office—so that the opinion of the court could decide all the issues one way or the other—then it was a final award. But if there was something left for the arbitrator or umpire to do, even if he retained for himself so little as the assessment of damages, then it was a consultative case and not a final award: see *Cogstad (C. T.) & Co.* v. *Newsum (H.), Sons & Co.*[7]

Since 1934, however, there has been a third way open to obtain the decision of the High Court. This is by way of an interim award. A special case can now be stated with respect to an interim award, just as with a final award: see sections 7 (4) and 9 (2) of the Arbitration Act, 1934, now replaced by sections 14 and 21 (2) of the Arbitration Act, 1950. Nowhere is an "interim "award" defined. But it seems to me that an interim award may be of two kinds. It may be an interim order made pending the final determination of the case; such as an award that an instalment under a building contract be paid pending final determination of the amount due. Or it may be an interim decision, given on a particular issue or issues between the parties, pending final determination of the whole case; such as a decision that a contract was concluded, but leaving over the question of damages. Such an award is not a final award because the arbitrator has not exhausted his duties. It is, however, an award because it is an order or decision on an issue calling for determination. It is, therefore, an interim award: and it can be stated in the form of a special case for the decision of the High Court.

[7] [1921] 2 A.C. 528; 37 T.L.R. 995.

Since the introduction of such an interim award, a consultative case should be confined to those cases where the arbitrator or umpire asks for the guidance of the court without coming to a decision himself. The typical case is where, during the course of the reference, a question of law arises, and he wants to know the opinion of the court before he comes to his decision. Such was the case in *In re Knight & Tabernacle Permanent Benefit Building Society*,[8] where the arbitrator wanted to know whether the society had power to make alterations in their rules so as to bind Knight. To such a case the words of Bowen L.J. still apply[9]: "The section contemplates a proceeding by the arbitrator "for the purpose of guiding himself as to the course he should "pursue in the reference. He does not divest himself of his "complete authority over the subject-matter of the arbitration. "He still remains the final judge of law and fact." Previously no appeal at all lay from the decision of the High Court on a consultative case. Even now it does not lie without the leave of the High Court or the Court of Appeal: see section 21 (3) of the Act of 1950.

Into which category does the first award in this case come? It is obviously not a final award: because the umpire in a certain event desires to reconsider his award. It is either an interim award or a consultative case. And of these two I think it is an interim award stated in the form of a special case for the opinion of the court. I say this because the umpire himself says that he is making an "award," and not merely stating "a question of law" for the opinion of the court, by which I take it that he is acting under section 21 (1) (*b*) of the Act of 1950 and not under section 21 (1) (*a*). Next, the umpire comes to a definite decision on all the issues raised before him. He says: "So far as it is a question "of fact I find, and so far as it is a question of law I hold, "1 . . . 2 . . . 3 . . . 4 . . . 5 . . ." Finally, he concludes: "Subject to the answer of the court to the questions hereafter "stated, I award and adjudge that the charterers do pay to the "owners . . ." etc. Every word of it shows that he is deciding each and every one of the issues raised before him subject to the opinion of the court on two points. I regard it therefore as an interim award decisive of those issues subject to the opinion of the court.

The next question is, what is the effect of an interim award? At any rate in a case like this, where the parties have raised this

[8] [1892] 2 Q.B. 613; 8 T.L.R. 783. [9] [1892] 2 Q.B. 613, 619.

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specific issue: is the claim for demurrage excluded by the cesser clause? The umpire held in his interim award (subject to the opinion of the court) that the claim was not excluded. The court took a different view and held that the claim was excluded by the cesser clause. That issue having been decided by the court, can it be reopened before the umpire? I think not. It is a case of "issue estoppel" as distinct from "cause of action estoppel" and "fact estoppel," a distinction which was well explained by Diplock L.J. in *Thoday* v. *Thoday*.[10] The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam: see *King* v. *Hoare*.[11] But within one cause of action, there may be several issues raised which are necessary for the 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, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances, see *Badar Bee* v. *Habib Merican Noordin*,[12] *per* Lord Macnaghten.[13] And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances: see *Henderson* v. *Henderson*[14]; *Hoystead* v. *Commissioner of Taxation*[15]; *New Brunswick Railway Co.* v. *British & French Trust Co.*[16]; *Connelly* v. *Director of Public Prosecutions*.[17]

Like principles apply to arbitration. Applying them to the present case: the whole claim was for demurrage. In order to

[10] [1964] P. 181, 198; [1964] 2 W.L.R. 371, 385; [1964] 1 All E.R. 341, 352, C.A.
[11] (1844) 13 M. & W. 494, 504.
[12] [1909] A.C. 615.
[13] Ibid. 623.
[14] (1843) 3 Hare 100, 115.
[15] [1926] A.C. 155, 170; 42 T.L.R. 207, P.C.
[16] [1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747.
[17] [1964] A.C. 1254; [1964] 2 W.L.R. 1145; [1964] 2 All E.R. 401, C.C.A., H.L.(E.).

A determine that claim, the parties raised (amongst other issues) this distinct issue: is the claim excluded by the cesser clause? That issue was determined by the judge (Megaw J.[18]) adversely to the shipowners. He held that their claim was excluded by the cesser clause. Now the shipowners wish to get that determination reversed by relying on the point of waiver. They wish B the umpire to find that the claim was not excluded by the cesser clause. That is the complete opposite of what the judge found. I do not think that they should be allowed to do this. It is obvious that, if they are right on the point of waiver, they could have saved all the argument on the issue which went up to the House of Lords. It was a waste of time to argue all that way if C the cesser clause had been waived. It seems to me that, if the shipowners wished to rely on this point of waiver, they ought to have raised it, or to see that it was raised, in the first award stated for the decision of the court. Not having done so, they cannot raise it now. It is in the interests of commerce that issues, once decided, should not be reopened because one side or D the other thinks of another point. If we were to allow the point of waiver to be raised now it might well mean another journey up to this court on another special case. That would never do. There must be an end of litigation sometime.

I would allow this appeal.

E DANCKWERTS L.J. I agree completely with the judgment of the Master of the Rolls and I do not wish to add anything.

DIPLOCK L.J. This appeal raises an important and difficult question as to the application of the principle nemo debet bis vexari pro una et eadem causa to arbitrations under the Arbitra- F tion Act, 1950. To this question two experienced judges of the Commercial Court have given conflicting answers.

Arbitration, like litigation, is concerned only with the legal rights and duties of the parties thereto. It is concerned with facts only in so far as they give rise to legal consequences. The final resolution of a dispute between parties as to their respective G legal rights or duties may involve the determination of a number of different "issues," that is to say, a number of decisions as to the legal consequences of particular facts, each of which decisions constitutes a necessary step in determining what are the legal rights and duties of the parties resulting from the totality of the

[18] [1963] 1 Lloyd's Rep. 246.

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facts. To determine an "issue" in this sense, which is that in which I shall use the word "issue" throughout this judgment, it is necessary for the person adjudicating upon the issue first to find out what are the facts, and there may be a dispute between the parties as to this. But while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an "issue."

In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: but such application will only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence.

This is but an example of a specific application of the general rule of public policy, nemo debet bis vexari pro una et eadem causa. The determination of the issue between the parties gives rise to what I ventured to call in *Thoday* v. *Thoday* [19] an "issue estoppel." It operates in subsequent suits between the same parties in which the same issue arises. A fortiori it operates in any subsequent proceedings in the same suit in which the issue has been determined. The principle was expressed as long ago as 1843 in the words of Wigram V.-C. in *Henderson* v. *Henderson* [20] which were expressly approved by the Judicial Committee of the Privy Council in *Hoystead* v. *Commissioner of Taxation.*[21] I would not seek to better them: "I believe I state the rule of the court correctly when "I say, that where a given matter becomes the subject of "litigation in, and of adjudication by, a court of competent juris-"diction, the court requires the parties to that litigation to bring

[19] [1964] P. 181, 198.
[20] (1843) 3 Hare 100, 114.
[21] [1926] A.C. 155, 170.

A "forward their whole case, and will not (except under special "circumstances) permit the same parties to open the same "subject of litigation in respect of matter which might have been "brought forward as part of the subject in contest, but which was "not brought forward, only because they have, from negligence, "inadvertence, or even accident, omitted part of their case. The B "plea of res judicata applies, except in special cases, not only "to points upon which the court was actually required by the "parties to form an opinion and pronounce a judgment, but to "every point which properly belonged to the subject of litigation, "and which the parties, exercising reasonable diligence, might "have brought forward at the time."

C Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal. An arbitrator today has power to make an interim award determining D particular issues separately from other issues in the arbitration. It is, I understand, conceded by Mr. Goff, on behalf of the owners, that if the arbitrator does so, his interim award creates an issue estoppel as respects the issue determined by the interim award. Neither party can at any subsequent hearing in the arbitration advance arguments or adduce evidence on that issue directed to E disputing the correctness of the determination previously made. The power of the arbitrator to make an interim award was first conferred by the Arbitration Act, 1934. Before that date the only kind of award that he could make was a final award which determined *all* the issues raised between the parties.

In choosing arbitration as the method of determining disputes F as to their respective legal rights and duties, the parties constitute the arbitrator the exclusive tribunal to determine all disputed questions of fact, but they do not thereby constitute him the exclusive tribunal to determine all the legal consequences of those facts. His determination of legal consequences of facts is subject to correction by the High Court. He is thus not the exclusive G tribunal to determine all the issues relevant to the dispute referred to him. Any reference to arbitration under the Arbitration Act, 1950, contemplates that, if the appropriate statutory machinery is invoked, the High Court may in a corrective role form part of the tribunal to determine all or any of the issues relevant to the dispute. The machinery can be invoked by the arbitrator, either of his own motion or by direction of the court, stating his award,

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whether final or interim, or any part of such award as a special case for the decision of the High Court. Where his award is a final award stated in the form of a special case, it does determine all the issues between the parties though the determination is inchoate. It still contains one or more potential alternative determinations of the legal consequences of the facts which the arbitrator has found until the award is completed either by failure of the parties to set down the special case for hearing or by the High Court's answering the questions of law stated. Once his final award is made, whether or not stated in the form of a special case, the arbitrator himself becomes functus officio as respects all the issues between the parties unless his jurisdiction is revived by the court's exercise of its power to remit the award to him for his reconsideration. But this is merely the way in which the principle nemo debet bis vexari pro una et eadem causa affects the arbitrator's functions. He has decided the questions of fact as to which he is the exclusive tribunal; he has determined their legal consequences subject only to correction by the High Court on the stated questions of law. The parties cannot reopen the same matters again before him. Where his award is an interim award stated in the form of a special case, it determines the particular issue or issues to which it relates in alternative ways dependent upon the answer of the High Court to the question of law stated in the special case. It creates an issue estoppel or issue estoppels between the parties and the arbitrator is functus officio as respects the issues to which his interim award relates. But since a particular issue, if determined in one way, may dispose of the whole of the dispute between the parties, but if determined in another way may leave other issues to be determined, an award upon an issue which is stated by an arbitrator in the form of a special case, which is in any event an inchoate determination, may become a final award when completed by the High Court's answering the questions of law in one way but only an interim award if the High Court answers the questions of law in another way. Now that an arbitrator has power under section 14 of the Arbitration Act, 1950, to make an interim award as well as a final award, I see nothing in the Act to prohibit him from making an award of the kind that I have just described. It is a convenient power calculated to avoid costs of unnecessary references back to the arbitrator.

In addition to the power of stating an award whether final or interim in the form of a special case, the arbitrator also has power to state any question of law arising in the course of the reference in the form of a special case for the decision of the High Court.

A question of law can arise in the course of a reference before any issue in the reference is determined; and the power to state such a question of law as a special case, unlike the power to state an interim award upon the issue to which the question of law may be relevant, can be exercised by the arbitrator before he determines the issue. If the question of law depends upon the existence of facts which are in dispute between the parties, he may state the question of law before determining whether those facts do exist. Indeed, the answer to the question of law may be necessary in order to inform him what facts would be relevant to the issues which he has to determine. The power also is thus one which if properly exercised may be of great assistance to the arbitrator and to the parties. But the answer of the High Court to a question of law arising in the course of a reference and stated in a special case which is not an interim award, although it is binding upon the arbitrator, at any rate in the sense that it would be misconduct on his part to make an award which conflicted with it (see *In re Knight & Tabernacle Permanent Benefit Building Society* [22]) does not give rise to an issue estoppel. It is open to the parties subsequently to adduce evidence upon which to base a contention that the question of law decided by the High Court has become irrelevant.

The question whether or not an issue estoppel arises as a result of a particular case stated for the decision of the High Court under section 21 of the Arbitration Act, 1950, depends upon whether the case is stated after the arbitrator has determined the issue, albeit in alternative ways dependent upon the answer of the High Court to the question of law stated, or whether the case is stated before he has determined the issue. Into which of these two classes the special case falls can only be ascertained by examining it.

The umpire certainly intended the document which he signed on November 21, 1962, to be an award in the form of a special case. He so describes it. He recites that the charterers requested that his award be stated in the form of a special case and that before making the document he has weighed and considered the facts, the evidence and the contentions of the parties. In the operative part of what is expressed to be his award he sets out the respective claims of the parties as to their legal rights and duties which form the subject-matter of the reference. These relate to a claim by the owners for demurrage at the port of loading, for dispatch money at the port of loading and to a further claim by the owners for the recovery of expenses of fumigation of the vessel at the port of

[22] [1892] 2 Q.B. 613, C.A.

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loading alleged to have been wrongfully deducted by the charterers upon payment of freight. He then proceeds to make eighteen findings of fact. There follow recitals of the respective contentions of the parties upon three issues, the first two of which were interconnected. They were (1) as to the period during which laytime ran for the purpose of calculating demurrage or dispatch money, (2) as to whether fumigation was necessary so as to entitle the charterers to deduct the cost from the freight, and (3) as to whether the charterers' liability to the owners ceased under the cesser clause (clause 27 of the charterparty) when the cargo was shipped. The umpire then set out his decisions on these issues, viz. (1) that the laytime ran from October 1, 1960, to October 23, 1960, (2) that fumigation was not necessary in order to render the vessel ready to load and that the charterers were not entitled to deduct the cost thereof from the freight, (3) that the charterers' liability did not cease under clause 27 of the charterparty. The document then continued: "Subject to the answer of the court to the "questions hereinafter stated I award and adjudge" . . . various specified sums of money. "The question (sic) of law for the "opinion of the court are as follows: 1. Whether upon the facts "found and upon the true construction of the charterparty any, "and if so what, parts of the period between October 1, 1960, "and 19.30 hours on October 23, 1960, count as laytime, and: "2. Whether the claimants' claim against the respondents is "excluded by clause 27 of the said charterparty. If the opinion "of the court is that the whole of the time as above counts as "laytime and that the claimants' claim against the respondents "is not excluded by clause 27 of the said charterparty, then my "award as above shall stand. If the opinion of the court is "different from the above, I respectfully ask that the opinion "of the court be made known to me and that this award be "remitted to me to enable me to reconsider my award."

The special case thus made it clear that the resolution of the dispute between the parties as to their legal rights and liabilities might involve the determination of three different issues: viz., what were the legal consequences of the relevant facts found by the umpire (1) as respects the dates between which laytime ran for the purposes of calculating demurrage or dispatch money, (2) as respects the right of the charterers to deduct the costs of fumigation of the vessel incurred by them at the port of loading, and (3) as respects the release of the charterers from any liability to the owners for demurrage under clause 27 of the charterparty. No question of law was stated for the decision of the court on

A the second of these issues. There appears to have been no dispute that if the vessel was in fact fit to carry the cargo without fumigation, the costs were not deductible from the freight and that if it was not, the costs were deductible. That issue was, therefore, disposed of by the umpire's finding of fact that the vessel was fit to carry the cargo without fumigation. Questions of law were B stated on the first and third issues, but the questions stated on these issues were in my view plainly questions as to the legal consequences of the facts found by the umpire. Whichever way they were answered, they would determine the respective issues. If answered in one way, they would complete the inchoate determination by the umpire of all the issues between the parties which C were contained in the special case; if answered in a different way, they would leave other issues still to be determined.

Why then is the special case not an award of the umpire in the form of a special case which, in the event of one answer, would become a final award determining all the issues between the parties, and in the event of any other answers, would become an D interim award determining particular issues, leaving others still for determination? Counsel for the owners submits that the House of Lords so decided in *Cogstad (C. T.) & Co.* v. *Newsum (H.), Sons & Co. Ltd.*[23] I disagree. At the time that case was decided arbitrators had no power to make interim awards, and thus no power to state an interim award as a special case for the E decision of the High Court. They had power to state a final award as a special case or a question of law arising in the course of a reference as a special case. It had been decided in *In re Knight & Tabernacle Permanent Benefit Building Society's Arbitration*[24] that there was no right of appeal from the High Court where a question of law arising in the course of a reference F had been stated as a special case for the opinion of the High Court. The actual decision in the *Cogstad* case[25] was that the special case stated for the opinion of the High Court, since it provided for the remission of the matters in dispute to the arbitrator if the court answered the questions submitted to the High Court in a particular way, was not a final award in the form G of a special case and thus could only be a consultative case, viz., a question of law arising in the course of a reference and stated as a special case for the opinion of the court. In 1921, if it was not either a final award stated as a special case or a consultative case, it was a mere piece of written misconduct by the arbitrator.

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[24] [1892] 2 Q.B. 613.
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Their Lordships' decision in the then state of the law that it was a consultative case need cause no surprise. But now that arbitrators have power to make an interim award and to state it as a special case for the decision of the High Court, neither the *Building Society* [26] case nor the *Cogstad* [27] case seems to me to be any longer in point.

For the reasons I have already discussed the special case stated by the umpire on November 21, 1962, was an award in the form of a special case. If the questions of law stated on the two issues had been answered in a particular way, it would have been a final award determining all the issues between the parties. In the way in which they were answered, it became an interim award determining these two issues and another issue, viz., that the costs of fumigation were not deductible from the freight. One of the issues determined was: "whether the claimants' claim "against the respondents is excluded by clause 27 of the said "charterparty?" The answer was that it is, "so far as the "owners' claim relates to demurrage alleged to have been incurred "at the port of loading."

The combined effect of the special case and this answer is to give rise to an "issue estoppel" which precludes the owners from seeking at any subsequent hearing in the arbitration to contend that their claim to demurrage at the port of loading is not excluded by clause 27 of the charterparty or to adduce further evidence in support of any such contention.

In this court Mr. Goff has contended on behalf of the owners that the only issue determined by the umpire in relation to clause 27 of the charterparty was whether upon its true construction it was capable of applying on the facts of this case and that the issue whether, although capable of applying, it was waived by the charterers was a separate issue which was not determined by the umpire or the court. But waiver is merely one ground for contending that the owners' claim to demurrage at the port of loading is not excluded by clause 27 of the charterparty. If the owners do not choose to rely upon it when that issue is determined by the tribunal of their choice, the issue estoppel will preclude them from relying upon waiver subsequently. In the present case the owners did rely among other matters upon waiver of clause 27 by the charterers at the hearing before the umpire, although subject to the opinion of the High Court, he determined the "issue" about clause 27 in the owners' favour upon grounds other than waiver. These grounds were in the result rejected by

[26] [1892] 2 Q.B. 613. [27] [1921] 2 A.C. 528.

A the court at the hearing of the case stated. The owners made representations to the umpire objecting to *any* question being stated for the decision of the court on the issue whether their claim was excluded by clause 27. They based their objection on the ground that the clause had been waived by the charterers. But they did not, when this objection was overruled by the B umpire, raise any point as to the form of the questions he proposed to state for the decision of the court in the special case. They did suggest that he should incorporate a finding of waiver of the cesser clause in his "findings of fact" in the special case —although waiver is not a fact but a legal consequence of facts. However, whether for this or some other reason, the umpire did C not do so. In the result the special case stated the question for the decision of the court on the issue as to the exclusion of the owners' claim by clause 27 of the charterparty in the wide terms I have quoted, and, it is conceded by the owners, stated no findings of fact which were capable of supporting an argument of waiver. The owners could have taken steps to have the special case D remitted to the umpire for further findings of fact upon which to base an argument of waiver. They did not do so. They allowed the special case to go before the court for decision upon the issue whether the charterers' liability was excluded by clause 27 in the form in which the umpire had stated it and upon the findings of fact therein set out. In these circumstances the E principle approved and applied in *Hoystead's* case [28] applies to this case too. They are estopped from reopening this issue and are accordingly precluded from contending before the umpire that their claim against the charterers is not excluded by clause 27 of the charterparty so far as it relates to demurrage alleged to have been incurred at the port of loading, either on the grounds F of waiver or any other ground. The umpire for his part is precluded from further considering that question.

I, too, would allow this appeal.

Appeal allowed. No order as to costs in Court of Appeal. Order as to costs before Mocatta J. to remain.

G

Answer to the question in consultative case in the affirmative.

Leave to appeal to House of Lords refused.

Solicitors: *Middleton, Lewis & Co.; Richards, Butler & Co.*

A. H. H.

[28] [1926] A.C. 155.

9

Indexed as:

Ward v. Dana G. Colson

Between
James C. Ward, Assignee of Cameo Interiors Limited, Plaintiff,
and
Dana G. Colson Management Limited, Defendant

[1994] O.J. No. 533

24 C.P.C. (3d) 211

46 A.C.W.S. (3d) 663

Action No. 6343/85

Ontario Court of Justice - General Division
Toronto, Ontario

E. Macdonald J.

Heard: March 14 and 15, 1994.
Judgment: March 18, 1994.

(15 pp.)

Practice -- Dismissal of action -- Grounds, general -- Bars, waiver or estoppel.

This was a motion for the dismissal of an action for the collection of an outstanding account on the ground that the plaintiff was without capacity to continue the action. The plaintiff, a former officer of C Ltd. who was bankrupt, was the assignee of all the accounts, claims and monies and choses in action of C Ltd. The plaintiff had been granted an order to continue the action and argued issue estoppel.

HELD: The motion was dismissed. Issue estoppel was not eliminated simply because the order was made as a result of an interlocutory application. The order granting the plaintiff the status to continue the action led to the conclusion that issues surrounding the capacity of the plaintiff to continue the action were canvassed before His Lordship and that the considerations currently before the Court were germane to the order. The fact that the matter of capacity was disposed of prohibited the Court from revisiting the issue. An appeal was the proper procedure.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 11.03, 21.01(3)(b), 24.01, 56.01.

Richard J. Worsfold, for the Plaintiff.
L. David Roebuck, for the Defendant.

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1 **E. MACDONALD J.**:-- At the opening of trial, Mr. Roebuck advised that he would be bringing, on behalf of the defendant, a motion to have the action dismissed. Alternative relief is sought, but by agreement of counsel, I am dealing, at this point, only with the motion for dismissal. It is brought under rule 21.01(3)(b), on the basis that the plaintiff is without legal capacity to commence or continue this action. The plaintiff James Ward is a former officer of Cameo Interiors Limited ("Cameo"), which is now a bankrupt company. He is the assignee of all the accounts, claims and monies and choses in action of Cameo. This action is for the collection of an outstanding account alleged to be owing by the defendant. Cameo was in the business of constructing dental offices and, in this capacity, supplied labour and materials to the defendant.

2 The cause of action in this matter was not part of the estate of Cameo when it became bankrupt in 1992 because it had been assigned to the Canadian Imperial Bank of Commerce ("CIBC"). Cameo had assigned its accounts receivable as security to the CIBC by way of a general assignment of accounts, dated June 12, 1979, and a general security agreement, dated November 8, 1985. In accordance with the terms of the general security agreement, Cameo was permitted to deal with its accounts receivable in the ordinary course of business. The general security agreement provided that all monies collected or received by Cameo were to be held by Cameo as trustee for the CIBC.

3 The CIBC made a formal demand with respect to the general security agreement on December 17, 1991. Thereafter, James Ward paid to the CIBC the full amount outstanding and took an assignment of the security of CIBC by way of a written assignment dated November 5, 1992. The above facts are not in dispute.

4 By way of motion, notice of which was given to the defendant, James Ward requested an order from this court to continue the action substituting himself as the plaintiff, as assignee, through the CIBC, of Cameo. The matter was argued before O'Brien J. who granted an order permitting Mr. Ward to continue on June 14, 1993. In response to Mr. Ward's motion before O'Brien J., the defendant brought a notice of cross-motion for the following relief:

(a) an Order dismissing this action for delay;
(b) in the alternative to (a) above, and in the event that the motion by Mr. Ward for an Order to continue is granted, an Order that Mr. Ward post security for costs before this action is restored to the trial list;
(c) its costs of both the motion and cross-motion on a solicitor and client scale and Federal Goods and Services Tax thereon;
(d) such further and other relief as this Honourable Court may deem just.

5 Of interest to me in disposing of this matter are the grounds set forth for the cross-motion which I set forth at verbatim as they appear in the defendant's notice of cross-motion before O'Brien J.:

(i) This action was set down for trial in August, 1987;
(ii) It was subsequently dismissed in November, 1987, due to the Plaintiff's failure to list it for trial on or before November 1, 1987, as it was ordered to do;
(iii) With the consent of the Defendant, the Order dismissing the action was set aside and it was listed for trial in March, 1988;
(iv) By November of 1990, this action had been struck off the trial list by reason of the Plaintiff's failure to answer numerous and substantial undertakings given on its examination for discovery some three years earlier;
(v) Almost three years have passed between the time that this action was struck off the trial list and the date of the Plaintiff's motion to have it restored to the trial list;
(vi) There has been inordinate delay for which the Plaintiff is responsible;
(vii) A limitation period has now passed;
(viii) Mr. Ward has waited, at a minimum, 5 months in bringing his motion for an Order to continue, with such delay being entirely unreasonable;
(xi) The Defendant would be substantially prejudiced, in a manner not compensable by costs or an adjournment, if this matter were restored to the trial list;
(x) Mr. Ward has deposed that, by July, 1993, he will be ordinarily resident outside of Ontario;
(xi) The existing Plaintiff is both a corporation and a nominal Plaintiff and there is good reason to believe that it has insufficient assets in Ontario to pay the costs of the Defendant;
(xii) Rules 11.03, 24.01 and 56.01 of the Rules of Civil Procedure;
(xiii) Such further and other grounds as counsel may advise and this Honourable Court permit.

6 The notice of cross-motion, taken in its entirety, suggests to me that the defendant directed its mind fully to the remedies open to it at that time. Inasmuch as the plaintiff was seeking an order to continue, naming James Ward as plaintiff, I have to take it that, aside from the cross-motion, the defendant in its defence of the motion directed its mind to the question of the capacity of Mr. Ward to obtain the order he sought. Mr. Roebuck's position (at the risk of oversimplifying it) is that the issue of capacity was not explicitly before O'Brien J. and, on that basis, it follows that it has not been disposed of with the result that there is nothing that would, in law, prohibit or prevent this court from entertaining the motion which Mr. Roebuck now brings.

7 On this question, I have had the benefit of very helpful submissions from Mr. Roebuck and Mr. Worsfold. In addition, I am guided by the disposition of the matter by O'Brien J. and, in this context, I refer to his endorsement which reads as follows:

> Order to continue to go naming James Ward, assignee of Cameo Interiors Limited as plaintiff in this action and restoring this action to normal trial list.
>
> I am not persuaded there is any reason to expedite this long outstanding lawsuit.
>
> There is evidence showing James Ward is leaving the jurisdiction and on the basis of the bankruptcy of the former plaintiff Cameo Interiors Limited I am satisfied there should be an order for security for costs to be posted by Ward.
>
> Those costs are fixed at $25,000. I rely on the draft bill submitted by defence counsel, filed on the motion although it was not properly submitted on the motion.
>
> I dismiss the cross-motion seeking dismissal of the action for delay.
>
> While there has been long delay in prosecuting this matter some of that delay has been occasioned by the defendant and there is no suggestion of prejudice to the defendant by reason of that delay. The defendant has agreed to a number of steps leading to restoring this action to the trial list. The type of prejudice considered as a requirement for dismissal in Wicha v. Niagara Peninsula (1977) 5 cpc [sic.] 59 (CA) are not present in this matter.
>
> James Ward is to post the security by Aug. 5/93 by deposit into court or by agreement between counsel relating to suitable letter of credit. If Ward does not post security within that time the defendant may move without notice to dismiss the plaintiff's action.
>
> Costs to trial judge.

8 O'Brien J.'s order was issued and entered. It bears the date of June 14, 1993 and provides, in paragraph 1, as follows:

> THIS COURT ORDERS THAT this proceeding continue and that the title of proceedings in all documents issued, served or filed after the date of this Order be as follows:
>
> JAMES C. WARD, ASSIGNEE OF CAMEO INTERIORS LIMITED
> Plaintiff
> - and -
>
> DANA G. COLSON MANAGEMENT LIMITED

Defendant

9 The order was not appealed. Mr. Worsfold points out that the motion for the order to continue was made on notice to the defendant and to the CIBC and to the trustee in bankruptcy for Cameo. Neither the CIBC nor the trustee took part in the motion.

10 Mr. Worsfold argues that all of the issues raised in the motion now before me were fully canvassed before O'Brien J. In response to this position, Stephen Brunswick, a partner in the law firm of Teplitsky, Colson, which had carriage of the action for the defendant prior to November 1993, states the following in an affidavit sworn on March 10, 1994:

1. I am a partner in the law firm of Teplitsky, Colson and had carriage of this action for the Defendant prior to November of 1993.
2. I make this affidavit to respond to the allegation of S. Harvey Starkman, on information and belief, that "the issues raised in the motion of the Defendant returnable at trial were fully canvassed before the Honourable Mr. Justice O'Brien on June 14, 1993."
3. I participated in the drafting of the materials filed on behalf of the Defendant for the motion before the Honourable Mr. Justice O'Brien on the 14th day of June, 1993, but an associate in my office, Larry Najjar, argued the motions.
4. While the Defendant brought a motion before the Honourable Mr. Justice O'Brien to dismiss the action for delay, it brought no motion to dismiss the action based on a lack of capacity in the Plaintiff, Cameo Interiors Limited to have commenced the action. Annexed as Exhibit "A" to this my affidavit is a copy of the Notice of Cross-Motion which I prepared and which was filed before the Honourable Mr. Justice O'Brien.
5. Mr. Najjar is at the present time in the far East and I am unable to get his comments as to the matters argued before the Honourable Mr. Justice O'Brien. However, I did discuss with him the results of the motion and I reviewed the endorsement of the Honourable Mr. Justice O'Brien at the time. I noted in particular that the Honourable Mr. Justice O'Brien gave no reasons for his Order continuing the action in the name of James Ward, as Assignee of Cameo Interiors.
6. It was my opinion at the time that the Order of the Honourable Mr. Justice O'Brien was procedural in nature and merely permitted the transmission of the interest of Cameo through the Canadian Imperial Bank of Commerce to Mr. Ward and did not preclude the Defendant from relying upon any defences that may arise from that state of affairs.
7. I instructed Mr. Najjar to confirm our position in writing to the solicitors for the Plaintiff before approving the Order of the Honourable Mr. Justice O'Brien. Annexed as Exhibit "B" to this my affidavit is a copy of a letter dated June 29, 1993 from Mr. Najjar which was forwarded to Mr. Wors-

fold. As indicated in the letter, two further reminders requesting a reply were sent on July 8, and July 14, 1993.

8. In that letter, Mr. Najjar stated the following:

> "Before I am able to approve the draft, I will require your confirmation that the Order is without prejudice to any defences that may arise therefrom."

9. By letter dated July 15, 1993, Mr. Najjar again wrote to Mr. Worsfold. While he returned an approved draft Order of the Honourable Mr. Justice O'Brien he noted the following:

> "Our approval of your draft Order is intended strictly to indicate that it conforms with his Lordship's endorsement. It is not intended as, nor should it be construed as, a waiver of any defences which arise from the various matters raised on the motion before Justice O'Brien or the background thereto. We hereby expressly reserve our rights to raise any defences arising or resulting from or related to the orders made."

Annexed as Exhibit "C" to my affidavit is a copy of the said letter of July 15, 1993.

10. Mr. Worsfold replied to Mr. Najjar's letter of July 15, 1993 by letter dated July 19, 1993 and responded to a number of matters contained therein, but not to the passage quoted above. Annexed as Exhibit "D" to my affidavit is Mr. Worsfold's reply of July 19, 1993. I was never advised by Mr. Najjar that he received a response from Mr. Worsfold on this issue, either oral or written. I have reviewed the correspondence file and can find no response on this issue.

11. Had the solicitors for the Plaintiff taken the position that the Order of the Honourable Mr. Justice O'Brien not only transmitted the interest of Cameo to Mr. Ward but also precluded any defences arising from that fact situation, I would at a minimum have attended before the Honourable Mr. Justice O'Brien to address that point. Having remained silent when confronted with our position on this matter, I am somewhat surprised to discover that the solicitors for the Plaintiff now wish to argue "issue estoppel" arising from that Order. I would have thought in the circumstances that those solicitors are now estopped by their conduct from taking such a position.

11 I do not agree that the order of O'Brien J. was procedural in nature and merely permitted the transmission of Cameo's interest through the CIBC to Mr. Ward. Rule 11 specifically refers to an assignment and, therefore, the motion before O'Brien J. raised the issues now argued before me. The excerpts of the correspondence referred to by Mr. Brunswick suggest to me that the penny was beginning to drop, so to speak, on these issues after the hearing before O'Brien J. Before dealing with the merits of the positions now advanced by Mr. Roebuck, I must first deal with the issue raised by Mr. Worsfold under the heading of "Issue Estoppel". Mr. Roebuck agrees that if the court accepts

the position that the defendant is estopped from bringing this motion, the matters raised in this motion become moot.

Issue Estoppel

12 I am satisfied the issue estoppel is not eliminated as an issue because O'Brien J.'s order was made in the context of an interlocutory application. A decision in an interlocutory application is binding on the parties, at least with respect to other proceedings in the same action. I agree with the submission that the general principle is that it is not open for the court, in a case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed within the appropriate time-frames. This principle is not affected by the fact that the first decision was pronounced in the course of the same action. See David Diamond v. The Weston Realty Company, [1924] S.C.R. 308 (F.C.C.).

13 Mr. Worsfold cites Fidelitas Shipping Co. v. Exportchleb, [1966] 1 Q.B. 630 (hereinafter "Fidelitas") in support of the proposition that, once an issue has been raised and determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again in the same or subsequent proceedings. I refer, in particular, to Lord Denning's comments which appear at p.640 of the judgment in Fidelitas:

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam: see King v. Hoare (1844) 13 M. & W. 494, 504. But within one cause of action, there may be several issues raised which are necessary for the 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, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances, see Badar Bee v. Habib Merican Noordin, [1909] A.C. 615, per Lord Macnaghten. And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances: (emphasis added)

14 Mr. Roebuck has urged me to consider the last two sentences of Lord Denning's comments and suggests to me that, on the facts of this particular case, this principle should be departed from.

15 I consider, as well, that the comments of Lord Diplock, made in the Fidelitas case, at p. 642, to be of further relevance in my determination of this issue:

> Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: but such application will only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence.

16 The impact of O'Brien J.'s order is to give the plaintiff, James Ward in his capacity as assignee of Cameo, status to continue the action. The fact that the order was made by O'Brien J. must, in and of itself, lead me to the conclusion that issues surrounding the capacity of the plaintiff to continue the action were canvassed before His Lordship, and that the considerations now advanced to me by Mr. Roebuck were germane to O'Brien J.'s decision to grant the order, as he did, in June of 1993. In my view, the courts should depart from the principles expressed by Lords Denning and Diplock in extremely rare circumstances. The reasons for this are obvious. A party to a proceeding, if granted a second chance to raise what was already before the court, undermines the integrity of the rules which guide the conduct of litigation. There has to be certainty and finality of the disposition of matters by the courts. Otherwise, the results would be chaotic.

17 I have considered, as well, that if the defendant now succeeds on their motion, there will be no disposition of the matter on its merits, but this, in and of itself, is not fatal to the motion now brought by the defendant.

18 The notice of motion, originally returnable before O'Brien, is very specific in that it alerts the defendant to the fact that an order would be sought permitting James Ward to continue in his capacity as assignee of Cameo Interiors Ltd., as plaintiff in this action. Mr. Worsfold points out that the court must be cautious in disposing of the matter, particularly if the disposition of the matter would create the appearance of having permitted the defendant a "second kick at the can" in terms of its position on the issue of capacity. I am in agreement with this point. On this point, Mr. Worsfold correctly points out that one has to raise all of one's legal arguments at one time and refers to the passage of Lord Diplock excerpted above.

19 I appreciate that the issue now raised by Mr. Roebuck is a discrete and complicated one. While I have no doubt that the careful and detailed analysis of that issue, as conducted by Mr. Roebuck, did not take place before O'Brien J., the fact remains that O'Brien J. has disposed of the matter of capacity and the disposition of the matter prohibits me, at this time, from revisiting the issue. My view is that the defendant stumbled upon defences on issues related to capacity after the disposition of the matter by O'Brien J. and it is now too late to raise these issues.

20 Accordingly, the defendant's motion to dismiss pursuant to Rule 21 does not succeed. At the conclusion of the hearing of this matter, I endorsed the record as follows:

> March 15, 1994

I have reserved judgment on the defendant's motion to dismiss this action. I have indicated to counsel that I will release reasons on Friday, March 18, 1994. Thereafter, I will meet with counsel to discuss costs and the disposition of the balance of the relief sought in the motions now before the court. The trial is therefore adjourned to a date to be fixed by me.

E. MACDONALD J.

Indexed as:

Ward v. Dana G. Colson Management Ltd.

Between
James C. Ward, assignee of Cameo Interiors Limited, plaintiff/respondent, and
Dana G. Colson Management Limited, defendant/appellant

[1994] O.J. No. 2792

51 A.C.W.S. (3d) 1293

Court File No. C18299

Ontario Court of Appeal
Toronto, Ontario

Brooke, McKinlay and Abella JJ.A.

Heard: November 28, 29, 1994.
Judgment: December 2, 1994.
(1 p.)

Practice -- Appeals -- Application to continue under Rule 11.01

This appeal related to an application to continue brought before a judge under Rule 11.01.

HELD Appeal dismissed.
:

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 11.01, 11.02(1).

L. David Roebuck, for the appellant.
Richard Worsfold, for the respondent.

The following judgment was delivered by

1 THE COURT (endorsement):-- The Rule 11 application to continue was not brought before the Registrar under rule 11.02(1) in this case, but before a judge under rule 11.01. The Canadian Imperial Bank of Commerce, the trustee in bankruptcy of Cameo Interiors Limited and the defendant, Dana G. Colson Management Limited, were all served with notice of the motion. All necessary material to support all of the arguments put to this court were before O'Brien J. on that motion. His decision was not appealed.

2 In spite of Mr. Roebuck's thorough argument, we are not persuaded that there was any error in the decision or reasons of MacDonald J. in this case.

3 The appeal is dismissed with costs.

BROOKE J.A.
McKINLAY J.A.
ABELLA J.A.

qp/d/mes/DRS/DRS

10

2012 CarswellOnt 4397, 2012 ONSC 2330, 214 A.C.W.S. (3d) 427

2012 CarswellOnt 4397, 2012 ONSC 2330, 214 A.C.W.S. (3d) 427

Evans v. Snieg

Laura Anne Evans and Michael Lydan, Plaintiffs and Stanislaw Snieg and Maria Snieg, Defendants

Ontario Superior Court of Justice

M.P. Eberhard J.

Heard: October 4, 2011 - April 13, 2012
Judgment: April 13, 2012
Docket: Barrie 11-0169

Proceedings: additional reasons at *Evans v. Snieg* (2012), 2012 ONSC 2970, 2012 CarswellOnt 6392 (Ont. S.C.J.)

Counsel: P. Krysiak, for Plaintiffs

J. Malmazada, for Defendants

Subject: Civil Practice and Procedure

Judges and courts --- Contempt of court — Punishment for contempt — Miscellaneous

In plaintiffs' action against defendant neighbours for nuisance, defendants were ordered to remedy nuisance problem by having work done in accordance with specified design — Defendants were found to be in contempt by failing to complete work ordered, and further evidence as to allegedly cheaper, less intrusive or better ways to remedy problem was not considered — Defendants' appeal was dismissed, and hearing held on penalty — Defendant SS ordered incarcerated for twenty days or until defendants paid $57,000 into court — There was arguable debate as to remedy for nuisance problem, but even if defendant was correct that his proposed remedy was superior, he could not ignore reality that court had made order as to how address problem — Estoppel applied to every point that properly belonged before appellate court, including defendants' fresh evidence disputing substantive merits of design plan that was available at time of appeal — Certain restraint should be exercised in neighbour dispute, as these were neighbours of otherwise good standing in community, but orders must be complied with so court could play its single role of making final decision — Societal impact not only of permitting litigant to choose not to obey court order must be considered but

also that harsh sanction might crystallize neighbourhood opinion into irreparable feuding — Severe but not crushing penalty was appropriate to give defendant dignity of compliance, and short period of incarceration would be necessary because other methods of encouraging compliance had been resisted by SS — Defendants could pay into court estimated cost of addressing nuisance problem, instead of completing work — If defendants did not make payment or abide with payment schedule for unpaid costs awards, then plaintiff could seek judgment for right to enter on lands to execute work per ordered design.

Cases considered by *M.P. Eberhard J.*:

Canada (Human Rights Commission) v. Taylor (1990), 75 D.L.R. (4th) 577, [1990] 3 S.C.R. 892, 3 C.R.R. (2d) 116, (sub nom. *Taylor v. Canada (Human Rights Commission)*) 117 N.R. 191, 13 C.H.R.R. D/435, 1990 CarswellNat 742, 1990 CarswellNat 1030 (S.C.C.) — followed

Evans v. Snieg (2011), 2011 CarswellOnt 7224, 2011 ONSC 4489 (Ont. S.C.J.) — referred to

Minott v. O'Shanter Development Co. (1999), 117 O.A.C. 1, 42 O.R. (3d) 321, 168 D.L.R. (4th) 270, 1999 CarswellOnt 1, 99 C.L.L.C. 210-013, 40 C.C.E.L. (2d) 1 (Ont. C.A.) — referred to

R. v. Nash (2002), 2002 CarswellOnt 5926 (Ont. C.J.) — followed

Reddy v. Oshawa Flying Club (1992), 11 C.P.C. (3d) 154, 1992 CarswellOnt 349 (Ont. Gen. Div.) — followed

RULING on penalty for defendant's contempt of court.

***M.P. Eberhard J.*:**

Procedure

1 This matter returned before me on three occasions all involving the effort to have the Defendant comply with the May 10, 2011 order of Howden J. Thereafter the Defendant appealed Howden J.'s contempt finding of July 22, 2011 [*Evans v. Snieg*, 2011 CarswellOnt 7224 (Ont. S.C.J.)], my October 4th 2011 order finding contempt and my December 2, 2011 order. In brief Appeal Book Endorsement reasons, all three appeals were dismissed on March 12, 2012, the day of the hearing.

2 The matter returned on an open motions list April 10, 2012. While vetting the list I rejected the Defendant's preliminary concern that the matter ought to be heard by Howden J. who has stated clearly that he is not seized.

3 The Plaintiffs in his motion sought an order finding the Defendants in contempt of the order of the Hon. Justice Eberhard dated December 2, 2011; an order of imprisonment of the Defendants until such time as the terms of the December 2, 2011 order are fulfilled, or in the alternative, an order of imprisonment of the Defendants if there contempt is not purged within seven days from the date of this order; an order permitting the Plaintiffs to engage a contractor to carry out the work stipulated by the December 2, 2011 order and a judgment against the Defendants for the

amount paid by the Plaintiffs for this work, if the Defendants failed to purge their contempt despite their imprisonment; an order striking the Defendants' defence in this action, or in the alternative, an order that the Defendants' defence in this action be struck if the Defendants failed to pay the costs following within 10 days from the date of this order and fail to purge the contempt within seven days from the date of this order; costs of this motion on a substantial indemnity basis; and such further and other relief as may be just.

4 The Defendants also filed a motion record. The Defendants claimed an order that this matter be adjourned and place before the Hon. Justice Howden, or in the alternative, an order that this matter be transferred to the court of the Drainage Referee, or in the alternative, an order setting aside the order of the Hon. Justice Howden dated July 22, 2011, or in the alternative, an order varying the order of the Hon. Justice Howden dated July 22, 2011; an order setting aside the current work prohibition against the Defendants; costs of this motion on a substantial indemnity basis; and such further and other relief as may be just.

5 The previous orders of Howden J. and Eberhard J. already found the Defendants in contempt. Whether or not there is a further finding of contempt as a result of the current motion, the issue of punishment for contempt must be addressed. Because the motion and cross-motion arose on a regular list day where the time limitation is generally one hour, it was immediately apparent that some triage must be done. This was especially so in light of the right of the contemnor to an oral hearing.

6 Although we commenced this hearing immediately after the morning break, the evidentiary portion took most of the day. With my leave over the protest of the Plaintiffs, Mr. Snieg adopted, as evidence on the contempt hearing, his affidavit prepared for the purposes of his own motion. As well, he gave oral testimony and was cross examined.

7 We were able to complete the Plaintiff's argument on the contempt issues on April 10 and I adjourned that issue to April 13, 2012. In doing so I had no optimism that the other issues could be addressed on this adjournment date since I created that space in the context of other assignments.

Evidence

8 The Defendants' evidence is not new. Its substance is familiar from the material that was before me on December 2, 2011. However on that day I declined to consider that evidence since it proposed a different solution to the nuisance problem then ordered by Howden J. on May 10, 2011. Stating that I did not sit in appeal Justice Howden, I set out in both my October and December orders further directions for the completion of the work as ordered. These directions were given as an opportunity for the Defendants to purge their already found contempt. On December 2, 2011 I and gave alternate directions as follows:

> (i) the Defendant shall have until January 3, 2012 to complete the work in accordance with the design reviewed by contractor Fruchi who has indicated he can do the work; or
>
> (ii) pay into court $57,000 to this action to be paid out to either Plaintiff or Defendant for completion of the ordered work (by order or agreement).

9 The Defendants have done neither.

10 The May 10, 2011 order of Howden J. which allowed some flexibility as to method was firmed up in the July 22, 2011 order which clarified "that, as part of carrying out the May 10th order and (i) above, the Defendants shall carry out the recommendations of Peter Smith, P. Eng. as soon as possible and no later than 30 days from this date." This necessitated a design. Jeff McCuaig of Pearson-McCuaig Engineering Ltd. (PME) provided the design.

11 The McCuaig design was not prepared until after my October 4th, 2011 order. By that time the Defendants had already been found in contempt by Howden J. on July 22, 2011 and the continuing non-compliance resulted in my further finding of contempt on October 4th 2011. This timing is significant because the Defendants now assert that the PME drawing goes beyond the Smith plan such that refusal to execute that design is not non-compliance with the Smith plan that Howden J. ordered. The timing demonstrates that Mr. Snieg's refusal predates his dispute of the PME design.

12 Mr. Snieg testifies that he understood the order; that he knew what he was supposed to do; but he declined to do the work as ordered because he had obtained expert opinions that the work would result in even more nuisance to the Plaintiffs property.

13 Mr. Snieg anticipates further trouble if the PME design work was done and some nuisance occurred. He tried to obtain a "guarantee" from the McCuaig who prepared the PME design in accordance with the engineering recommendations accepted and ordered by Justice Howden. He interprets silence in the face of a demand for such guarantee from McCuaig, or Smith, as an admission that they too believe the design is flawed.

14 The reply material filed by the Plaintiffs includes an affidavit from Mr. McCuaig setting out his explanations to the concerns expressed to him at a site meeting with Mssrs. Kuntze, Massara and Snieg on April 4, 2012. He further explained that "our design was a representation of the Court Order based on the recommendations of Peter Smith. I stated that we would not deviate from the directions of the Court Order."

15 The Defendants file the affidavit of contractor Giuseppe Massara who disagrees with the McCuaig design and suggests a cheaper "common tool used by contractors in these exact types of situations."

16 The Defendants put forward the November 18, 2011 opinion of Mr. John Kuntze that the McCuaig design goes far beyond the Smith plan ordered by Howden J.; John Kuntze writes:

> The McCuaig drawing appears to attempt to recreate the opinion of Peter Gerald Smith P.Eng. in his February 18, 2011 affidavit. This text based opinion was prepared based on a visual examination of the property only, with no detailed measurement of distance or elevation in formulating the opinion. As outlined below, it is my opinion that the recommendations on the McCuaig drawing go beyond the limits of what was identified in the Smith affidavit.

17 It is noted that Howden J. preferred the evidence of Smith over that of Mr. Kuntze about whom he wrote "In

addition, Mr. Kuntze's answers on cross-examination have effectively injured his credibility and the credibility of his report and his comments on the Smith recommendations. He has not been forthright in his assessment of the problem, and his comments on the law failed to take into account that the problems for the Plaintiffs began with the changes in elevation and boundary slope by the Defendants, as Mr. Evans uncontroverted evidence indicates."

18 Mr. Snieg asserts that the McCuaig design creates new nuisance problems with the municipality and neighbours down the street. He has initiated a petition to have the drainage referee assess plans and there is an appointment on April 21 for the Referee to look at the property.

19 Moreover, as he has repeatedly asserted, Mr. Snieg did not wish to lose his driveway or the area where he planned to build a barn which he testifies are both necessary for him to carry on his farming operation. He testifies, and provides opinion from architect Stanley Sota, that both the driveway and a barn are made impossible by the design arising from the Smith recommendations and PME design.

20 Mr. Snieg repeatedly requested opportunity to make a statement to the court during his examination in chief by his own counsel. I reassured him that he would have opportunity to do so over and above the questions and answers his counsel was using to present evidence in an organized fashion. Given this opportunity, Mr. Snieg reasserted his view that following the McCuaig design would create more problems as "everyone was telling him". He also stated: Everyone telling me in reports that the plan is wrong. If I have to do it or go to jail, I prefer to go to jail. He further used the opportunity to proclaim that this is all the fault of Mrs. Evans and that all the neighbours say she complains continually about everything. He also stated, "My place is the nicest. Everyone is jealous." He also stated he would "Take my chances when everyone telling me ..." This diatribe was helpful in understanding Mr. Snieg's non-compliance, I say without irony.

21 Speaking logically, there are two separate problems: There is an arguable debate as to the best remedy for the nuisance problem. There is also Mr. Snieg's problem with the administration of justice. Even if he is correct on the best remedy for the nuisance problem, Mr. Snieg cannot avoid the reality that the court has made an order as to how the nuisance problem must be addressed. There is a fundamental issue, important to society as a whole, whether a litigant can be permitted choose not to obey a court order that he thinks may do more harm than good.

22 Of course, there is jurisprudence on that issue.

23 In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.) the Supreme Court of Canada adopted with approval:

> The duty of a person bound by an order of a court is to obey that court order while it remains in force regardless of how flawed he may consider it, or how flawed it may be. Public order demands that it be negated by due process of law, not by disobedience.

24 This principle was restated in *R. v. Nash*, [2002] O.J. No. 1060 (Ont. C.J.):

> Accordingly, in effect, the Supreme Court of Canada, by saying that an order of a Court must be obeyed until it has been set aside or modified, is another example that you cannot make a collateral attack on the validity of an order in the course of a trial on general principle. And mistakes of law or erroneous beliefs in what your duties are not an excuse.

25 Express in that principal is the protection that flawed court orders can be corrected by appeal.

26 The Defendants have appealed the orders of Howden J. dated July 22, 2011; Eberhard J. dated October 2, 2011 and December 2, 2011.

27 In very brief reasons the appeals were dismissed. The Court of Appeal stated:

> (a) The appellant appeals from three orders. First he says there was no basis for the finding by Howden J. on July 22, 2011, that he deliberately and wilfully disregarded the May 10, 2011 order. We disagree. There was ample evidence of noncompliance to a degree that justified the finding of Howden J. This appeal is dismissed.
>
> (b) Second he says that the order of October 4, 2011 was made following an unjust denial of his request for an adjournment. We do not agree. Eberhard J. exercised her discretion to proceed on clear evidence of the risk posed by weather. She was entitled to do so. This appeal also fails.
>
> (c) Third he says that the order of December 2, 2011 ought not to have been made. Rather he says the contempt motion before the court that day should not have been dealt with but rather the dispute should have been transferred to the Drainage Referee. This suggestion is simply misconceived. The court had no choice but to address the contempt motion before it. We see no error in it doing so. This appeal is also dismissed.

28 Although there is little to go on, it is apparent that the substance of the July 22 Howden order was before the court. The issue appears to have been the contempt finding, but there is no suggestion that the underlying order was flawed.

29 The issue relating to the October 2nd order appears to have been the refusal of the adjournment request but there is no suggestion that the finding of contempt or the underlying order were flawed.

30 The issue relating to the December 2nd order appears to have been about dealing with the contempt issue when the cross motion was also before me for transferring the dispute to the Drainage Referee. The response: "This suggestion is simply misconceived." is so emphatic it leaves much to be inferred. What is known is that the cross motion was based in the volumes of "new evidence" that were before me on December 2nd, before the Court of Appeal and before me in the present cross motion and adopted by Mr. Snieg in his testimony on the contempt hearing. In my endorsement of December 2nd 2012 I stated:

> I do not sit in appeal of Howden J. New evidence of a different, cheaper, less intrusive or better way to remedy the problem is not before me. The Defendant has appealed the orders but has not brought an application to stay en-

forcement. **If there is fresh evidence to suggest that there is a better way to remedy the "migration" then the Court of Appeal can decide for themselves whether to hear it or not.**

...I note that it is the Court of Appeal, not I, who can listen to new evidence or stay enforcement.

(My emphasis added)

31 The Court of Appeal hardly needs my permission to consider fresh evidence, but they were sitting in appeal of this very order. The Defendant knew from my endorsement that fresh evidence was a matter for an appeal. The Court of Appeal could have corrected me if I was in error on the point. They did not.

32 I infer that the Court of Appeal found not only the transfer to the Drainage Referee but also the material on which the request was based were "simply misconceived." If I am wrong in drawing this inference, it is nevertheless patent that the "fresh evidence" before me now (except the contractor's opinion) was available and in issue by December and before the appeal was conceived. I am unimpressed by the submission that there wasn't time before the expedited appeals to ready this evidence. It was already present.

33 The principles of *Res Judicata* are cited in *Reddy v. Oshawa Flying Club*, 1992 CarswellOnt 349, 11 C.P.C. (3d) 154 (Ont. Gen. Div.):

Res Judicata

7 ...Res judicata operates by the application of two doctrines of estoppel developed in the case law as cause of action estoppel and issue estoppel. The doctrine of cause of action estoppel is based on the premise that, where the legal rights or liabilities of the parties have been determined in a prior action, they should not be re-litigated. Cause of action estoppel applies not only to points on which the court has pronounced but to every point which properly belonged to the subject of the litigation (67 E.R313. 3 Hare 100 (Ch.D.), at p. 381 [E.R.]).

8 The Ontario Court of Appeal in *Upper v. Upper*, 119331 O.R. I. Ri9331 1 D.L.R. 244. At p.7 [O.R.] cited *Henderson, supra*, with approval and quoted the following proposition from that judgment:

> Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward ... only because they have, from negligence, inadvertence, or even accident. Omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the trial.
>
> . . .

12 With respect to issue estoppel, this arm of the res judicata principle is based on the same theory of avoiding a multiplicity of proceedings but focuses on particular issues resolved in the earlier litigation. The application of issue estoppel precludes the re-litigation of issues which have been decided in a prior proceeding whether or not the claims and defences were the same as in the current proceeding. The doctrine of issue estoppel will be applied if the same issues are involved in the prior and current litigation, such issues were determined in the prior litigation and the decision in that litigation was final.

13 Issue estoppel has been succinctly defined in *Angle v. Minister of Revenue* (1974), 47 D.L.R. (3d) 544. At p.555, Dickson J. states:

> Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No.2)*, [1967] 1 A.C. 853 at p.935 defined the requirements of issue estoppel as:
>
> (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 person as the parties to the proceedings in which the estoppel is raised or their privies.
>
> The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings.

See also *Minott v. O'Shanter Development Co.*, [1999] O.J. No. 5 (Ont. C.A.).

34 I find that estoppel applies in this case not only to points on which the Court of Appeal has pronounced but to every point which properly belonged to the subject of the litigation taken before it. Mr. Snieg has been asserting that the Smith plan was wrong before Howden J. ordered it implemented, after it was ordered but before there was a design created to implement it, and since a design was created. As improbable as it is that the Court of Appeal was not aware that he disputed the correctness of the Smith plan by presenting voluminous opinions to that effect in his appeal material, certainly the correctness of the plan could have been litigated in that forum

35 My endorsement cued the Defendant to litigate it in that forum.

36 My endorsement cued the Court of Appeal to anticipate a request for fresh evidence, the only purpose of which was to dispute the correctness of the Smith plan.

37 I allowed the Defendant to testify on all his reasons for disputing the Smith plan, despite the spectre of a multiplicity of proceedings, because it could bear on his state of mind leading to his non-compliance with the Howden order. His testimony provides a complete record not only on whether his contempt of the court order has been purged

or should be excused, but also his grounds for wanting a different procedure and solution to the nuisance problem which is at the base of this litigation.

38 After all is said and done, Mr. Snieg just doesn't like what Howden J. decided. He thinks he knows better. In his own words, he is prepared to take his chances and he prefers jail to doing the work as ordered.

Discussion and Orders

39 This court has plenty of experience with neighbour disputes. It is among the range of differences between people where passions run high. People really care about their homes, their autonomy in the living space, their peace in the environment they have carve out for themselves, their dreams and plans.

40 The dispute itself destroys that peace, those dreams and plans, and not only for the people directly involved: the whole neighbourhood is disturbed. Factions can form. Blame is debated. Everybody wonders if they are next.

41 The court is presented with neighbour disputes that may have no solution that satisfies everyone. Someone is necessarily disappointed. Seldom is there a right answer on these things.

42 But there has to be an answer. The only service a court can be in these neighbour disputes is to make a decision. Then, the neighbours must abide by the decision. There is clarity and the argument can stop, albeit with one of the neighbours entirely unsatisfied.

43 It is the only way it can work. The court can be of no service whatever unless its orders are complied with.

44 The best advocacy in such disputes arises even before the matter comes to court where counsel can assist the court in providing that service. The best advocacy invokes the perspective and wisdom of professionals experienced with the ravages of litigation, organized and equipped not only to advance their clients' position in a calm and measured way, but also to seek out and imagine a realistic, peace-building solution. (This is a rebuke.)

45 I return to my observation made earlier: Speaking logically, there are two separate problems: There is an arguable debate as to the best remedy for the nuisance problem. There is also Mr. Snieg's problem with the administration of justice. Even if he is correct on the best remedy for the nuisance problem, Mr. Snieg cannot avoid the reality that the court has made an order as to how the nuisance problem must be addressed. There is a fundamental issue, important to society as a whole, whether a litigant can be permitted choose not to obey a court order that he thinks may do more harm than good.

46 Still, in a neighbour dispute I recognize that I should exercise a certain restraint. These are not fraudsters or thugs. These are neighbours of otherwise good standing in the community. I must consider the societal impact not only of permitting a litigant to choose not to obey a court order but also that harsh sanction may crystallize neighbourhood opinion into irreparable feuding. It is therefore my intention to impose a severe but not crushing penalty so as to give Mr. Snieg the dignity of compliance.

47 This includes a short period of incarceration. I conclude this is necessary because the other methods for encouraging compliance have been resisted. Once Mr. Snieg knows that the question is not whether the best plan to remedy the nuisance problem has been imposed but that he must obey the order of the court whether he disagrees with it or not, he will have the opportunity to comply.

48 The nuisance problem has to be addressed. However, there is a lot of history now that demonstrates the continuing impediments to completion. As Mr. Snieg did not like the solution arising from the Howden order, in December I provided an alternative. He could proceed with the design and contractor then available, or pay into court the estimated cost. He says he didn't pay money in because he doesn't have such money. The Defendants have property. If there is a judgment against the Defendants in future for this work, the Defendants' property will be at risk for enforcement purposes, so Mr. Snieg should have the dignity of coming up with the money or arranging financing.

49 Further, there are numerous unpaid costs awards. In argument, counsel proposed coming up with a payment schedule. The Defendant should be given opportunity for the dignity of doing so. Lest the Plaintiff refuse a reasonable payment schedule, the court should have the mandate to assess reasonableness.

50 So, the penalty for contempt as crystallized on April 10, 2012 when argument began on this contempt hearing, is as follows:

(a) Warrant of committal to issue for Stanislaw Snieg to be executed forthwith and he is to remain incarcerated until release on the sooner of Monday April 30, 2012 or proof of compliance with (b) hereafter:

(b) Payment into court of $57,000 as ordered December 2, 2011 (see paragraph 8, supra);

(c) Upon release the Defendants shall within 15 days to present Plaintiffs' counsel with a proposed payment schedule for costs ordered and thereby owing as of April 10, 2012;

51 If after 15 days of release the Defendant has not complied with paragraphs (b) and (c), the Plaintiff may file motion material seeking judgment for the right to enter upon the Defendants' lands to execute the PME design and for the cost of executing the remedy emanating from the PME design without further notice to the Defendants.

52 If the Plaintiff is seeking further penalty for contempt, notice must be served (on Defendants' counsel since this is a continuing hearing) and a special appointment obtained through the Trial Co-ordinator for a motion lasting more than one hour.

53 If the parties are unable to agree on the payment schedule for costs they may move before Eberhard J., on notice, to fix a payment schedule.

54 If the Defendant has complied with (b) and (c) and there is an agreement or order for a payment schedule, then either party may move, within 15 days of such compliance, for a case management meeting, to be attended by an

engineer for the Plaintiff and an engineer for the Defendant, presided over by a judge and attended by counsel to monitor, for the engineers to discuss whether an alternative remedy for the nuisance can be agreed, based on the combined expertise of the engineers.

55 In advance of such meeting the parties may exchange any design they wish discussed and counsel may provide questions for the experts to consider.

56 Counsel will not be invited to participate at the meeting other than to monitor and all discussion will remain privileged.

57 Counsel can agree to have me preside but only on the understanding that I will remain seized of the adjudication of matters arising on this case until the contempt is fully purged. Otherwise a neutral judge will be scheduled to assist the engineers in their discussion but not to adjudicate on the plans discussed. Such presiding judge will not be expected to read anything more than a two page summary, from each side, of the nuisance problem (not the contempt problem) to focus the discussion on solutions. (Paragraph 54-58 also to be provided.)

58 Following the case management meeting, either party may move for a final order for the method, timing and cost of the implementation of the PME design or such other design as may result by agreement from the case management meeting.

59 Parties may address costs issue for the April 2012 hearing by written submissions not to exceed 2 pages. Plaintiff to serve Defendant within 10 days, Defendant to respond within 10 days thereafter and any reply within 5 days thereafter. All to be delivered within 30 days to the judicial secretary.

Order accordingly.

END OF DOCUMENT

11

Warren v. Gilbert et al.
[Indexed as: Warren v. Gilbert Estate]

92 O.R. (3d) 241

Court of Appeal for Ontario,

Winkler C.J.O., Feldman and Rouleau JJ.A.

October 10, 2008

Judgments and orders -- Setting aside -- Estate trustees seeking to set aside family law judgment that was confirmed on appeal on basis that estate would have asserted interest in matrimonial home had it been represented at trial -- Motion judge properly dismissing motion -- Trustees being appointed after trial judgment but well before hearing of appeal -- Trustees not moving in timely manner to assert estate's rights -- Estate's claim would not have succeeded at trial as it was taking position contrary to wishes of deceased.

The appellants were the trustees G's estate. G held certain property as joint tenant with her nephew D. Before her death, G was made a party to family law proceedings between D and K. She died before judgment was rendered and her interest passed by right of survivorship to D. At trial, K was awarded a one-half interest in the property by way of resulting trust. After the trial judgment was rendered and before D's appeal was heard, the appellants took out letters of administration and became estate trustees. They made no attempt to intervene in the appeal. After the appeal was dismissed, the appellants brought a motion to set aside the judgment on the basis that had the estate been represented at trial, it would have asserted an interest in the matrimonial home. The motion was dismissed. The appellants appealed.

Held, the appeal should be dismissed.

Per Feldman J.A. (Winkler C.J.O. concurring): A person who should have been made a party to a proceeding but who received no notice of the proceeding can seek to have the proceeding reopened if the person moves in a timely manner and there is potential merit to the person's claim. While the trustees were not yet appointed at the time of the family law trial, they were in place long before the appeal of the judgment. The inference drawn by the motion judge that one of the appellants, who was D's father, chose to wait for the outcome of the appeal and took steps to assert a claim by the estate only after D lost the appeal was an irresistible one. As the appellants did not move in a timely manner, the first criterion for reopening was not met. The second criterion was also not met. Had the estate appeared at trial, it would have had to take a position contrary to the one taken by G while she was alive. During her lifetime, G failed to take any steps to sever the joint tenancy, even after the matrimonial litigation started, because she wanted D to become the sole owner of the property by right of survivorship. It was most unlikely that the estate would have taken the position at the

original trial that it now sought to assert, and it was unlikely that the estate would have succeeded had it done so.

Per Rouleau J.A. (dissenting): There was evidence before the motion judge which raised a triable issue as to whether G intended to sever the joint tenancy before her death and took steps to do so. The estate's claim against the property should be determined in a new trial within the family law proceedings. The appellants' delay was relatively short and was fully explained.

Cases referred to

Coulson v. Secure Holdings Ltd., [1976] O.J. No. 1459, 1 C.P.C. 168 (C.A.); Han v. Re/Max Town and Country Realty Inc., [1995] O.J. No. 303, 77 O.A.C. 391, 53 A.C.W.S. (3d) 275 (C.A.); Hughes v. Fredericton (City), [1998] N.B.J. No. 335, 165 D.L.R. (4th) 597, 204 N.B.R. (2d) 153, 82 A.C.W.S. (3d) 576 (C.A.); [page242] Nu-Pharm Inc. v. Canada (Attorney General), [1999] F.C.J. No. 1313, [2000] 1 F.C. 463, 179 D.L.R. (4th) 531, 247 N.R. 227, 38 C.P.C. (4th) 288, 2 C.P.R. (4th) 49, 91 A.C.W.S. (3d) 301 (C.A.); Weinstein v. Weinstein (Litigation Guardian of) (1997), 35 O.R. (3d) 229, [1997] O.J. No. 3445, 19 E.T.R. (2d) 52, 30 R.F.L. (4th) 116, 73 A.C.W.S. (3d) 522 (Gen. Div.), distd

Other cases referred to

Trost v. Cook (1920), 48 O.L.R. 278, [1920] O.J. No. 46, 56 D.L.R. 305 (S.C. (H. Ct. Div.))

Authorites referred to

Feeney, Thomas G., and Jim Mackenzie, Feeney's Canadian Law of Wills, 4th ed., looseleaf (Toronto: Butterworths, 2000)

Mowbray, John, and Lynton Tucker, et al., Lewin on Trusts, 18th ed. (London, Ont.: Sweet & Maxwell, 2007)

APPEAL from the order of Salmers J. dated July 18, 2007 dismissing a motion to set aside a judgment.

Alan J. Davis and Sheldon I. Erentzen, for appellant, estate trustees for the Estate of Elizabeth Gilbert.

Gerald Sadvari and Paula Armstrong, for respondent, Kellie Warren.

FELDMAN J.A. (WINKLER C.J.O. concurring): --

Introduction

[1] The appellants are estate trustees of the aunt of one of the parties to a family law action, who seek to set aside the family law trial judgment that was confirmed on appeal in December 2006, on the basis that had the estate been represented at the trial, it would have asserted an interest in the

matrimonial home. The motion judge refused to set aside the judgment. For the reasons that follow, I would dismiss the appeal.

Facts

[2] The appellants are the trustees of the estate of Elizabeth Gilbert, who held the subject property as joint tenant with her nephew David Gilbert. The property was purchased in 1995 for $125,000, with $10,000 down ($5,000 contributed by Kellie Warren and $5,000 by David Gilbert). By the time of the family law trial, the property was worth over $2 million and, Elizabeth Gilbert having died, her interest had passed by right of survivorship to David. At the trial, Kellie Warren was awarded a one-half interest in the property by way of resulting trust.

[3] Before the trial, Elizabeth Gilbert had been made a party to the family law proceedings between David Gilbert and Kellie [page243] Warren because she was a joint tenant on title to the property, which was both a farm and the matrimonial home of David and Kellie. She filed an answer and an affidavit which stated her position that she held the property as joint tenant with David Gilbert, she was a beneficial owner of her half of the property and not a bare trustee, and she had made some financial contribution to the upkeep of the property. She disputed that Kellie Warren was entitled to any interest in the property.

[4] Elizabeth Gilbert was originally represented by two successive lawyers, but later acted on her own. At no time did she sever the joint tenancy as she could have. This was consistent with her intent that by virtue of the joint tenancy, David would eventually have the whole property by right of survivorship when she died. She had no will and, on an intestacy, those entitled were her two brothers, William and George (and possibly her common-law spouse), but not her nephew, David, William's son.

[5] At the family law trial, counsel for Kellie Warren told the trial judge that Elizabeth Gilbert had died and that David Gilbert was the sole owner of the property by right of survivorship. Counsel for Kellie Warren also told the trial judge that Elizabeth Gilbert had a claim in the litigation that she had abandoned and which had not been pursued by the estate. David Gilbert's lawyer did not seek to take any issue with these statements. He took the position that although David was the sole owner of the property by right of survivorship because Elizabeth had died, the best case for Kellie was a claim to 1/2 of 1/2 of the property because of Elizabeth's joint interest while she was alive.

[6] David's father, William Gilbert, testified at the trial on behalf of his son David. He and his brother George Gilbert were at that time looking for a will by their sister. When no will was found, the brothers took out letters of administration and became estate trustees. This was done several months after the trial judgment had been rendered and four months before David's appeal of that judgment was heard by this court in December 2006.

[7] William Gilbert attended that appeal hearing. The estate trustees made no attempt to intervene in that appeal or to seek any right or status for the estate at that appeal.

[8] It was only after this court had dismissed David's appeal on December 18, 2006 that the estate trustees brought the motion below, asserting an interest in the property for the first time. They did so by seeking to reopen the family law proceeding on the basis that the rights of a party who had died before trial had been determined without notice to the estate and without affording it an opportunity to participate in the proceeding, with the result that the judgment could not bind the estate. [page244]

[9] The motion judge dismissed the motion on three bases. First, he found that the estate was not prejudiced because it can still claim against David for its share of his half of the property. The motion judge concluded that MacDougall J., the judge at the family law trial, had determined that Kellie was entitled to half of the whole property, no matter who owned it on title. However, that finding was in part a factual finding by MacDougall J. based on the record before him.

[10] The second basis was that William Gilbert, one of the estate trustees and David's father, was well aware of all the facts and circumstances throughout the entire period of the litigation and could have raised them at the trial.

[11] The third basis was that Elizabeth Gilbert took no steps to sever the joint tenancy during her life. It was her wish that the property pass to David, as it did. It was not her wish to sever the joint tenancy and have her interest in the property devolve to her beneficiaries under an intestacy.

Analysis

[12] A person who should have been made a party to a proceeding but who received no notice of the proceeding can seek to have the proceeding reopened if the person moves in a timely manner and there is potential merit to the person's claim. See Coulson v. Secure Holdings Ltd., [1976] O.J. No. 1459, 1 C.P.C. 168 (C.A.); Hughes v. Fredericton (City), [1998] N.B.J. No. 335, 165 D.L.R. (4th) 597 (C.A.); Han v. Re/Max Town and Country Realty Inc., [1995] O.J. No. 303, 77 O.A.C. 391 (C.A.); Nu-Pharm Inc. v. Canada (Attorney General), [1999] F.C.J. No. 1313, 179 D.L.R. (4th) 531 (C.A.); Weinstein v. Weinstein (Litigation Guardian of) (1997), 35 O.R. (3d) 229, [1997] O.J. No. 3445 (Gen. Div.).

[13] In my view, this case fails to meet either condition and is therefore distinguishable from these authorities on both bases.

(1) Failure to move in a timely manner

[14] The trustees did not move in a timely manner to assert any rights on behalf of the estate. Once appointed, they did not seek to assert any position on behalf of the estate in the appeal of the trial judgment, despite the fact that they were fully aware of that appeal, that the subject matter of that appeal was primarily the property that formed the most valuable potential asset in the estate, and despite having been appointed estate trustees four months before the appeal was heard. William Gilbert says this is because he did not know until after the appeal was decided that the estate had a legal argument that the joint tenancy was [page245] effectively severed in law by the circumstances of the purchase, use and ownership of the property by David and Kellie, and on that basis there was an argument that David may not have become owner of the entire property upon Elizabeth's death by right of survivorship.

[15] William Gilbert was not cross-examined on his affidavit. Nevertheless, even accepting this statement as unchallenged, in my view, the reason he relies on is not sufficient to reopen the case. Trustees, once appointed, have an obligation to secure the assets of the estate:

> A new trustee should forthwith acquaint himself with the nature and particular circumstances of the trust property, and should take such steps as may be necessary for its due protection.

John Mowbray et al., Lewin on Trusts, 18th ed. (London, Ont.: Sweet & Maxwell, 2007).

It is clear that the trustees understood this obligation. They plead in their Statement of Claim that they took such steps and that they did so following Elizabeth's death and before they were appointed as trustees of the estate.

[16] In this case, the main "asset" of the estate was its potential claim to an interest in this property, valued at approximately $2 million, as the value of the deceased's other assets was $50,000. In their Statement of Claim in this proceeding, the estate trustees plead, at para. 32, that while they were looking for a will of Elizabeth Gilbert (before they were appointed estate trustees), they also "undertook action to secure property left by Elizabeth Anne Gilbert, including important papers relating to issues pertaining to the subject property, pending the formal appointment of Estate Trustees to administer her estate". These "papers" include handwritten notes and draft letters that Rouleau J.A. refers to in his reasons. And at para. 40 of the Statement of Claim, they plead that: "After the death of Elizabeth Gilbert her estate, by the plaintiffs as Estate Trustees, remitted payments relating to carrying costs pertaining to the subject property, including, without limitation, payment on account of the First Mortgage in favour of FCC, Second Mortgage in favour of Gorill, property taxes and insurance premiums."

[17] Clearly, based on these actions by the trustees, following the death of Elizabeth Gilbert, and both before and after their appointment as estate trustees, they saw this property as the main "asset" of the estate and were taking steps to preserve it for the estate.

[18] In protecting the assets of the estate, the trustee must act not only honestly, but also reasonably: [page246] Trost v. Cook (1920), 48 O.L.R. 278, [1920] O.J. No. 46 (S.C. (H. Ct. Div.)), at para. 16. Since the property was still the subject of litigation when the trustees were appointed, it was incumbent on the estate trustees to seek timely advice to determine whether and how they could assert any interest of the estate in the property in the ongoing litigation, and to take those steps in a timely way.

[19] While the trustees were not yet appointed at the time of the family law trial, they were in place long before the appeal of that judgment. The inference drawn by the motion judge that William Gilbert chose to wait for the outcome of the appeal and took steps to assert a claim by the estate only after his son David Gilbert lost the appeal is an irresistible one.

[20] In my view, where the trustees sat on their potential claim while the case was sub judice, they do not meet the first criterion for reopening a completed proceeding.

(2) The potential merit of the estate's claim that the joint tenancy was severed during the life of the Elizabeth Gilbert

[21] I also agree with the motion judge regarding the justice of the claim by the estate. The question whether Elizabeth's handwritten notes, referred to by Rouleau J.A., would have been sufficient for her to successfully argue that the joint tenancy was severed while she was alive is not relevant here, given that she never asserted any such position during her lifetime. Had the estate appeared at the trial, it would have had to take a position contrary to the one taken by Elizabeth while she was alive and contrary to David's position. It would have sought a result that severed the joint tenancy retroactively so that Elizabeth Gilbert's interest in the property would devolve to the beneficiaries under an intestacy, rather than to David in accordance with Elizabeth's consistent intent. David would have been in opposition to his father and uncle because his position was that he was the sole owner of the property by right of survivorship. Given his father's position throughout, up until the

time David lost the appeal, it is most unlikely that the estate would have taken the position at the original trial that it now seeks to assert.

[22] In any event, where Elizabeth Gilbert, during her lifetime, affirmed the joint tenancy both by the position she took in the litigation and by failing to take any step to sever the joint tenancy when she was aware of the litigation and of Kellie Warren's position, I question whether it would have been open to a trial judge to allow the estate, on behalf of Elizabeth, to assert that without her knowledge and contrary to her intentions, the joint tenancy was severed while she was alive by the actions of Kellie Warren, [page247] and to thereby retroactively reverse the transmission of her interest to David by right of survivorship, that had occurred upon her death.

Conclusion

[23] For these reasons, as well as the fact that the trustees effectively sat on their rights while the case was still sub judice, the justice of the case does not compel the result that the decision below be set aside and the matter wholly re-litigated.

[24] I would dismiss the appeal with costs fixed at $20,000, inclusive of disbursements and GST.

ROULEAU J.A. (dissenting): --

Introduction

[25] I have had the benefit of reading the reasons of my colleague, Feldman J.A. I reach a different conclusion and, for the reasons that follow, would allow the appeal and order that the Estate be made a party to the family law proceedings between David Gilbert and the respondent Kellie Warren. I would also set aside the judgment of Justice MacDougall in the family law proceeding dated May 19, 2006, insofar as it dealt with Elizabeth Gilbert's interest in the Lansdowne Street property and remit the matter to the Superior Court to determine the extent, if any, of the Estate's interest in that property.

[26] In essence, the issue at the original trial in 2005 before MacDougall J. was determining who owned the Lansdowne Street property. The trial judge concluded that although David and Elizabeth Gilbert were on title as joint tenants, the legal title did not reflect the true ownership interests. Rather, David and Elizabeth were holding the property in trust. Having been informed that Elizabeth had abandoned her claim to the property, the trial judge found that David and Kellie were the beneficiaries of this trust in equal shares. He therefore found each to be an owner of a 50 per cent interest in the property.

[27] In my view, had Elizabeth's Estate been present and participated at trial, it could, at a minimum, have argued that it was a beneficiary of the trust. Further, the Estate could have argued that Elizabeth was indeed the owner of a half interest in the property and that, even though her interest was nominally held as a joint tenant, the conduct of both David and Kellie had the legal effect of severing the joint tenancy sometime prior to Elizabeth's death. In either case, the Estate would own an interest in the property. [page248]

The Family Law Trial

[28] Well before the commencement of the family law trial in October 2005, Elizabeth had fallen ill, and by July 21, 2005, she had died.

[29] Following Elizabeth's death, David became adverse in interest to Elizabeth's Estate. David's position at that point was that the property was now his by virtue of it having been held as joint

tenants. At trial, David's solicitor told the court that he took the "legal position that as a result of the death of the joint owner, he is now the legal sole owner of this property". It was not in David's interest to suggest that anything he or Kellie had done prior to Elizabeth's death had severed the joint tenancy and converted it to a tenancy in common. Neither was it in his interest to show that Elizabeth had made contributions to the property entitling her to an equitable interest. Either of these would likely reduce his interest in the property whether or not Kellie was successful in her claim.

[30] Kellie had been adverse in interest to Elizabeth from the outset. Kellie's position was that Elizabeth had no interest in the property and there was no joint tenancy. She maintained that Elizabeth was a bare trustee with respect to her ownership interest, holding it in trust for Kellie and David.

[31] After hearing the position of both David and Kellie, the trial judge interrupted Kellie's solicitor and asked about what he termed the "Elizabeth Gilbert issue". Kellie's solicitor advised the court that, because Elizabeth had died, David "by survivorship is now the sole owner of the farm property" and Kellie is claiming a 50 per cent interest in the property. She then made three assertions:

(1) Elizabeth's original claim had been abandoned.
(2) The Estate of Elizabeth did not make a claim in the proceeding. This appeared to confirm that Elizabeth was not intended to have been a one-half owner in the property.
(3) There was no evidence to suggest that Elizabeth was intended to be an owner of the property.

[32] Each of these three statements made by Kellie's solicitor was either wrong or misleading. First, Elizabeth had not abandoned her claim. Second, the Estate could not have brought a claim as no will had then been found and no Estate trustee was in place. Third, some of the material filed in the proceedings did suggest that Elizabeth was intended to be an owner of the property. [page249] This information included an affidavit sworn by Elizabeth prior to her death specifically claiming to be an owner of the property, it having been acquired as an investment.

[33] As no one was representing Elizabeth or the Estate at the trial, no one was there to take issue with Kellie's solicitor's statements.

[34] It is not surprising, therefore, that the trial judge's reasons do not address and make no reference to the position taken by Elizabeth in her pleadings. In fact, the reasons largely adopt the statements made by Kellie's solicitor. They state that the Estate was not a party to the proceeding, that Elizabeth had not contributed to the property, that there was no intention that Elizabeth be a co-owner and that Elizabeth had no beneficial interest in the property.

[35] Given the trial judge's finding that "Elizabeth was holding her half interest as a trustee and that she did not have a beneficial interest in the property", it is apparent that the trial judge concluded that Elizabeth and David were not joint tenants but rather that they held the property in trust. The trial judge then determined that the beneficiaries of this trust were David and Kellie in equal shares.

The Reasons of the Motion Judge

[36] As set out in the reasons of Feldman J.A., there were three bases on which the motion judge dismissed the Estate's motion to be joined as a party in the family law proceedings:

(1) MacDougall J. had found that Kellie owned a one-half interest regardless of who owned the property. Any claim the Estate had would therefore be against David.
(2) All of the issues now being raised on behalf of the Estate could have been raised at the trial by William Gilbert, one of the trustees of the Estate.
(3) Elizabeth took no steps to sever the joint tenancy and, therefore, was content that David receive the property by operation of the joint tenancy on her death.

[37] In my view, none of these supported dismissing the motion.

[38] As to the first reason, MacDougall J.'s reasons make clear his finding that, from the outset, Elizabeth had no interest in the property and was holding it as a trustee. It is only after making this finding that he addressed who, as between Kellie and David, were the beneficial owners of the property and in what proportions. Nothing suggests that, had he considered Elizabeth's [page250] contribution to the property and concluded that she also had a beneficial interest, this interest would only reduce David's and still leave Kellie with a 50 per cent share.

[39] With respect to the second basis for the motion judge's decision, whatever information William Gilbert had at the time of trial, he had no standing to raise anything on behalf of the Estate. At that point, William did not know if a will existed or who the beneficiaries were. Other than being there for a portion as a witness, it is unclear how much of the trial he attended. As for his failure to intervene on the appeal, this was fully explained in his affidavit prepared for this motion, which was not challenged by Kellie. There is, therefore, no basis for suggesting that William, on behalf of an Estate he did not represent at the time of trial and for which, at the time of the appeal, he had only recently been appointed trustee, delayed acting until he would see the outcome of the trial and the appeal. Such an inference would be pure speculation. In addition, there is a second trustee who stands to inherit from the estate. This second trustee does not appear to have had any involvement in the trial and had no interest in delaying the estate's intervention until after disposition of David's appeal.

[40] Third, whether Elizabeth took steps to sever the joint tenancy after filing her answer in May 2003 is a central issue to be addressed at a new trial. In that regard, the material before the motion judge was sufficient to raise a triable issue. Specifically:

(a) Handwritten notes made by Elizabeth suggested both that she intended to be an owner and that she considered her interest to be quite separate from David's. Although the record before us does not provide detail concerning the dates when or the circumstances in which the notes were made, it does, nonetheless, raise issues. Among other things, the notes state that:

    (i) "David and Kellie were to have a prenuptial agreement before . . . we made this investment";
    (ii) "We never got anything finalized because Steve had to go to a meeting -- prime purpose was to protect my half for me".
    (iii) "I am told that I said Kellie paid the mortgage payments -- and I wanted to give her my half of the farm -- totally false -- I want my half -- every cent"; [page251]

(iv) "I hired you [Elizabeth's solicitor] to represent me on my half of the property -- my half has nothing to do David's half"; and
(v) "Ken protect the property Ken & I -- what proceedings I have to take over farm -- take David off title or David and I and put Ken on title".

(b) A draft letter prepared by Elizabeth's solicitor dated September 9, 2003 was filed. The deponent was not at that point aware of whether the letter was sent. The letter apparently represented Elizabeth's view. It stated:

(i) "in my view my client would be within her rights to sue her joint tenant for singular title to the property following Mr. Gilbert's breach of a verbal agreement to pay the mortgage to the Farm Credit Corporation, and the other significant prejudice to her in the circumstances" and
(ii) "she is not content that either Ms. Warren or Mr. Gilbert be on the property. I do not know whether she has the right or ability to keep Mr. Gilbert off the property but at this date she wishes to do so for a period of time until she is certain that her interests are adequately protected."

(c) A certificate of pending litigation was filed against the property by Kellie. The legal effect on title of this document, if any, was not addressed.
(d) The legal or equitable consequence to Elizabeth, if any, of a declaration that from the outset David acquired the property not as a joint tenant but in trust for himself and Kellie was not addressed.

[41] In addition to this material that was before the motion judge, a new trial would allow the Estate to call witnesses such as Elizabeth's former solicitor, and to question Kellie and David about their interaction with Elizabeth both before and after the separation. Specifically, the Estate could question the parties as to whether Elizabeth raised with them the concerns set out in the notes and her wish to protect her half interest for herself. What, if anything, would emerge from cross-examination on the subject would have to be weighed by the trial judge together with all the other evidence. It may well be that, from this testimony alone or from this testimony considered together with the documents [page252] referred to alone, a judge would conclude that Elizabeth was asserting that the joint tenancy had been severed and, but for her illness and death, this position would have been reflected in her pleadings.

[42] Contrary to the motion judge's conclusion, the materials filed and issues raised were such that the Estate's claim against the property should be determined in a new trial within the family law proceedings.

Submissions on Appeal

[43] At the appeal, the focus of Kellie's submissions was that the appeal should be dismissed because the Estate failed to move in a timely manner and because the Estate's claim that the joint tenancy was severed during Elizabeth's lifetime is without merit. I will deal with both of these in turn.

(a) Did the Estate move in a timely manner?

[44] I agree that the delay in seeking relief is a factor to be considered when deciding whether to set aside a decision. In the present case, however, the delay is relatively short and has been fully ex-

plained in the affidavit filed by William. He was not cross-examined on his affidavit, and his evidence is not contradicted in any way by Kellie.

[45] The Estate trustees have explained that they were not appointed as trustees of the Estate until August 17, 2006. By that date, the trial, having commenced almost a year earlier in October 2005, had been completed. Judgment had been rendered on May 19, 2006. An appeal was already underway, and was heard on December 18, 2006, about four months after the trustees' appointment.

[46] Although an executor must not delay in converting or realizing the assets of the estate, the law recognizes the difficulty in getting the affairs of an estate in order by generally providing the executor with a year in which to do so:

> The executor must not unreasonably delay in getting in the assets and settling the affairs of the estate and he will be personally responsible for any loss occasioned by undue delay. There is no hard and fast rule as to what constitutes undue or unreasonable delay, but it is the practice to speak of the executor's or administrator's year and the courts attach importance to the question whether the alleged failure to convert or realize assets which resulted in the loss to the estate occurred within or beyond a year.

Thomas G. Feeney and Jim Mackenzie, Feeney's Canadian Law of Wills, 4th ed., looseleaf (Toronto: Butterworths, 2000), at 8.16. [page253]

The four months that passed between their appointment and the hearing of the appeal and the six months before this motion was launched both fall well within the general one-year period.

[47] The respondents argue that the appellants should have sought to intervene at the appeal, and that their failure to do so precludes their ability to have the judgment set aside now. The evidence does not suggest, however, that the trustees could have intervened effectively at the appeal. Even by the time of their motion to have the Estate added as party, the trustees were not aware that Elizabeth had filed an Answer in the family proceedings, although they presumed one had been filed on her behalf. In those four months, they would have had to retain counsel, review the judgment, obtain copies of the trial transcripts and review all of the documents left by Elizabeth to discover those that have now been put forward in support of this motion.

[48] It is only through doing all of this work that the trustees could have known that the trial judge's critical finding -- that Elizabeth did not have a beneficial interest in the property -- was made without considering Elizabeth's claim, was contrary to Elizabeth's position, was contrary to much of the documentary evidence available, and was made after the judge had been told by Kellie's counsel that there was no evidence to suggest that Elizabeth intended to be an owner and that Elizabeth had abandoned her claim. According to the trustees' uncontradicted evidence, it was not until January 2007 that they had any idea that Elizabeth's estate may have any valid ownership interest.

[49] Feldman J.A. views the fact that the Estate was making mortgage, tax and insurance payments relating to the property as contradicting this assertion and indicating that the trustees saw the property as the main asset of the estate even before their appointment. I disagree. William's evidence is that Elizabeth had been making similar payments during her lifetime, since she was a guarantor of the mortgages on the property and David was often unable to pay. When she died, the Estate assumed this obligation. Given the trustees' uncontradicted evidence that they had no idea that the estate may have had a valid ownership interest in the property until January 2007, I interpret these payments as protecting the Estate rather than demonstrating that they viewed the property as

its main asset. In short, after taking their position as trustees, William and George exercised reasonable diligence in investigating the state of its assets and bringing this motion to have the estate made a party to proceedings that affected its property interests.

[50] Additionally, when weighing the potential prejudice caused by the delay in seeking the relief, it is significant, in my [page254] view, that Kellie's solicitor bears some of the responsibility for the failure of the Estate to participate in the family law trial. From the transcript, it is apparent that the trial judge was concerned about the issue of Elizabeth's Estate participating in the trial. Kellie's solicitor's response to the trial judge was incorrect and contributed to the trial judge deciding the case without input from the Estate. In that sense, Kellie and David, to the extent that his solicitor did not correct the information, are authors of the unfortunate need to return the matter for a new hearing.

[51] Finally, where a trial proceeds in the absence of an affected party, there is a real issue as to whether that party is bound by the result: see Coulson v. Secure Holdings Ltd., [1976] O.J. No. 1459, 1 C.P.C. 168 (C.A.). As a result, I would not give effect to this submission.

(b) Is the Estate's claim without merit?

[52] Kellie argues that it is apparent from Elizabeth's pleading and her conduct that she was and intended to be an owner in joint tenancy with David and was content that the property passed to David on her death. As part of this submission, it is suggested that the Estate could not take a position contrary to the position taken in Elizabeth's initial pleading.

[53] Although I agree that Elizabeth originally pleaded that she was a joint tenant, this was a position she took in 2003 based on the information she had available to her at that time. It does not follow that because this position was advanced at the outset of the proceeding, Elizabeth and the Estate were invariably stuck with that position and would have been unable to change their position up to and during the trial.

[54] As circumstances change and additional information comes available, a party can apply to change its position and its pleadings. Subsequent to the initial pleading filed in 2003, it is apparent from Elizabeth's notes and other materials I have referred to earlier, that Elizabeth's position was changing. The fact that she was gravely ill for some time before her death may well be a factor to consider when viewing her conduct subsequent to the initial pleading. In addition, the death of Elizabeth resulted in a further significant change of circumstances.

[55] My colleague questions whether it would have been open to a trial judge to allow the Estate on behalf of Elizabeth to assert that, without Elizabeth's knowledge and contrary to her intentions, the joint tenancy was severed while she was alive. I disagree. This assumes that Elizabeth did not, during the period of her illness and prior to her death, in fact intend to sever the joint [page255] tenancy and assumes that David or Kellie, through their actions, had not severed the joint tenancy. These are the very issues that were not addressed at trial because the Estate did not participate and that, if established, may have entitled Elizabeth (and, after her death, the Estate) to a remedy in equity.

[56] I would, therefore, not conclude that the Estate would inevitably be bound by the original pleading and would have been unable to change its position had it been present at trial. It has been made clear in submissions before us that, should the matter proceed, the Estate would indeed seek to amend the pleading. Unless some prejudice were shown, the amendment would likely be granted.

[57] Amending the pleading to advance new positions would, however, be of little significance if there was no basis upon which the Estate could emerge from a new trial with an interest in the property. This, in reality, is at the core of this appeal.

[58] As I will explain, in my view there are two potential outcomes that warrant consideration at a new trial. The first assumes that the trial judge's finding that Elizabeth held the property in trust will stand, and the second assumes that this finding will be set aside. Both of these depend on the court setting aside the trial judge's finding that the Estate had made no contribution to the property. The materials filed in this court suggest that this finding may well be set aside, as they show that Elizabeth did make contributions to the property both in terms of money and by securing the credit needed to fund the purchase. The precise amount of the contribution has not, at this stage, been determined. This is properly a matter for trial, as is the legal effect of such contributions.

(i) Assuming that the trial judge was correct and that David and Elizabeth held the property in trust

[59] If, at a new trial, the court concludes that MacDougall J. was correct and that, from the outset, David and Elizabeth held the property in trust and not as joint tenants, the Estate will then be in a position to argue that MacDougall J.'s finding that Elizabeth made no contribution to the property was wrong. The Estate could present evidence and argue that Elizabeth, and after her death the Estate, contributed to the acquisition and maintenance of the property and are beneficiaries of the trust. If Elizabeth and the Estate contributed to the property, it may well follow that the Estate is properly a beneficiary of this trust. The extent of each party's interest in the trust -- David, Kellie and Elizabeth -- would then be determined. [page256]

(ii) Assuming that the trial judge was incorrect and that the property was in fact acquired and held as joint tenants

[60] If the Estate can show that Elizabeth was not holding the property in trust for David and Kellie but rather as owner in joint tenancy, then the Estate could argue that the joint tenancy was converted to a tenancy in common sometime prior to her death. This would make the Estate owner of a one-half interest in the property.

[61] As set out earlier, there was some evidence before the motion judge to the effect that Elizabeth contributed to the property and suggesting that the joint tenancy may have been converted to a tenancy in common or, alternatively, suggesting that the Estate has an equitable claim to a half interest in the property.

[62] It is not for me to determine what evidence can properly be led at a new trial, the value of that evidence or the strength of any claim. By suggesting that the issues sought to be raised by the Estate have some merit, I should not be taken as suggesting that the Estate has a strong case. Rather, I mean only that there are issues that can properly be raised by the Estate that are not clearly without merit, and that the Estate, through no fault of its own, has been unable to have a court rule on. The fact that a decision has already been made, but on an incomplete record and in circumstances as I have described, including the judge being provided with incorrect information, should not deprive the Estate of an opportunity to make its case.

[63] It would be wrong, in my view, to conclude, based on the materials before us, that the result of a trial at which the Estate was a full participant would invariably have produced the same result

as was obtained in their absence. In the course of a trial, positions regularly change and unforeseen outcomes frequently occur. The present case is one where caution dictates that the matter be returned to the Superior Court to have those issues raised by the Estate properly adjudicated.

Conclusion

[64] I would allow the appeal and order that the Estate of Elizabeth Gilbert be made a party to the family law proceedings between David Gilbert and Kellie Warren, that the judgment of Justice MacDougall dated May 19, 2006 be set aside insofar as it deals with the half interest in the Lansdowne Street property claimed by the Estate, and that the issue be remitted back to the Superior Court to determine the extent, if any, of the interest held by the Gilbert Estate. The order of Simmons J.A.'s prohibiting the [page257] distribution of any proceeds of sale of the property would be continued until trial or further order of the Superior Court.

[65] I would award the appellant costs of the motion and of the appeal on a partial indemnity basis. I would fix the costs of the motion at $20,000 and the costs of the appeal at $20,000, both inclusive [of] GST and disbursements.

Appeal dismissed.

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Indexed as:

Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79

Canadian Union of Public Employees, Local 79 ,
appellant;
v.
City of Toronto and Douglas C. Stanley, respondents, and
Attorney General of Ontario , intervener.

[2003] 3 S.C.R. 77

[2003] S.C.J. No. 64

2003 SCC 63

File No.: 28840.

Supreme Court of Canada

Heard: February 13, 2003;
Judgment: November 6, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

(135 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Labour law -- Arbitration -- Dismissal without just cause -- Evidence -- Recreation instructor dismissed after being convicted of sexual assault -- Conviction upheld on appeal -- Arbitrator ruling that instructor had been dismissed without just cause -- Whether union entitled to relitigate issue decided against employee in criminal proceedings -- Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 -- Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Judicial review -- Standard of review -- Labour arbitration -- Recreation instructor dismissed after being convicted of sexual assault -- Arbitrator ruling that instructor had been dismissed without just cause -- Whether arbitrator entitled to revisit conviction -- Whether correctness is appropriate standard of review -- Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 -- Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Summary:

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. [page78] The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy [page79] result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

Per LeBel and Deschamps JJ.: As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute, [page80] an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions -- for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in deci-

sions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between [page81] patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

Cases Cited

By Arbour J.

Referred to: Ontario v. O.P.S.E.U., [2003] 3 S.C.R. 149, 2003 SCC 64; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487; Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, [2003] 2 S.C.R. 157, 2003 SCC 42; [page82] Demeter v. British Pacific Life Insurance Co. (1983), 150 D.L.R. (3d) 249, aff'd (1984), 48 O.R. (2d) 266; Hunter v. Chief Constable of the West Midlands Police, [1982] A.C. 529, aff'g McIlkenny v. Chief Constable of the West Midlands, [1980] 1 Q.B. 283; Re Del Core and Ontario College of Pharmacists (1985), 51 O.R. (2d) 1; Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, 2001 SCC 44; Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12; Lemay v. The King, [1952] 1 S.C.R. 232; R. v. Banks, [1916] 2 K.B. 621; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Sarson, [1996] 2 S.C.R. 223; R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706; R. v. Power, [1994] 1 S.C.R. 601; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Scott, [1990] 3 S.C.R. 979; Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44; R. v. O'Connor, [1995] 4 S.C.R. 411; United States of America v. Shulman, [2001] 1 S.C.R. 616, 2001 SCC 21; Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481, rev'd [2002] 3

S.C.R. 307, 2002 SCC 63; Franco v. White (2001), 53 O.R. (3d) 391; Bomac Construction Ltd. v. Stevenson, [1986] 5 W.W.R. 21; Bjarnarson v. Government of Manitoba (1987), 38 D.L.R. (4th) 32, aff'd (1987), 21 C.P.C. (2d) 302; R. v. McIlkenny (1991), 93 Cr. App. R. 287; United States v. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7; R. v. Bromley (2001), 151 C.C.C. (3d) 480; Q. v. Minto Management Ltd. (1984), 46 O.R. (2d) 756; Nigro v. Agnew-Surpass Shoe Stores Ltd. (1977), 18 O.R. (2d) 215, aff'd (1978), 18 O.R. (2d) 714; Germscheid v. Valois (1989), 68 O.R. (2d) 670; Simpson v. Geswein (1995), 25 C.C.L.T. (2d) 49; Roenisch v. Roenisch (1991), 85 D.L.R. (4th) 540; Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd. (1988), 47 D.L.R. (4th) 431; Canadian Tire Corp. v. Summers (1995), 23 O.R. (3d) 106.

By LeBel J.

Referred to: Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710, 2002 SCC 86; Ontario v. O.P.S.E.U., [2003] 3 S.C.R. 149, 2003 SCC 64; C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Miller v. Workers' Compensation Commission (Nfld.) (1997), 154 Nfld. & P.E.I.R. 52; Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487; Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941; Ivanhoe inc. v. UFCW, Local 500, [2001] 2 S.C.R. 565, 2001 SCC 47; Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [page83] [1998] 1 S.C.R. 982; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890; Macdonell v. Quebec (Commission d'accès à l'information), [2002] 3 S.C.R. 661, 2002 SCC 71; Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20; Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382; Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147; Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796, [1970] S.C.R. 425; CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983; Canadian Union of Public Employees, Local 301 v. Montreal (City), [1997] 1 S.C.R. 793; Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles), [1993] 2 S.C.R. 756; Canada Safeway Ltd. v. RWDSU, Local 454, [1998] 1 S.C.R. 1079; Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644; Hao v. Canada (Minister of Citizenship and Immigration) (2000), 184 F.T.R. 246; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753; Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms.

Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 [ad. 1995, c. 6, s. 6(3)].

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 48(1).

Authors Cited

Allars, Margaret. "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 Queen's L.J. 163.

Comtois, Suzanne. Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs. Cowansville, Qué.: Yvon Blais, 2003.

[page84]

Cowan, Jeff G. "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003.

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., The Province of Administrative Law. Oxford: Hart Publishing, 1997, 279.

Elliott, David W. "Suresh and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 Sask. L. Rev. 469.

Evans, J. M., et al. Administrative Law: Cases, Text, and Materials, 3rd ed. Toronto: Emond Montgomery, 1989.

Falzon, Frank A. V. "Standard of Review on Judicial Review or Appeal", in Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia, June 2002.

Garant, Patrice. Droit administratif, vol. 2, 4e éd. Cowansville, Qué.: Yvon Blais, 1996.

Holloway, Ian. "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 Man. L.J. 28.

Howard, M. N., Peter Crane and Daniel A. Hochberg. Phipson on Evidence, 14th ed. London: Sweet & Maxwell, 1990.

Jones, David Phillip. "Notes on Dr. Q and Ryan: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003.

Lange, Donald J. The Doctrine of Res Judicata in Canada. Markham, Ont.: Butterworths, 2000.

Law Society of Upper Canada. Rules of Professional Conduct. Toronto: Law Society of Upper Canada, 2000.

Lovett, Deborah K. "That Curious Curial Deference Just Gets Curiouser and Curiouser -- Canada (Director of Investigation and Research) v. Southam Inc." (1997), 55 Advocate (B.C.) 541.

MacLauchlan, H. Wade. "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281.

McLachlin, Beverley. "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 C.J.A.L.P. 171.

Mullan, David J. Administrative Law. Toronto: Irwin Law, 2001.

Mullan, David J. "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import [page85] Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264.

Mullan, David J. "Recent Developments in Standard of Review", in Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners. Canadian Bar Association (Ontario), October 20, 2000.

Paciocco, David M., and Lee Stuesser. The Law of Evidence, 3rd ed. Toronto: Irwin Law, 2002.

Perell, Paul M. "Res Judicata and Abuse of Process" (2001), 24 Advocates' Q. 189.

Perrault, Gabrielle. Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle. Montréal: Wilson & Lafleur, 2002.

Sossin, Lorne. "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 S.C.L.R. (2d) 37.

Sprague, James L. H. "Another View of Baker" (1999), 7 Reid's Administrative Law 163.

Sullivan, Ruth. Sullivan and Driedger on the Construction of Statutes, 4th ed. Markham, Ont.: Butterworths, 2002.

Teplitsky, Martin. "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., Labour Arbitration Yearbook 2001-2002, vol. I. Toronto: Lancaster House, 2002, 279.

Watson, Garry D. "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280, 149 O.A.C. 213, 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40, 2002 CLLC para. 220-014, [2001] O.J. No. 3239 (QL), affirming a judgment of the Divisional Court (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC para. 220-038, [2000] O.J. No. 1570 (QL). Appeal dismissed.

Counsel:

Douglas J. Wray and Harold F. Caley, for the appellant.

Jason Hanson, Mahmud Jamal and Kari M. Abrams, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

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Sean Kearney, Mary Gersht and Meredith Brown, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

ARBOUR J.:--

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to [page87] testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral

attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each [page88] case, the standard for judicial review had been met (para. 86).

B. *Court of Appeal for Ontario* (2001), 55 O.R. (3d) 541

7 Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding", the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the [page89] resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

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(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see

also [page91] *Dr. Q, supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard... . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she [page92] must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction -- the finding of another court -- admis-

sible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

[page93]

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound, supra*, at para 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, aff'd (1984), 48 O.R. (2d) 266 (C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law [page94] doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in

many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided [page95] in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, " Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement, [page96] as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P

> should not be allowed to relitigate an issue already lost by simply changing defendants ... .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc.*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due [page97] process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category -- what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

> First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".
>
> Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that [page98] is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for es-

> toppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free [page99] rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232, at pp. 256-57, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple

"vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the [page100] arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson, supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk, supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in [page101] subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as

"oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of [page102] oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway, supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

[page103]

> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bo-*

mac Construction Ltd. v. Stevenson, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application [page104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter, supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.) . The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in [page105] previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter, supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through

police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq.*). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter, supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less [page106] on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to [page107] secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter, supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Re Del Core, supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues [page108] determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so... . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined ... . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter, supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco, supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, aff'd without reference to this point (1978), 18 O.R.

(2d) 714 (C.A.); *Bomac, supra*, at pp. 26-27; *Bjarnarson, supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Gen. Div.), at p. 115; see also [page109] P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and Watson, *supra*, at pp. 648-51.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that [page110] from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the in-

terest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended [page111] or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. *Application of Abuse of Process to Facts of the Appeal*

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of [page112] sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court -- or the jury --, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

[page113]

The reasons of LeBel and Deschamps JJ. were delivered by

LeBEL J.:--

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, [page114] 2002 SCC 86 , I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain

circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64 , released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise , it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149 ; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain, supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available within the [page115] pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33). Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular [page116] representations in a specific

case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

- the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and,
- the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less [page117] deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. *The Two Standards of Review Applicable in This Case*

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions -- for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by special-

ized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

[page118]

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), at pp. 960-61; and *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47, at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate [page119] question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp., supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of this particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister*

of Citizenship and Immigration), [1998] 1 S.C.R. 982, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 , at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan, supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" [page120] (para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan, supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education, supra*, at para. 39; *Canadian Broadcasting Corp., supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe, supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, endorsed in *Pushpanathan, supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop [page121] a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe, supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890). This appeal does not represent a departure from this general principle.

75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan, supra*, at para. 49 ; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71, at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of

situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can [page122] be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) *The Definitions of Patent Unreasonableness*

78 This Court has set out a number of definitions of "patent unreasonableness", each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (p. 237). Cory J.'s characterization in *PSAC, supra*, of patent unreasonableness as a "very strict test", [page123] which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam, supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

> In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

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82 Similarly, in *C.U.P.E. v. Ontario, supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam, supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan, supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario, supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) *The Interplay Between the Patent Unreasonableness and Correctness Standards*

84 As I observed in *Chamberlain, supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain, supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Dr. Q, supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

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(i) Patent Unreasonableness and Correctness in Theory

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *CUPE, supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see D. J. Mullan, *Administrative Law* (2001), at p. 69; see also H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-86).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*CUPE, supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ("*Nipawin*") , at p. 389, and in *CUPE, supra*, at p. 237:

> ... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment" in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147. [page126] *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a correctness basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*", [1970] S.C.R. 425 (see Mullan, *Administrative Law, supra*, at pp. 69-70; see also *National Corn Growers, supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *CUPE*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law, supra*, at p. 70) .

89 If Dickson J.'s reference to *Anisminic* in *CUPE, supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

90 In *Paccar*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as [page127] one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*CUPE, supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but ... then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20; see also D. J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-70). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 Queen's L.J. 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. [page128] concurring) took to patent unreasonableness in *Paccar, supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> ...
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 ("*CUPE, Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*CUPE, Local 301, supra*, at para. 59; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 771 and 774-75).

94 This view was recently forcefully rearticulated in *Ryan, supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been... . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

[page129]

> ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar, nor the companion case of *Ontario v. O.P.S.E.U.*, should be misinterpreted as a retreat from the position that in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were two standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness -- whether the employees' criminal convictions could be relitigated -- and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness -- whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "rationally supported"; this standard cannot be met where, as here, what supports the adjudicator's decision -- indeed, what that decision is wholly premised on -- is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable -- a conclusion that flows from the applicability of two separate standards of review -- is very different from suggesting [page130] that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *Paccar*, at p. 1004 -- "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry

on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" -- the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, [page131] there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.
>
> (L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644:

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she ... reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law.*
>
> (I. Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 Man. L.J. 28, at pp. 64-65 (emphasis in original); see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: inter-

vening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review [page132] under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) *The Relationship Between the Patent Unreasonableness and Reasonableness Simpliciter Standards*

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter*

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario, supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam, supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear", [page133] the reviewing court should not intervene (*Nipawin, supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.
>
> (*Ryan, supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin, supra*, and *CUPE, supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe, supra*, for

instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to [page134] find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *PSAC, supra*, at pp. 963-64, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational... . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-28; see also G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), at pp. 34-35; P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> ... admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest ... that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense [page135] of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does

> not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.
>
> (Mullan, "Recent Developments in Standard of Review", *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246, at para. 9:

> I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focussed on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *Paccar, supra*, at p. 1004, *per* La Forest J.; *Ryan, supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.), or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin, supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead [page136] that tribunal to reach the decision it did" (*Ryan, supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *Paccar, supra*, at pp. 1003-4, *per* La Forest J., and *Chamberlain, supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal ... is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the ... standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan, supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or

patent unreasonableness (see D. K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser -- *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness [page137] are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Falzon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam, supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable .

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" [page138] of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above -- i.e., attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam, supra*, at para. 56) is not clear enough (see D. W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 Sask. L. Rev.

469, at pp. 486-87). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards."

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education, supra*, [page139] and *Ivanhoe, supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers, supra* (see generally Mullan, "Of Chaff Midst the Corn", *supra*; Mullan, *Administrative Law, supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *CUPE, supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed . An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

116 This brings me to the second problem: in what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is [page140] flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident -- i.e., clear, obvious, or immediate -- is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law, supra*, at p. 72; see also *Ivanhoe, supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

[page141]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision", to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam, supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

(*Ryan, supra*, at para. 53)

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record ... Or can one go beyond the record to demonstrate -- "identify" -- why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?
>
> (D. P. Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10.)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See, in this regard, the comments of Mullan in "Recent Developments in Standard of Review", *supra*, at p. 4.)

[page142]

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch -- i.e., interpretations that fall outside the range of those that can be "reasonably", "rationally" or "tenably" supported by the statutory language -- and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning"; provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan, supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators [page143] in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 , at para. 65, *per* L'Heureux-Dubé J., citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, and *Ryan, supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be [page144] overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam, supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible". While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible -- whether its illegibility is evident on a cursory glance or only after a close examination -- the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the [page145] decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Dr. Q, supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault, supra,* at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this

> way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-6). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 71:

> In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"... . A third aspect of the rule of law is ... that "the exercise of all public [page146] power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance .

"At its most basic level", as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> ... societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals ... are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.*
>
> (See the Honourable Madam Justice B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis in original) ; see also MacLauchlan, *supra*, at pp. 289-91.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers, supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a [page147] way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (i.e., irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts [page148] should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 367-68) . As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for

courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC

Court File No.: CV-09-8122-00CL

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